



Nderitu v Chase Bank (K) Limited (In Receivership) & 2 others (Cause 365 of 2017) [2023] KEELRC 3180 (KLR) (4 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3180 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 365 OF 2017
JK GAKERI, J
DECEMBER 4, 2023

BETWEEN

JOSEPH GITHUI NDERITU CLAIMANT

AND

CHASE BANK (K) LIMITED (IN RECEIVERSHIP) 1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION 2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED 3RD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 20th February, 2017 alleging unfair and unlawful termination of employment. The claim is subsequently amended.
2. The Claimant was employed by the 1st Respondent on 1st September, 2012 as a bank teller and in 2013 he transferred from ABC branch Elite Banking to Rongai where he was promised, by word of mouth that he would be promoted to Senior Customer Service.
3. The claimant avers that around November 2013 and without notice, he was placed on suspension on account of alleged fraudulent transactions in the Bank.
4. The claimant avers after 5 months of suspension and without any communication, he visited the Respondent seeking to find out how far investigations had gone but was summarily dismissed for alleged gross misconduct.
5. The claimant further avers that he was charged in the Chief Magistrate's court in Criminal Case No. 593 of 2014 but charges were later withdrawn under Section 87(a) of the Criminal Procedure Code.
6. It is the Claimant's case that Respondent summarily terminated his services unfairly and subjected him to unemployment without investigating the fraud allegations and giving the claimant a hearing.



7. The claimant avers that since the termination, he has been out of employment and has suffered loss of income and earnings occasioning great difficulties and embarrassment.
8. The Claimant further states that conciliation efforts between him and the Respondent fell through.
9. The claimant further states that the 1st Respondent was put under receivership on 7th April, 2016 by the Central Bank of Kenya and the 2nd Respondent was appointed as the Official Receiver while the 3rd Respondent was appointed to act as the statutory manager of the 1st Respondent.
10. The Claimant prays for;
 - a. A declaratory order that his dismissal amounted to unfair termination of employment and therefore entitled to the remedy of reinstatement, re-engagement and compensation with back wages and without the loss of privileges, promotion and seniority.
 - b. A declaratory that the Respondent's act of dismissing the claimant was unlawful, arbitrary, oppressive or unconstitutional.
 - c. A declaratory that the claimant's termination of employment was wrongful and void.
 - d. Unconditional Reinstatement for the claimant.
 - e. Three (3) months salary in lieu of notice at Kshs.45,000/= a month Kshs.135,500/=.
 - f. Five (5) months half pay (Suspension) Kshs.112,500/=.
 - g. Twenty two (22) days unpaid leave Kshs.45,000/=.
 - h. Twelve Months salary damages for the unlawful termination amounting to Kshs.540,000/=.
 - i. Legal fees in Cr. No. 593 of 2014 Kshs.150,000/=.
Total Kshs.982,500/=
 - j. Damages for unfair termination and economic injury from date of dismissal to the retirement age to be determined by the court.
 - k. Gratuity for the years of service worked to be determined by the court.
 - l. Exemplary damages for oppressive, arbitrary and unconstitutional acts on part of the Respondent bank.
 - m. A certificate of service to be issued to the claimant.
 - n. Any other compensation that the court may deem fit and necessary to grant.

Respondent's case

11. In Response to the Memorandum of Claim the respondent filed a reply to memorandum of claim dated 20th July, 2017.
12. The Respondent states that on the 9th December 2013 it conducted a preliminary investigation that showed that the claimant was involved in fraudulent transactions which caused it a loss amounting to Kshs.6,730,000/= hence the claimant was issued with a suspension letter for a period of two weeks.
13. The Respondent avers that the Claimant's suspension was extended to 23rd December, 2013 and further extended to 6th January, 2014 to enable it conclude the internal investigations and the claimant was frequently notified of the proceedings of the investigations.



14. The Respondent states that the Kenya Police and Banking Fraud and Investigations department are independent state agencies that acted on their own volition in execution of their duty.
15. The respondent further states that its internal investigations revealed that the claimant was guilty and he was invited for disciplinary hearing on 20th March 2014 and the disciplinary committee recommended that the claimant be summarily dismissed on 16th April 2014.
16. The Respondent states that the claimant's termination was procedurally fair and was in line with the provisions of the *Employment Act*, 2007.
17. The Respondent urged the court to dismiss the claim with costs.

Claimant's evidence

18. The Claimant testified as CW1 and adopted his written statement dated 20th February, 2017 that rehearses the contents of the Memorandum of Claim as his evidence in chief.
19. On cross-examination the Claimant stated that he was issued with a dismissal letter which led to the filing of the instant case.
20. The Claimant testified that when he was employed, he was posted at ABC mall but was later transferred to the Ongata Rongai branch where he was given more duties at no extra pay, an issue he raised with his supervisor.
21. The Claimant testified that his duties at work involved money transfer and the dismissal letter makes reference to deposits and withdrawals involving MoneyGram and Western Union.
22. The Claimant testified that the criminal charges were withdrawn under Section 87(a) of the Criminal Procedure Code.

