



**Esadia v Co-operative Bank of Kenya Limited (Cause E740 of 2021)  
[2023] KEELRC 2740 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2740 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E740 OF 2021  
DKN MARETE, J  
OCTOBER 24, 2023**

**BETWEEN**

**BRUCE ESADIA ..... CLAIMANT**

**AND**

**THE CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated vide a statement of Claim dated 7th September, 2021. The issues in dispute are herein elaborated as;
  - I. Wrongful, Unfair And Unlawful Termination Of The Employment Services Of Bruce Esadia;
  - II. Violation of Articles 22(1), 23(1), 25(c), 27, 41(1), 47 and 50 of *The Constitution* of Kenya, 2010;
  - III. Violation of Section 45 of the *Employment Act* No. 11 of 2007.
2. The Respondent in a Memorandum of Response and counter claim dated 24th September, 2021 denies the claim and prays that it be dismissed with costs. She also prays for an award of the counter claim.
3. The Claimant in a Claimant's Memorandum of Reply and Response to Counterclaim answers the Response and Counter claim in denial and opposition.
4. The claimant's case is that on 14th October, 2013, he received an offer of employment from the Respondent as a Back Office Trade Finance Officer of the Co-operative bank, South Sudan subject to a six-month probations period. This was accepted on 18th August, 2013.
5. The claimant's further case is that he remained in employment until 2019 when he was dismissed. At this time he earned Kshs.362,709.95 as gross pay.



6. The Respondent's case is that the claim revolves around the breakdown, due to the negligent conduct of the Claimant, of trust and confidence thereby leading to financial loss of SSP.105,000.00 and eventual termination of his services.
7. It is the Respondent's case that on establishing default on the part of Claimant's conduct in the course of employment and performance of his duties she took all necessary and lawful disciplinary procedures including issuing with cautionary letter and a Show Cause letter dated 5th November, 2018 and 4th October, 2019 respectively detailing the Claimant's lapses in the performance of his duties.
8. On 20th December, 2019 the Claimant was invited to attend disciplinary proceedings on 6th December, 2019 which letter served him all cautionary issues he may have required. This were had on 6th instant and he was issued with letter of dismissal on 24th December, 2019. He appealed against the decision of dismissal but this also again dismissed by the Respondent.
9. The Respondent further issues a counter claim for Kshs.5,324,476.07 arising out of a loan facility with the Respondent and Kshs. 500,000/= being a personal loan made to him by the Respondent.
10. She therefore prays as follows;
  - a. The sum of Kshs.5,324,476.07 being the outstanding loan liabilities due from the Claimant to the Respondent as at the time of his dismissal.
  - b. Interest on (a) above at the prevailing commercial bank interest rates until payment in full.
  - c. Costs of this suit and the counterclaim together with interest thereon at court rates.
  - d. Any other further or incidental relief that the Honourable court may deem fit to grant.
11. This matter came to court variously until the 17th October, 2023 when it was heard inter partes. Here, the parties narrated and reiterated their respective cases through oral evidence.
12. The issues for determination therefore are,
  1. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful.
  2. Whether the Claimant if entitled to the relief sought.
  3. Whether the Respondent is entitled to the counter claim.
  4. Who bears the costs of the cause.
13. The 1st issued for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submissions posits a case unfair and unprocedural termination of employment in contravention of Section 41 of *employment Act*, 2007 that provides and defined substantive and procedural fairness in the case of termination of employment. It is his case that this was not heard.
14. He also submits a case of unfair appeal mechanism which did not award him adequate facilities to launch and be heard in appeal.
15. The Respondent's submissions come out as follows;
  3. The Respondent submits, as well become clear in a moment, that it not only hand fair and valid reasons to terminate the Claimant's employment, but also took him through the correct termination procedure.



