



REPUBLIC OF KENYA



KENYA LAW
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**Wang v Equity Bank (Cause E945 of 2021)
[2023] KEELRC 3187 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3187 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E945 OF 2021
NJ ABUODHA, J
DECEMBER 5, 2023**

BETWEEN

LEON YANG WANG CLAIMANT

AND

EQUITY BANK RESPONDENT

JUDGMENT

1. By a statement of claim filed on 17th November, 2021, the claimant averred inter alia that:
her statement of claim on 8th June, 2022 pleaded inter alia
 - i. The Claimant states that he was employed by the Bank on two separate distinct occasions firstly on 27th August 2013 in the position of Relationship Manager and rose through the ranks to a position of General Manager, Chinese Coverage until his resignation on 6th May 2019.
 - ii. The Claimant states that upon his resignation and Respondent's acceptance of the same on 12th June 2019 all the rights and obligations arising under the contract dated 27th August 2013 ceased to have any binding legal effect save as may be provided for by Law.
 - iii. The Claimant states that on or around 10th September 2020, he was engaged by the Respondent under new terms of service in the position of Group Head of Chinese Coverage Business.
 - iv. The Claimant states that he had a stellar performance in the Bank for the period he served in both occasions. He has never had any disciplinary issue with the Bank for the period he served which was ever brought to his attention save for the subject of this suit.
 - v. That the Claimant states that it is a term of contract and a requirement in law that the Respondent was to maintain a conducive work environment devoid of any frustrations, harassments, intimidation and unfair labor practices against the Claimant.



- vi. The Claimant states that it is also a requirement in law that his employment could only be terminated with valid reasons upon following fair procedure and equitably.
- vii. The Claimant states that around 4th October 2021 the Bank's Group Chief Commercial Officer wrote to him a Show Cause Letter and Suspension on the following allegations;
 - a. Failure to declare personal interest when engaging with customer, South River Homes A/C No. 1410269254832 and Eris Property developers, A/c No. 1410269044658 which is contrary to the Group's Code of Conduct & Work Ethics clause 2.7 on conflict of interest which provides that "The Group does not expect any member of staff to subordinate his duty to his private interests and neither shall a member of staff put himself in a position where his duty and private interest conflict, nor use his official position to further his private interest. However, should a member of staff find that he is officially called upon to deal with any matter or issue in which he has a personal interest, such an employee is duty bound to disclose his interest to the management at the earliest opportunity".
 - b. Sharing of confidential information with external parties, case in point, sharing Credit proposal discussions with Mr. Chen one of the directors of Cool Breeze Development Ltd vide chenchongcii@gmail.com on August 25, 2021. This contrary to the Group's Code of Conduct & Work ethics clause 2.6 on confidentiality which provides that "No employee of the Group shall communicate directly or indirectly, in writing or verbally, any article, official document or information which relates to the Group or the Group's customer to unauthorized, persons, excepts with the Group's express authority or in the performance, in good faith of the duties assigned to him."
- viii. The Claimant states that he was asked to give a written response to the allegations which he did on 5th October 2021 and demanded for further particulars on the allegation of conflict of interest. The Respondent did not give further particulars as requested.
- ix. The Claimant states that he was summoned for a disciplinary hearing to be held on 13th October 2021, against the two allegations contained in the Show cause letter.
- x. The Claimant states that in order to prepare for the hearing and prefer an effective defence against the allegations, he requested, on various email correspondences, to be furnished with the following: -
 - a. A copy of the Disciplinary Procedure Manual.
 - b. A copy of the investigation report.
 - c. Access to emails and physical documents to support his defence.
 - d. A confirmation that the disciplinary hearing scheduled to be rescheduled to allow the above concerns to be addressed.
- xi. The Claimant states that the Respondent did not supply him with the much needed documents and information save for the Disciplinary procedure/Manual to enable him have adequate time to prepare for his defence until the 12th October 2021 that the Respondent responded to his request by only reinstating his system access rights but declining to give the documents requested to facilitate preparation of his defence. The Respondent however indicated that the disciplinary hearing would still continue as scheduled.