Respondent's evidence

23. RWI, Geoffrey N. Nyakundi, a Manager at Kenya Deposit Insurance Corporation and the appointed Liquidator of the Respondent adopted the witness statement dated 16th January, 2023 as evidence in chief.
24. On cross-examination, the witness testified that the suspension letter dated 9th December 2013 did not have an acknowledgment of receipt by the claimant. The witness stated that the letter may have been hand delivered to him hence the lack of acknowledgement.
25. The witness further stated that he was not present at the disciplinary hearing and could not ascertain the membership of the Disciplinary hearing committee. Further, he admitted that the minutes of the hearing and the recommendation were not attached as they could not be traced.
26. On re-examination, the witness testified that the claimant was in breach of the contract of employment and the letter of dismissal stated the reasons for termination.

Claimant's submissions

27. The Claimant's counsel identified two issues for determination;
 - i. Whether the Claimant's termination of employment by the Respondent was unlawful, wrongful and unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought



28. On the first issue, counsel relied on the provisions of Section 45(2)(c) of the *Employment Act*, 2007 that;

“A termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure”

29. Counsel submitted that the termination of the Claimant’s employment was not carried out in accordance with a fair procedure as the claimant was verbally placed on suspension without any written notice to show cause for a period of four months.

30. That the Claimant was summarily dismissed from employment without being subjected to a disciplinary hearing thereby denying him the right to a fair hearing.

31. Counsel further submitted that despite suspending the claimant to pave way for investigations, the respondent did not furnish the claimant with a copy of the investigation report thereby denying him reasonable opportunity to address the issue at hand.

32. It was also submitted that the report furnished in court did not attribute any culpability on the claimant but the respondent summarily dismissed the claimant.

33. Counsel submitted that termination of the claimant’s employment was unlawful and unfair as it failed to adhere to the requirements of Section 41 of the *Employment Act*, 2007.

34. Counsel relied in the holding in Co-operative Bank of Kenya Limited V Yator (Civil Appeal 87 of 2018 (2021) KECA 95 KLR where the court held;

“... even where an employee has committed gross misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken an employer must ensure procedural fairness to the employee by allowing the employee to give his defence.

... it follows that the act of summarily dismissing the respondent without giving him an opportunity to be heard as was the case with the first complaint amounted to unfair termination”

35. Counsel submitted that the Respondent failed the test set out under Section 43 of the *Employment Act*, 2007 as it failed to prove that there were valid reasons for terminating the claimant’s employment.

36. Reliance was also made on the sentiments of the court in Joseph Otieno Nyolo v Rift Valley Railways (K) Limited (2014)eKLR where the court held;

“... it’s the opinion of the court that the courts investigations into the validity or genuineness of the reasons for termination accrues only where it is shown that the employer invoked due process as per Section 41 of the Act.”

37. Counsel further submitted that the respondent’s actions of failing to provide written reasons for suspension and subsequently convening a disciplinary hearing prior to summarily dismissing the claimant was in breach of the claimant’s right to Fair Administrative Action enshrined in Article 47 of *the Constitution* of Kenya, 2010 and Section 4(1) of the *Fair Administrative Action Act*, 2015.

38. Counsel submitted that the Respondents actions of dismissing the claimant from employment without granting him a fair hearing and allowing him to defend himself was an affront to the rules of natural justice and established principles of equity.



39. On the 2nd issue, counsel submitted that the claimant had successfully demonstrated that the termination of his employment by the 1st Respondent was both unlawful and unfair and was thus entitled to the reliefs prayed for in the Memorandum of Claim.

40. Counsel relied on the holding in *Cooperative Bank of Kenya Limited V Yator (Supra)*, where the court stated as follows;

“In the instant appeal, the Learned Judge awarded ten months salary as compensation and the reasons given were that the Respondent had lost a good job in the lucrative banking industry and it would be difficult to get another job in the sector once accused of loss of money. That the respondent suffered loss of his source of income at the time he had big loans to pay and young children to take care of. Lastly that the Respondent lost his job without notice or payment in lieu thereof and suffered loss and pain having served the appellant for a period of fifteen years. We find no fault in the above reasoning. We indeed embrace it and therefore have no basis to interfere with the award of ten months salary as compensation.”

41. Counsel submitted that considering the Respondent is under liquidation, it was impractical for the court to order reinstatement and urged the court to order the claimant to be compensated by way of aggravated and exemplary damages which will compensate the claimant for the irreparable damage to his professional reputation as a result of the unfair dismissal.

