



**Bora & another v First Community Bank Ltd (Cause E024 of 2022)  
[2023] KEELRC 3331 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3331 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E024 OF 2022  
ON MAKAU, J  
DECEMBER 20, 2023**

**BETWEEN**

**HUSSEIN DIDA BORA ..... 1<sup>ST</sup> CLAIMANT**

**OMAR MOHAMED BOKO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**FIRST COMMUNITY BANK LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimants were dismissed from employment by the respondent on 10<sup>th</sup> April, 2019 and brought this suit on 10<sup>th</sup> May, 2022 seeking the following reliefs: -
  - a. A declaration that the termination of the claimants' employment was unfair, unprocedural and unlawful.
  - b. A declaration that the criminal trial of the claimants who were victims of the theft was unfair and unjustified the claimants are entitled to compensation.
  - c. An order for Respondent to pay the 1<sup>st</sup> and 2<sup>nd</sup> claimant compensation and damages as pleaded in paragraphs D (a-e) and D (f-j) above respectively.
  - d. An order that the Respondent gives the claimant a certificate of service.
  - e. An order that the Respondent gives the claimant a certificate of service.
  - f. Costs of the suit plus interest thereon.
2. The respondent filed defence on 26<sup>th</sup> September, 2022 denying liability and prayed for the suit to be dismissed with costs.



## **Factual background**

3. The 1<sup>st</sup> claimant was employed on 4<sup>th</sup> January 2010 as a Management trainee and rose through the ranks to become Branch Manager Moyale Branch earning monthly salary on Kshs.113,402.00.
4. The 2<sup>nd</sup> claimant was employed on 8<sup>th</sup> August 2011 as a Teller and rose through the ranks to become Head Teller Moyale Branch earning a gross monthly salary of Kshs.78,494.90.
5. On 12<sup>th</sup> February 2019, at about 4.30pm, armed robbers attacked the bank and robbed the bank, staff and customers at gun point. They further forced the claimants to go to the inner office and forced them to open the safe from where they took away money.
6. On 13<sup>th</sup> February 2019 the claimants were arrested and charged in the Chief Magistrate's court at Marsabit with case No.120 of 2019. The charges included failure to prevent the commission of a felony, stealing by employees and conspiracy to commit a felony. In the meanwhile, the claimants were suspended for negligence and breach of bank policies. They were later heard on 10<sup>th</sup> April 2019 by a committee and issued with summary dismissal letters citing the following reasons:-
  - a. Breach of a policy related to dual custody of the keys.
  - b. Fundamental breach of contractual obligation amounting to gross misconduct.
7. Subsequently, the claimants were found innocent in the criminal trial and were acquitted of all the charges.
8. It is the claimants' case that they never committed the alleged misconduct and therefore the reason for the dismissal was not valid and fair. They maintained that no eye witness was called during the disciplinary hearing to testify against them. They further contended that the dismissal was done on the basis of a disciplinary hearing held on 20<sup>th</sup> March 2019 which was strange to them as they were never invited. They however admitted that they attended a hearing on 10<sup>th</sup> April 2019 the same day they were dismissed.
9. On the other hand, the respondent's case was that following the said robbery at the bank, the claimants were suspended by the letter dated 27<sup>th</sup> February 2019 for the said criminal charges and further investigations as per clause 4.10.5 of the respondent's HR Policy Manual. On 4<sup>th</sup> April 2019, the respondent notified the claimants that investigations were complete and invited them to defend themselves against certain breaches noted by the investigators. However, the investigator did not testify in the hearing and the report was not availed to the claimants.
10. The hearing was held on 10<sup>th</sup> April 2019 where the claimants attended and defended themselves against the allegations levelled against them. Although they were notified of the right to be accompanied by a staff representative of their choice, they opted to attend the hearing alone. It is the respondent's case that the claimants admitted the charge during the disciplinary hearing. They allegedly admitted having breached the Vault Management Procedure on the afternoon of 12<sup>th</sup> February, 2019 by use of biometric access only, and the cash handling procedure under clause 4.2.4 of the HR Policy Manual. However, no witnesses testified against the claimants during the disciplinary hearing.
11. The respondent maintained that the claimants, breached their obligations under their contracts fundamentally warranting summary dismissal for gross misconduct. As such the claimants were served with termination letters. They were further issued with certificate of service and received their terminal dues. It maintained that there was no hearing done on 20<sup>th</sup> March 2019 and explained that, the reference to that date was just an error.



12. The respondent confirmed that its security manager admitted during the criminal trial that the claimants were just victims of armed robbery and exonerated them of the crime. It was further admitted that there was no armed security guarding the bank on the said date but private security guards with sticks.