- xii. The Claimant states that this conduct by the Respondent is a clear manifestation that the disciplinary process was being handled for ulterior and sinister motives other than to ascertain the truthfulness of the issue at hand. It was being done with a pre-determined mindset as no justification was given why the claimant was being denied material facts he was required to respond to and the insistence of conducting a hearing under those circumstances.
- xiii. The Claimant states that the Respondent instead proceeded to convene a hushed disciplinary hearing without him being given an opportunity to respond. The Claimant states that the Respondent required him to attend a disciplinary hearing without knowing the extent of the allegations he was to respond to, this violated the cardinal rules of Natural Justice of being afforded a fair hearing contrary to the Kenya Constitution, Employment Act and the Bank's own Internal Disciplinary Policies.
- xiv. The Claimant states that apart from responding to the allegations in the show cause letter in writing, he also attended the disciplinary hearing and gave his defence which the Respondent did not consider and address.
- xv. The Claimant states that the Respondent proceeded to terminate his service on the two allegations in the show cause letter, which were not valid reasons to terminate him since they were neither truthful nor valid.
- xvi. The Claimant states that in respect to the first charge, the reason for termination was not valid for the following reasons: -
 - a. The alleged transaction occurred between two separate entities transacting in their individual capacities without the involvement of the Respondent.
 - b. The alleged transaction did not involve any participation of the Claimant.
 - c. The alleged transaction occurred around 12th September 2019 when the Claimant was not an employee of the Respondent and had no legal relationship with the Respondent.
 - d. The Respondent did not describe what conflict of interest existed between itself and the Claimant who apart from not having any interest in the transaction was not an employee of the Respondent and had no legal relationship with the Respondent.
 - e. The Respondent did not describe what conflict of interest existed between itself and the Claimant who apart from not having any interest in the transaction was not an employee of the Respondent at the particular time.
 - f. The Claimant not being an employee of the Bank at the relevant time was not bound by the Bank Group's Code of Conduct and work ethics Clause 2.7 on conflict of Interest which makes reference to "any member of staff" not to subordinate his private interest to that of the Bank.
- xvii. Similarly, the Claimant states that there was absolutely no valid reason to terminate his service in respect to the second charge since: -
 - a. A request was made to him by the Respondent customer through the customer's known email address.
 - b. The Claimant under his duties with the Respondent was required to respond to the customer which he did by sending the requested information.



- c. The Respondent customer has confirmed that they did request the said information by sending the request for information.
 - d. The Respondent customer has confirmed that they did request the said information which was sent to them through their known email and they have never complained about it and that it was never divulged to any unauthorized third party.
 - e. To-date no complaint against him has been made by the Respondent customer nor has any such complaint been given to him to respond to.
2. The Claimant in the upshot prayed for orders among others:
 - a. Reinstatement to previous position without loss of benefits and payment of the ½ withheld salary during suspension
 - b. 12 months salary as compensation for unfair loss
 - c. Damages for defamation
 - d. Alternatively Kshs. 31,188,400/-
3. The Respondent filed its defence dated 17th February, 2022 and averred *inter alia*
 - a. In response to paragraph 7 of the claim, the Respondent states that the Respondent's increased profitability is attributable to the Respondent's employees collective and deliberate strategy. The Claimant cannot possibly take sole credit for the same.
 - b. In response to paragraph 8 of the claim, the Respondent states that it maintains conducive work environment devoid of any frustrations, harassments, intimidation and unfair labour practices. The Claimant is put to strict prove of any allegation to the contrary.
 - c. In response to paragraph 9 of claim, the Respondent states that the Claimant's termination was premised on valid reasons upon following a fair procedure.
 - d. In further response to the rest of the allegation at paragraph 11 that the Respondent failed to avail further particulars on the allegation of conflict of interest, the Respondent pleads that: -
 - i. The material particulars in respect of the allegation of conflict of interest were clearly stated in the Notice to Show Cause Letter dated 4th October, 2021.
 - ii. The particulars in respect of the allegation of conflict of interest were also explained to the Claimant by the Heads of Security during a meeting held on 1st October, 2021.
 - e. In answer to paragraph 13, 14, 15 & 16 of the claim, the Respondent states that it, by an email of 12th October, 2021 among other emails, responded to the Claimant as follows: -
 - i. Allowed the Claimant access to lais emails for 3 hours between 2:00 pm and 5:00 pm on 12th October, 2021.
 - ii. Attached and forwarded to the Claimant the disciplinary procedure as requested.
 - iii. Informed the Claimant that the Notice to Show cause dated 4th October, 2021 contained the relevant information contained in the investigation report.