4. Consequently, the statement of Claim dated 7 September 2021 is bereft of merit. Conversely, the Respondent's Counterclaim is merited to the extent that the Claimant has admitted to owing the Kshs.5,324,476.07 claimed therein.
5. In support of these Submissions, the Respondent relies on the Memorandum of Reply and Counterclaim and the Witness Statement of Beatrice Kathure for their full intent, tenor and purport.
6. The Claimant joined the Respondent's service in October 2013. Following completion of his probationary period, he was confirmed to permanent terms on 1 August 2014.
7. An audit conducted in 2018 revealed that the Claimant had misrepresented his performance results for 2017. This prompted the Respondent to issue him with a cautionary letter dated 5 November, 2018, inter alia, reminding him to always adhere to the Respondent's Operating and Staff Manuals in the performance of his duties.
8. At the time of his summary dismissal in December, 2019:
  - a. The claimant was serving as the Respondent's Head –Corporate & Trade finance, South Sudan;
  - b. The claimant had served the Respondent for approximately 6 years.
16. Again, under the Staff Manual, the Respondent is entitled to summarily dismiss an employee who:
  - a. Wilfully neglects to perform any work which was his duty to perform or improperly performs his duty which he is required to have performed carefully and properly.
  - b. Wilfully or by negligence allows or facilitates loss, destruction or damage of any property of cash.
  - c. Being a Head of Department, fails to ensure that policies and procedures are complied with and that there are internal controls in place to safeguard against, misappropriation and other irregularities.
17. Further, in his role as Head – Corporate & Trade Finance Officer, South Sudan, the clamant was responsible for and/or involved in (inter alia);
  - a. Marketing corporate loans.
  - b. Overseeing loan disbursements such as the impugned loan facility.
  - c. Appraising loan applications.
  - d. Recommending to the Credit Management Department ("CMD") Nairobi, the approval and/or disbursement of a loan application exceeding USD.100,000.00.
  - e. Supervising and/or offering guidance and leadership to junior officers in the Corporate & Trade Finance Department.
12. In exercising his functions, the Claimant was required to be diligent, conscientious and meticulous in a bid to, inter alia, and prevent loss of funds.
13. The level of diligence and conscientiousness required of the Clamant must be viewed against the backdrop of:



- a. The sensitive and high-ranking position of Head, Corporate Trade and Trade Finance Department held by the Claimant.
  - b. The high level of trust bestowed upon the Claimant (and his team), then physically based in South Sudan, to protect the Respondent's interests in ensuring that loan facilities were only awarded to legible borrowers;
  - c. The inherent risk involved in loan appraisals and review. A loan disbursed to an ineligible borrower carries a significant risk of default and loss of customer funds. At a macro-level, such defaults inevitably fuel an increase in the cost of borrowing thus hinder in access to credit.
14. The Respondent's investigations in September and October 2019 established that the Claimant negligently and/or carelessly performed duties which he was required, under contract, to perform diligently and carefully.
18. The Respondent submits that acts of the Claimant constituted gross misconduct warranting summary dismissal under Section 44 (4) (c) of the *Employment Act* and Appendix 14 of the Respondent's Staff Manual [See pp. 7 – 10 of the Respondent's Supplementary Bundle of Documents].
19. Further, the Respondent is required to prove, on a balance of probabilities that it genuinely believed that the reasons enumerated in the Show Cause Letter and Summary Dismissal Letter existed at the time of Claimant's dismissal. This burden and standard of proof to be applied by the employer is as pronounced by the Court of Appeal in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [supra] in the following terms:
- “...The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist” causing it to terminate the employee's services...”
20. She also urges this court to uphold the substantive fairness of the summary dismissal on the strength of the aforementioned decisions of the Court of Appeal. The Respondent also invites the Honourable Court to be guided by the binding and persuasive precedence in the authority of *Violet Kadala Shitsukane v Kenya Post Savings Bank*, Nairobi Civil Appeal No. 295 of 2016 2020 eKLR [supra] where the Court of Appeal dismissed an appeal lodged by an employee challenging her dismissal from Kenya Post Savings Bank. The Court of Appeal stated that there were valid reasons “for dismissing the appellant for failing to adhere to operation procedures contrary to the laid down policy of the respondent”. The Court added that the Appellant's conduct had caused the Respondent “to lose faith and trust in her” [See the Respondent's Bundle of Authorities];
21. Again, in *Edison Safari Kusa v NIC Bank (K) PLC* [2021] eKLR, where the Honourable Court upheld the termination of the Claimant on grounds Filed on: - No Paid- - BY: MUTHAURA MUGAMBI AYUGI & NJONJO - Reference: E2GGPE9N - KSH. 0.00 13 that “the Claimant had flouted well known bank procedures by sharing keys and failing to do a cash count at the vault...”
22. In sum, the Respondent submits that it demonstrated sufficient, valid and justifiable reasons for summarily dismissing the Claimant from employment as it did. As such, the substantive fairness of the impugned dismissal cannot be impeached.
23. Her further case and submissions come out as follows;