### **Claimants submissions**

13. The claimants submitted on the following issues: -
  - a. Whether there was valid reason for their dismissal.
  - b. Whether a fair procedure was followed.
  - c. Whether the reliefs sought ought to be granted.
14. On the 1<sup>st</sup> issue, it was submitted that the reason for the termination was not valid since the claimants were not victims of armed robbery. It was submitted that senior offices of the bank confirmed that the claimants were innocent victims of robbery and that is why the criminal charges failed. It was further submitted that they ought to be treated fairly and even counselled since they nearly lost their lives during the armed robbery. Consequently, the court was urged to hold that the reasons for the termination were not fair and valid.
15. As regards the 2<sup>nd</sup> issue, it was submitted that the claimants were taken through a disciplinary hearing. However, it was submitted that the hearing was not fair because it was being done when the claimants had just survived a near death robbery, and subsequent arraignment to court for the same robbery. Further the same managers lined up as witnesses in the criminal case including the Security Manager Mr.Omari Manyenze, Head Operations and the HR Manager all sat in the disciplinary committee chaired by the HR Manager.
16. In the circumstances, it was submitted that the said persons were conflicted and therefore the disciplinary hearing was not fair within the contemplation of section 41 of the *Employment Act*. Besides the claimants were charged before being given an opportunity to show cause and without being summoned by the investigator to shed light on what transpired on the day of the robbery.
17. To fortify the above submissions, reliance was placed on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Ltd* (2014) eKLR where the court held that for termination of employment to be fair, there must be a valid and fair reason and the employee must be taken through a fair process as set out by section 41 of the *Employment Act*.
18. On the issue of reliefs sought, it was submitted that the claimants are entitled since the action taken against them was unreasonable as the reasons cited were invalid considering the circumstances of the case. The claimants worked for many years and deserved fair treatment before dismissal. They were also not accorded an opportunity to appeal against the dismissal.

### **Respondent's submissions**

19. The Respondent submitted on the same issues framed by the claimants above. From the onset, it was submitted that the claimants have not established that the dismissal lacked substantive justification or was procedurally flawed. It was argued that the claimants admitted in evidence that they were charged with criminal offences in court and thereafter they were invited to disciplinary hearing which culminated in the dismissal from employment.



20. As regards the reasons for the dismissal, it was appreciated that the burden of proof was upon the employer by dint of section 43 and 45 of the *Employment Act*. It was submitted that a reason for termination is valid if the employer reasonably believed the same to exist. In this case it was submitted that respondent believed the claimants were on the wrong considering that they had been charged with criminal offences, and that the internal investigators implicated them for breach of Bank's HR Policies.
21. Reliance was placed on the case of *Moses Mwaniki Nderitu v Ibrahim Kinyanjui Gashobe T/A Theresha General Merchants* (2020) eKLR and *Kenya Revenue Authority v Peuwel Waitbaka Gitabi & 2 others* (2019) eKLR.
22. As regards the issue of procedure, it was submitted that termination was procedurally fair. It was further submitted that the procedure under section 41 of the *Employment Act* was followed. It was argued that the matter was investigated internally and the claimants were notified of the breaches revealed. Thereafter they were invited to a disciplinary hearing on 10<sup>th</sup> April, 2019 in the company of a representative of their choice. During the hearing they were given an opportunity to air their representations which were considered before the dismissal. Finally, they were notified of the decision to dismiss them vide dismissal letters.
23. As regards the issue of the reliefs sought it was submitted that the same is not merited since the dismissal was fair and lawful. It was further submitted that the claimants were paid their terminal dues and were issued with certificates of service. Consequently, the court was urged to dismiss the suit with costs.

### **Analysis and Determination**

24. Having considered the pleadings, evidence and submissions, I agree with the parties that three issues fall for determination namely: -
  - a. Whether the reasons for the dismissal were valid and fair.
  - b. Whether fair procedure was followed.
  - c. Whether the reliefs sought are merited.

### **Reasons**

25. Section 45 (1) and (2) of the *Employment Act* provides that:-
  - (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove –
    - a. That the reason for the termination is valid;
    - b. That the reason for the termination is a fair reason -
      - i. Related to the employee's conduct, capacity or compatibility, or
      - ii. Based on the operational requirements of the employer; and
    - c. That the employment was terminated in accordance with fair procedure.”
26. Section 43 of the *Employment Act* provides that:-
  - 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

27. In this case, the reasons for the termination were cited in the dismissal letter dated 10<sup>th</sup> May, 2019 thus:-

“Mr.Omar Mohamed Boko

First Community Bank Limited

Moyale Business Centre.

Through:

Ag.Business Centre Manager, Moyale

Dear Omar,

RE: Summary Dismissal

We write in reference to the disciplinary meeting held on 20<sup>th</sup> March, 2019 at Head Office where allegations relating to negligence of duty on your part and specifically, improperly performing your duty in regards to the vault management procedure were presented and discussed. You were given an opportunity to respond to these allegations.