- iv. Confirmed that there will be a representative from the investigation department to respond to any question and/clarifications that the Claimant may have regarding the investigations.
- v. Informed that the hearing shall proceed as scheduled.
- f. In answer to paragraph 18 of the claim and while putting the Claimant to strict prove of any allegation to the contrary, the Respondent states that: -
 - i. The allegations against the Claimant were explained during a meeting held on 1st October, 2021 between the Claimant and the Head of Security.
 - ii. The Claimant was subsequently served with a Notice to Show Cause letter dated 4th October, 2021 detailing the extent of the allegations leveled against him.
 - iii. The Claimant responded to the Notice to Show Cause Letter via his response dated 5th October, 2021.
 - iv. The Claimant was granted access to his emails for 3 hours between 2:00 pm and 5:00 pm on 12th October, 2021.
 - v. The Disciplinary hearing was undertaken on 13th October, 2021 a period of eight (8) days after the Claimant had dully responded to the Notice to Show Cause.
- g. In answer to paragraph 22 of the claim and while putting the Claimant to strict prove of any contrary allegations, the Respondent pleads that: -
 - a. The Claimant was duly involved in the transaction by inter-alia;-
 - i. Forwarding a contract regarding consultancy to one Andrew Mwaura, a director of Eris Property Developers Limited.
 - ii. Sending SMS's to the Respondent's Group Chief Commercial Officer that Chinese Clients were being mistreated notwithstanding that he was not working for the Respondent at the time.
 - b. The Claimant was informed clearly that he failed to declare personal interest when engaging with customer, South River Homes A/C No. 1410269254832 and Eris Property Developers A/C 1410269044658. The nature and extent of personal interest was made known to the Claimant as confirmed in his response dated 5th October, 2021.
 - c. The Claimant ought to have disclosed his personal interest in 20(b) above upon him rejoining employment with the Respondent. He did not.
- h. In answer to paragraph 23 of the claim, the Respondent pleads that the correspondences and discussions between the bank official in respect of whether or not to approve any customer transaction is confidential and cannot be disclosed to the customer who has applied for the loan. Such a customer is for all intents and purposes a third party in so far as those discussions were concerned. The disclosure is a breach of confidentiality.
- i. The Respondent denies that the Claimant has suffered any loss and damages as alleged at paragraph 27 of the claim and put the Claimant to strict prove thereof. In further response thereto, the Respondent avers that an order for reinstatement should not issue for the reasons that: -



- a. The reasons for termination of the Claimant's employment were valid and the process was procedurally fair.
- b. On account of the Claimant's gross misconduct, the Respondent has lost faith and trust in the employment of the Claimant. The relationship has completely broken down.
- c. The position occupied by the Claimant prior to his termination is no longer vacant and/or available. Thus, it is not practical to re-engage the Claimant.
- j. In answer to paragraph 28 of the claim, the Respondent pleads that: -
 - a. There having been valid reasons for terminating the Claimant's employment and the proper procedure having been adopted, there is no basis for claim of unfair termination.
 - b) The allegations of defamation, psychological and mental torture and unfair labour practices are without any legal and/or factual basis.

Evidence

4. At the trial the Claimant (CW1) adopted his witness statement and the documents filed with the claim as his evidence in chief and exhibits. According to CW1, he was employed by the respondent on two distinct occasions. The first was on 22nd October, 2013 and he left on 6th May, 2019 through resignation. He was gain employed on 10th September, 2020 as the Group Head-Chinese Business Coverage. His role was to acquire and manage Chinese clients at the Bank. The second appointment ended on 15th October, 2021. Before termination, he was issued with a notice to show cause. It was CW1's evidence that there were two allegations against him. The first was that he failed to declare personal interest between himself and Equity Bank's customers. The transaction in issue took place in 2019 September. Two respondent's customers lent money to themselves outside of the bank system. It was his evidence that then he was not the respondent's employee as he had resigned in June. This issue according to him, came up after he was hired for the second time. He further stated that himself and most of his friends had accounts with the respondent. The second accusation against him was that he communicated confidential information to a third party through email. According to him the addressee of the email was a customer of the respondent and that the client had asked for the information. It was CW1's evidence that he was a relationships manager and the email concerned loan projects financed by the respondent. He wanted to know if due diligence had been done as he noticed a few red flags. In his view he acted to protect the respondent's interest. He testified that the client was not aware of the loan.
5. He was summoned for disciplinary hearing over the two allegations and he attended the hearing. He however did not have the investigation report to enable him prepare himself. He had earlier written an email asking for additional information and investigation report but was never furnished with the same. It was further CW1's evidence that it was the client who asked for the information.
6. Concerning his salary, CW1 stated that he was earning Kshs. 1,763,200/- per month. He prayed that the Court orders his reinstatement to employment.
7. In cross-examination he stated that under clause 1.0 of his letter of appointment, he was required to familiarize himself the Bank's procedures, policies and processes. He admitted that he was issued with a notice to show cause to which he responded. According to clause 4.0 of the respondent's HR procedure manual, the hearing notice was supposed to be three days but was given seven days' notice to