34. Managerial employees, such as the Claimant herein, hold vital positions in which greater trust is placed on them. Correspondingly, greater fidelity to duty is expected of them.
35. The Claimant was entrusted with the delicate and sensitive role of heading an entire corporate and trade finance department in a foreign country. As confirmed by the Claimant during cross-examination, he was one of the eyes and ears of the Respondent regarding the viability of loan applications that exceeded a certain threshold (i.e., USD.100,000).
36. The Claimant's role could only be performed by someone enjoying the trust and confidence of the Respondent's management. As such, he bore a greater burden of trustworthiness and reliability than his juniors.
37. His acts and omissions regarding the disbursement of the impugned loan facility and the loss of SSP 105M suffered by the Respondent betrayed the trust and confidence reposed on him. Accordingly, the Respondent had to terminate his services.

Termination of Claimant's Employment Was Procedurally Fair

38. The Respondent followed the following procedure, laid down under section 41 of the [Employment Act](#), in effecting the termination:
  - (a) The Respondent issued the Claimant with a Show Cause Letter dated 4 October 2019, requesting him to provide a written response to specific charges of negligence, carelessness and improper performance of duties [See pp. 16 – 18 of the Respondent's Bundle];
  - (b) The Claimant responded to the Show Cause Letter vide a response dated 10 October 2019 [See pp. 19 – 25 of the Respondent's Bundle];
  - c. The Respondent considered the Claimant's response but deemed it insufficient for purposes of allaying the allegations of gross misconduct facing the Claimant;
  - d. Accordingly, the Respondent issued a letter dated 2 December 2019 inviting the Claimant to a disciplinary hearing to be held on 6 December 2019. The Invitation Letter informed the Claimant that he had a right to be accompanied by a fellow member of staff and Filed on: - No Paid- - BY: Muthaura Mugambi Ayugi & Njonjo - Reference: E2GGPE9N - KSH. 0.00 14 tender documentary evidence in support of her case [See pg. 26 of the Respondent's Bundle]. The Claimant did not request for additional time within which to prepare and attend the hearing;
  - e. the Respondent's Staff Disciplinary Committee listened to the Claimant's oral representations during the hearing of 6 December 2019;
  - f. The Respondent summarily dismissed the Claimant from employment vide a letter dated 24 December 2019. The Letter contained the reasons why the Claimant's employment was terminated and informed him of his right to appeal [see pp. 36 – 37 of the Respondent's Bundle];
  - g. The Claimant lodged an appeal vide a letter dated 9 January 2020 [See pg. 38 of the Respondent's Bundle].
  - h. The Respondent considered the appeal, deemed it unmerited and dispatched a response declining the appeal to the Claimant's Registered Postal Address [See pg. 39 of the Respondent's Bundle].



39. The participation of Anthony Mburu in the disciplinary hearing did not vitiate the dictates of fair hearing as contended by the Claimant.
24. In support of the counter claim, the Respondent submits that at the date of his dismissal, the Claimant's outstanding loan under the personal loan and Commercial Loan Facility stood at KShs.5,324,476.07 with the same continuing to accrue interest until payment in full.
25. Over all, the Respondent's case overwhelmed that of the Claimant. It is walk over. In both the oral hearing and written submissions, the Respondent brings out a case of gross misconduct on part of the claimant which was met with all lawful disciplinary process leading to termination of employment. The claimant was granted an opportunity to appeal but this was also found to be wanting. There was no good reason so sustain his continued stay in employment. I therefore find a case of lawful termination of employment and hold as such.
26. The 2nd issue for determination is whether the Respondent is entitled to the counter claim. Through and through, this has been a straight forward matter. The Respondent's case is that this is even acknowledged by the Claimant. She therefore become entitled to the counter claim.
28. I am therefore inclined to dismiss the claim and award the counter claim on the following terms;
- i. The Claimant is ordered to meet and pay Kshs.5,324,476.07.00 owing to the Respondent.
  - ii. The Claimant is ordered to meet and pay interest on (i) above at the prevailing commercial band interest rates until payment in full.
  - iii. Each party shall bear their costs of the suit and counter claim.

**DELIVERED, DATED AND SIGNED THIS 24TH DAY OF OCTOBER 2023.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

Mr Orina instructed by MMA Advocates LLP for the Claimant.

Vincent Oloo instructed by Muthaura Mugambi Ayugi & Njonjo Advocates for the Respondent