During the disciplinary hearing, it was noted that you breached the Operation’s policy by violating the Vault Management Procedure that requires dual custodianship of the vault room. As the vault custodian, you admitted to have breached the vault management procedure that afternoon where the vault was only secured by use of only biometric access. The Branch Manager, Hussein Dida was therefore able to independently gain access to the vault room at the time of the robbery incident that occurred at the Moyale Branch. This led to loss of funds by the Bank.

during the proceedings it was confirmed that you contravened and breached the Bank’s policies and Procedures. The Company hereby draws your attention to the provisions of clause 10(b) of your letter of appointment dated 27 July 2011 which you hereby confirmed by signing that you will adhere to. Subject the provision of the Employment Act you have fundamentally breached your obligations arising under your contract of service and your actions have amounted to gross misconduct. It is for this reason that the Management is terminating your contract of service with effect from 10 May 2019.

Your final dues will be paid as follows:

salary up to 10<sup>th</sup> May 2019.12.33 days annual leave earned but not taken.

Provident fund shall be paid as per the rules of the scheme.

Attached is the calculation of your final settlement. These payments will be subject to tax and all other statutory deductions.”

28. The reason for the dismissal was gross misconduct in the nature of breach of the bank’s policies and procedures with respect to vault management. The claimants were therefore blamed for the loss of bank money to the robbers. I have carefully considered the said allegations against the evidence and submissions tendered.

29. There is no dispute that on 12<sup>th</sup> February 2019, robbers armed with guns and knives attacked the respondent’s Moyale branch. It is also not in dispute that on the material day the bank was not guarded



by armed police as usual. It is further not in dispute that the robbery took place in broad day light and witnessed by both staff and customers none of whom was called to testify during the disciplinary hearing or in this court.

30. The respondent alleged that investigation on the incidence was done by the security manager Mr.Omari Manyenze who neither gave evidence before the disciplinary committee or this court. His investigation report was also not produced as exhibits before the disciplinary committee or this court. It follows that the evidence by RW1 and RW2 on the robbery incidence is hearsay.
31. The said security manager was a witness in the criminal case and he exonerated the claimants from the offences charged. In my view, the evidence by the claimants that they were victims of armed robbers has not been rebutted. In fact the respondent corroborated the said evidence by confirming that there were CCTV videos which captured the armed robbery.
32. In the circumstances, I find that the weight of the evidence tilts in favor of the claimants. The bank lost money through armed robbery and not their negligence. It is obvious that if the claimants resisted the robbers' demands, they would have been killed or injured. The bank has admitted that it had no armed police officers to guard the bank on the material day. Consequently, I must find that the respondent has failed to prove a valid and a fair reason for the dismissal of the claimants.

### **Procedure followed**

33. Section 41 of the [Employment Act](#) provides that:-
  - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  - (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.”
34. There is evidence that the incidence was investigated and the claimants were invited to a disciplinary hearing. The charges against them were explained to them. They were given the right to be accompanied by a representative of their choice. They attended without representatives by choice and they were given a chance to explain what happened on the day of the robbery. They aired their representations which were considered by the disciplinary committee. The committee decided that a dismissal was the punishment to the claimants and dismissal letters dated 10<sup>th</sup> April, 2019 were served on the them.
35. Considering the above matters, I am satisfied that a fair procedure was followed as contemplated in section 41 of the [Employment Act](#). The claimants were given a fair opportunity to defend themselves of the allegations levelled against them.

### **Reliefs sought**

36. In view of the finding that dismissal was not grounded on valid and fair reason, I find and hold that the dismissal was unfair and unlawful within the meaning of section 45 of the [Employment Act](#). The dismissal was also unjustified since the claimants were just victims of a deadly robbery.



37. In view of the foregoing the claimants are entitled to compensation under section 49 and 50 of the Employment Act. They have each prayed for twelve (12) months salary as compensation. They served for over 8 years each without any disciplinary issues. I take judicial notice that being dismissed from service of a bank spells doom on the claimants' career and as such they may not secure any other job in the banking sector. Consequently, I award each 10 months gross salary as compensation for the unfair and unjustified dismissal from service.
38. The claimants have further prayed for punitive damages for suffering caused on them by being taken through criminal case. However, the said claim is not well anchored. It has not been shown that the arrest and prosecution was based on the respondent's sole decision. It has also not been shown that the arrest and the prosecution was done by the respondent solely or at all. Consequently, I decline to award the said punitive damages.

### **Conclusion**

39. I have found that the dismissal of the claimants was unfair and unlawful as it was not justified by a valid and fair reason. I have further found that each claimant is entitled to ten (10) months gross salary as compensation for the unfair termination. Consequently, I enter judgment in the following terms:-
- i. 1<sup>st</sup> claimant  
Kshs.113,402 x 10=Kshs.1,134,020.00
  - ii. 2<sup>nd</sup> claimant  
Kshs.78,494.90 x 10=Kshs.784,949.00
  - iii. The award is subject to statutory deductions.
  - iv. The claimants are awarded costs plus interest at court rate from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