- attend the disciplinary hearing. He confirmed that he was accused of conflict of interest. He guaranteed a loan for a customer he had a personal relationship with. He confirmed that Eris Properties was a customer of the Bank. It was further his testimony that Mr. Chen was anxious that the loan application could be a fraud. There were two signatories to the account and that Mr. Chen was not the majority shareholder.
8. According to CW1, the security team did not raise issue with the sharing of confidential information with 3rd parties. He spoke to the Branch Manager, Florence Muthama about the loan and she informed him that the documents for the loan had been signed and the loan application kept in the credit file. He was not satisfied with Ms Muthama's explanation. According to him the Branch Manager ensures that all documents are in order but the sector heads take responsibility if anything goes wrong with the loan. He had not seen the credit file by the time he wrote the email as the file was with the Credit Risk Department. He however did not have in his documents, any email stating he was denied access to the file and he never raised the issue with the section head.
 9. In re-examination he stated that he agreed to be a guarantor and that at that time he was not an employee of the Bank. He resigned in June, 2019. He further stated that he sent an email to a 3rd party and the email was forwarded to Mr. Chong as a shareholder and director of Eris Property and signatory to the account. The email was shared with the Bank. According to him the loan application was submitted without the approval of Chinese investor Mr. Chong therefore he was concerned about possible fraud in the application. He stated that he had seen an email at page 15 of the respondent's bundle of documents and noted that Chong said he was aware of the loan. He said he had contacted CW1 and asked him to hold the loan processing pending consultation with the Chairman. Regarding clause 4.2.6 of the Group Code of Conduct prohibiting communication of confidential information to unauthorized persons, it was his evidence that Mr. Chong was an authorized and that he was authorized as well to make the communication and that he was acting in good faith to protect the Bank. As the Head of Chinese Investment, he would take responsibility for any loss.
 10. Concerning conflict of interest, he stated that he was not asked for any disclosure about what he did prior to being hired. The Code of Conduct was not applicable to him in 2019 because he was not an employee of the respondent then.
 11. The respondent's witness Mr. Wycliff Ontumbi (RW1) stated that he was the senior Human Resource at the respondent. He wrote and signed a witness statement dated 24th March, 2022 which he relied on as his evidence in chief. He also relied on the documents filed with the claim. It was his evidence that he was aware of the claimant's case. The claimant was the Head of Chinese portfolio. He was to solicit business from Chinese and give them business support.
 12. According to him, the claimant was terminated on grounds of conflict of interest. He was not an employee when the issue arose but had a duty to disclose at the point of being hired or when dealing with the Bank. The claimant further shared information with Mr. Chong who was the Bank's customer. According to him, Mr. Chong was not part of the Equity Group.
 13. Concerning show cause, it was his evidence that the claimant was given 7 days instead of 3 days and had access to email. The claimant was therefore given ample time. Regarding the confidential information RW 1 stated that the email concerned loan application and that relationships were not based on Country of Origin but on trust and that the claimant was not the only one responsible for loans to Chinese sector.
 14. In cross examination he stated that the claimant was not to follow up all Chinese clients. It was only loans from the Chinese sector and would follow up others when required. The claimant was



terminated on account of loss of confidence and conflict of interest. The staff were required to declare conflict of interest however at the time the claimant was accused, he was not a staff of the Bank. Clause 2.7 of the Code of Regulations requires disclosure of personal interest by member of staff. The claimant was not a member of staff when the incident in question occurred. The claimant was terminated for sharing confidential email with unauthorized persons. The email was an official communication for Bank records. It was not to be shared with Bank customers. The claimant could have sought authority before sharing. The client disputed the loan saying he was not aware of the same. According to him the concerns by the claimant were not genuine. The issues he was raising were for other interests and that the Bank's interests had been adequately protected because Florence had signed the loan. He in his statement he admitted that there was an element of fraud. It was further his evidence that the claimant requested for the investigation report but was not given because it was an internal document but relevant aspects of it was disclosed in the show cause letter. The claimant was further allowed access to email for three hours. Further the claimant never raised the issue of ample time.

