



**Wanyara v Equity Bank (Kenya) Limited (Cause E070 of 2022)  
[2023] KEELRC 3159 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3159 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E070 OF 2022  
M MBARÚ, J  
NOVEMBER 30, 2023**

**BETWEEN**

**NICHOLAS KILO WANYARA ..... CLAIMANT**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant on 11 September 2008 as a bank clerk and posted to Kenol Branch in Murang'a County and then transferred to Ukunda branch and promoted to the position of branch accountant. In the year 2017 he was promoted to cash officer and transferred to Digo Road branch Mombasa and in September 2019 he was transferred to Kwale as operations manager.
2. On 11 September 2019 the claimant was arrested on alleged conspiracy to effect unlawful purposes contrary to Section 395(f) of the *Penal Code* and arraigned in court on 12 September 2019 and later his 2 days' salary was deposited in his account.
3. There was no hearing or notice for such action and pleas to be given a hearing were ignored. On 24 September 2019 the claimant was paid his last salary and later, through the branch manager at Digo Road, Joachim Ireri, the security department was told that the claimant had been dismissed from his employment after he was released from custody after 14 days.
4. At the time, the claimant was earning Kshs. 92,800 per month. There was unfair termination of employment as the reasons leading to dismissal were never shared. The claimant is seeking the following terminal dues;
  - a) Notice pay Kshs. 92,800;
  - b) Service pay for 11 years worked Kshs. 510,400;
  - c) House allowances for 11 years Kshs. 1,837,440;



- d) Compensation for 12 months Kshs. 1,113,600; and
  - e) Costs of the suit.
5. The claimant testified in support of his case that his employment was terminated by the respondent after being arrested, which matter is still pending in court. After leaving remand, the branch manager, Digo Road Branch told him to hand over his duties and leave. He had just been promoted to operations manager at Kwale. There was no notice prior to the dismissal or any disciplinary hearing or payment of terminal dues resulting in unfair termination of employment.
  6. Upon cross-examination, the claimant testified that the police arrested him as a result of an incident at his branch where he was the cash officer. It related to Mpesa transactions through his phone number and Till to the respondent. He remained in custody for 14 days and later released on bond. He was charged with conspiracy and stealing by servant and the arrest was by the DCI and Banking Fraud Unit.
  7. In response, the respondent admitted that the claimant was an employee but following gross misconduct, he was arrested on 11 September 2019 and charged with the offence under Section 395(f) of the *Penal Code* and arraigned in court on 12 September 2019. He remained in police custody for more than 14 days. Summary dismissal was on account of gross misconduct and therefore lawful and justified and the claim for notice or compensation is not due.
  8. The claimant was not earning Kshs. 92,800 as alleged. He was notified of the reasons leading to summary dismissal being that he was in police custody for a period of more than 14 days.
  9. The claimant was a member of a pension scheme and hence not entitled to service pay. The salary paid was consolidated and the claims made should be dismissed with costs.
  10. In evidence, the respondent called Wycliffe Ontumbi the human resource manager who testified that the claimant was under a written contract of employment and regulated under the policy of the respondent to undertake his duties diligently but he failed to do so. On diverse dates between 12 March to 6 September 2019 the claimant was engaged in fraudulent transactions involving the respondent's Mpesa Till. The respondent reported the matter to the police for investigations and upon which the claimant was arrested with the offence under Section 395 of the *Penal Code* and later arraigned in court on 12 September 2019. In terms of Section 44(4)(f) of the *Employment Act*, 2007 summary dismissal was lawful.
  11. Upon cross-examination, the witness testified that the claimant engaged in fraudulent transactions of Kshs. 231,870 through Mpesa which he deposited in his phone and that of his spouse against company policy. He also remained absent from work while in police custody for over 14 days. The respondent was not able to conduct disciplinary hearing since the claimant was in custody. At the end of employment, the claimant was paid Kshs. 137,205.21.
  12. Mr Ontumbi testified that during the investigations into the claimant's gross misconduct, he was not an employee of the respondent. He cannot tell how the investigations were conducted or the outcome. The letter and notice of summary dismissal cannot be explained or how the claimant was served since upon dismissal, he was blocked from the bank online system and could not access. There is also nothing to show that the claimant was paid his terminal dues. There is no evidence of receipt.
  13. On the claim for house allowance, there was a consolidated salary, there was a pension scheme and the claims made should be dismissed.