15. The Court having reviewed the pleadings, evidence and the documents filed in support and opposition of the claim flags out two issues for determination namely whether reasons for which the claimant was dismissed from employment were valid and justifiable and whether the process of dismissal was fair. Further if the claimant becomes successful what are the appropriate remedies.
16. The claimant was accused of disclosure of confidential information to 3rd parties and conflict of interest. According to the show cause letter dated 4th October, 2021 the claimant was accused of failure to declare personal interest when engaging with a customer, South River Homes and Eris Property Developers which was contrary to Group's Code of Conduct and Work Ethics clause 2.7 on conflict of interest. According to the respondent's witness Ms. Olaka, the claimant agreed to act as a personal guarantor to a loan borrowed by Eris Properties from South River Homes and upon being rehired on 1st November, 2020 failed to declare his personal interest in respect of the said transaction and continued to be involved in the same. The claimant was further accused of sharing confidential information with external parties, that is to say sharing credit proposal discussions with Mr. Chen, one of the directors of Cool Breeze Development Limited.
17. According to the claimant, the transaction between Eris Properties and South River Homes was between two separate entities transacting in their individual capacities without the involvement of the respondent and further that the transaction occurred around 12th September, 2019 when he was not an employee of the respondent and had no legal relationship with the respondent. Regarding the loan application, he stated that Chen Chong was a shareholder in Eris Property and also a director and signatory to the Bank account. He had been the key person in the respondent's dealing with the company. According to him, it came to his attention that a phase II loan application had been submitted at EXCO and deferred without the involvement of Cool Breeze. When he contacted Chen Chong, he confirmed that neither himself nor the chairman had been involved in the discussion over the proposed facility. Chen Chong was anxious that the application could be a fraud and requested to see the evidence. He requested that the application be put on hold. Mr. Chen Chong wrote a statement to the respondent setting out his position on the loan stating among others that at the time of signing the forms, he was advised that the documents were merely for indicative financing intention by the Bank. It was his understanding that they were not a formal loan application.
18. Reason for termination of employment need not be strictly proved but must however be reasonable and proportional in the circumstances. Termination of employment more often than not impacts on the life of an employee hence the decision to bring a contract of employment to an end ought to be



governed by reasonableness and proportionality. In the English case of *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. It was stated as follows concerning the proportionality test:

“ leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations...”

19. Lord Denning in the case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 observed as follows:

“ The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him ”

20. The claimant as observed earlier was terminated on account of conflict of interest in that he failed to declare personal interest when engaging with a customer, South River Homes and Eris Property Developers which was contrary to Group’s Code of Conduct and Work Ethics clause 2.7 on conflict of interest. He was further accused of sharing confidential information with a third party without authority. It was common ground that the transaction the claimant was involved in took place when he was not in the respondent’s employment. There was therefore an obligation on the part of the respondent to demonstrate more than it did, how the claimant became conflicted in a transaction that took place prior to joining the respondent’s employment.

21. Regarding the sharing of information with 3rd parties, the claimant was reasonably concerned about the loan application submitted by Eris properties and out of caution sought to know from the company’s director Mr. Chen Chong if he was aware of the application. Mr. Chong gave the clarification and his intention when signing the loan application. The claimant’s designation was Group Head Chinese Business Coverage and Eris was among the customers in his portfolio. The inquiry by claimant as presented by him and explained by Mr. Chong could not therefore in absence of evidence of inappropriate use be construed as disclosure of confidential information to unauthorized 3rd party. The loan concerned Mr. Chong’s company and the claimant as the Head of Chinese Business Coverage was within his responsibility when he made the inquiry.

22. The respondent failed to demonstrate how the infractions if any, put the respondent at reputational jeopardy or risk of loss. Further, assuming the infractions by the claimant were offenses against the respondent’s code of regulations, they could have been dealt with by less drastic disciplinary options than termination. Not all infractions in employment should attract dismissal. There are less drastic disciplinary measures such as warning, loss or privileges or surcharge where there is material loss, that can be handed down to an employee in milder cases that need not attract the ultimate penalty of a dismissal. It is the Court’s view that in terminating the claimant’s service based on the allegations against him, the respondent acted disproportionately and unreasonably hence unfair.



23. The Claimant was employed on 10th September, 2020 on permanent and pensionable basis. He was summarily dismissed on 15th October, 2021 meaning he had worked for the respondent for about a year at the time his service was terminated. The contract had a termination clause of one month's notice or pay in lieu. The contract could have been terminated by the claimant or brought to an end by natural causes and further the claimant being new in employment would have been the first to leave if the respondent was to embark on any redundancy or restructuring that would lead to loss of jobs. An award of four month's salary would therefore adequately compensate the claimant.
24. In conclusion the Court enters judgment against the respondent as follows.
- USD.
- i. One month's salary in lieu of notice 16,000
 - ii. Four months' salary as compensation 64,000
Total 80,000
 - iii. Costs of the suit.
 - iv. Items (i) and (ii) shall attract interest at Court rates from date of delivery until payment in full but subject to taxes and statutory deductions where applicable.
25. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY DECEMBER, 2023

ABUODHA NELSON JORUM

JUDGE