14. At the end of the hearing, both parties filed written submissions which are analysed and the issues which emerge for determination are where there was unfair termination of employment and whether the remedies sought should issue.
15. The claimant does not deny the fact that on 11 September 2019 he was arrested by the police following Mpesa transactions through his phone and that of his spouse and relating to his employment as a cash officer. He was charged in court with the offence of conspiracy and stealing by servant under the provisions of Section 395(f) of the *Penal Code*.
16. The claimant does not deny that upon his arrest and arraignment in court, he remained in custody for a period of over 14 days.
17. This much is noted in the letter and notice of summary dismissal issued by the respondent dated 25 September 2019 that after being in police custody from September 11, 2019 to date. The decision to dismiss you is in accordance with Section 44(4)(f) of the *Employment Act*, 2007.
18. This letter was sent to the claimant's postal address at P.O. Box xxxxxx Nairobi. This is the same address in his letter of appointment dated 14 August 2008.
19. Even where the employer has the right to dismiss an employee under Section 44 of the *Employment Act*, 2007 (the Act), the due process of Section 41(2) of the *Act* must be adhered to. This requires that;
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
20. Whatever the gross misconduct, the motions of Section 41(2) of the *Act* are mandatory.
21. In addressing the mandatory nature of Section 41(2) of the *Act*, the Court of Appeal in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) held that;
 

We note that the appellant was dismissed before the criminal trial was concluded. In this case the outcome of the criminal case did not therefore impact on the decision taken to dismiss him. The law requires that he should have been subjected to the internal disciplinary mechanisms as provided under the *Employment Act*. From the record we, like the learned Judge, are satisfied that the respondent had good cause to terminate the appellant's employment. He was no doubt not a very compliant employee and his actions caused the employer to lose money. We find that there was sufficient evidence against him to justify his sacking. We accordingly find that there was substantive fairness in the appellant's dismissal.

What concerns us now is whether there was procedural fairness in the dismissal process. As pointed out earlier, it is evident that the learned Judge did not consider the aspect of procedural fairness. In determining this issue, we must be guided by Section 41 of the *Employment Act* which provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee. The said section provides for notification and hearing before termination on grounds of misconduct in the following way: - ...
22. Fair procedure before termination or summary dismissal of an employee is part of the due process requirements.



23. In *Jane Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR, the Court held that;

Section 45 of the *Employment Act* makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41 ...

24. The mandatory elaborate procedure set up under section 41 of the *Act*, requires notification, a hearing and consideration of the employee's representations in the presence of a fellow employee of his choice. Therefore, the process has three aspects, and absence of any one of them will definitely obviate the fairness of the process leading to the decision to terminate an employee's contract of service or summarily dismissing the employee.
25. Where the employer is unable to get the employee to attend the envisaged hearing, such matters must be demonstrated to the court to assess and make a finding.
26. The notice to attend disciplinary hearing is therefore paramount. The fact of the claimant being in custody is not a bar to issuance of such notice. Where the respondent found it necessary to issue notice of summary dismissal through the claimant's last known address, it was equally possible to summon him to attend disciplinary hearing and failure to which, the notice would have well served the respondent.
27. Equally important is the report to be issued to the labour officer in the event an employee remains absent from work without good cause in terms of Section 18 (5)(b) of the *Act*:
- (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
28. In this case, termination of employment was procedurally unfair. The claimant is entitled to compensation.
29. Taking the substantive issue at hand that the claimant was involved in conspiracy and stealing by servant, such put into account, three months' salary is hereby found sufficient compensation at Kshs. 86,000 x 3 = Kshs. 258,000 based on the last payable salary.
30. Notice pay is also due in a case where summary dismissal is found procedurally unfair. Notice of Kshs. 86,000 is hereby awarded.



31. On the tabulation of final dues, the respondent allocated the following;
- a) Last salary Kshs. 86,000;
  - b) Pending leave days Kshs. 141,121.90;
  - c) Leave allowance 2019 Kshs. 4,417.14;
  - d) Leave allowance 2013 Kshs. 6,000;
- Less deductions  
Total Kshs. 137,205.71  
Less surcharge of Kshs. 529,111.
32. At the end of employment, the respondent was justified to deduct any liabilities and losses caused by the claimant in terms of Section 19 of the Act. In the notice of summary dismissal, the respondent informed the claimant that there was a liability of Kshs. 529,111. He has not cleared such amount.
33. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a) Compensation Kshs. 258,000;
  - b) Notice pay Kshs. 86,000;
  - c) Terminal dues paid at Kshs. 137,205.71;  
Less Kshs. 529,111 due from the claimant
  - d) Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