Respondent’s submissions

42. The Respondent’s counsel highlighted three issues for determination as hereunder;

- a. Whether the suit is competently before the court
- b. Whether the claimants dismissal was fair
- c. Whether the reliefs sought should be granted

43. On the first issue, counsel submitted that since the Respondent was insolvent at the time of filing the suit, the suit was improperly before the court and the provisions of Sections 66-69 of the *Employment Act, 2007* were instructive on how to claim compensation against an employer who is insolvent.

44. Counsel submitted that Section 66 of the *Employment Act, 2007* presupposes that where an employer is insolvent an application for compensation should be made to the Cabinet Secretary. Section 67 (b) (ii) of the Act defines insolvency to include where a receiver or liquidator had been appointed.

45. Counsel submitted that since parliament had decreed the law regarding insolvent employers, the procedure binds all employees and the court’s discretion is fettered when adjudicating claims against insolvent employers.

46. Counsel relied on the holding in *James Omari Mareno v Chase Bank Limited (2022) eKLR* where Lady Justice Monica Mbaru held;

“From the foregoing its clear that the intention of the drafters of the law meant to avoid adding unnecessary financial burden to an institution undergoing insolvency. In Employment and Labour Relations the exemptions and requirement for leave is to ensure that the minister is able to intervene and ensure employee properly owed in terminal dues is paid and that a company undergoing financial crisis and insolvency is not



subjected to multiplicity of suits which would be expensive, time consuming and at times unnecessary . . .”

47. In light of the foregoing, counsel submitted that the instant suit was fatally defective and should be struck out with costs.
48. On the second issue, counsel submitted that the claimant’s dismissal was fair as it was based on fair reasons and proper procedure under Sections 41 and 43 of the *Employment Act*, 2007 was followed since the claimant was involved in fraudulent activities.
49. Reliance was placed on the decision in *Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike* (2017) eKLR where the Court of Appeal observed as follows;

“ Under Section 43 of the Act the onus is on the employer to prove the reasons for termination, failing which termination shall be deemed to be unfair. The test is however a partly subjective one in that all an employer is required to prove are the reasons that he genuinely believed to exist causing him to terminate the employees services. In the present case it seems quite clear from the evidence on record that KPLC believed and had ample reasonable basis for so believing that Wasike had attempted to steal cable wire from KPLC store which he was in charge of.

Counsel submitted that the supposed acquittal in the Criminal Case No. 593 of 2014 was not an acquittal rather the charges against him were withdrawn under section 87(a) of the Criminal Procedure Code which discharge is without prejudice and not a bar to subsequent prosecution therefore does not amount to an acquittal.”

50. Counsel further submitted that criminal proceedings are distinct from disciplinary hearing and have different evidential burden and standard of proof.
51. Reliance was also made on the holding in *Jacob Oriando Ochanda V Kenya Hospital Association Ltd T/A Nairobi Hospital* (2019) eKLR where the court cited the decision in *Attorney General and another V Maina Githinji & another*, Nyeri Civil of Appeal No. 21 of 2015 where the court held as follows:

“An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reasons that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements.”

52. Counsel submitted that a fair procedure was followed and suspension letters and hearing notices were issued to the claimant but owing to the claim being filed at a time when the respondent had been put in liquidation, the received notices were unavailable.
53. On the third issue, counsel submitted that the claim was fatally defective and lacked merit and urged the court to dismiss it with costs.

Findings and determination

54. The issues for determination are;
 - i. Whether the suit is competently before the court?
 - ii. Whether termination of the Claimant’s employment was fair?



- iii. Whether the claimant is entitled to the remedies sought?
55. On the 1st issue, the respondent submitted that the claim was improperly before the court as it was filed when the Respondent was insolvent and section 66-69 of the *Employment Act*, 2007 were clear on how to claim compensation against an insolvent employer.
56. The sections the Respondent relies on applies to an employee who is owed or whose employment is terminated due to insolvency which is not the case in the instant suit as the dues have not crystalized hence the matter is competently before the court.
57. On the 2nd issue, the court is invited to interrogate the fairness of the Claimant's termination from employment. In determining this issue, the court has to consider whether the respondent had a substantive justification to terminate the claimant's employment and conducted the termination in accordance with a fair procedure.
58. The absence of both or one of these elements renders the termination of employment unfair within the meaning of Section 45 of the *Employment Act*, 2007.
59. The elements of a fair termination of employment were aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, as substantive justification and procedural fairness. (See also *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR where the Court of Appeal made similar sentiments.)
60. Section 41 and 45(2) of the *Employment Act*, 2007 address procedural fairness, while Sections 43, 45(2), 45(5) and 47(5) deal with substantive justification.

Reason for termination

61. It is common ground that the Claimant was an employee of the 1st Respondent from 1st September, 2012 to 16th April, 2014, about 1year and 7 months and was transferred from ABC Branch to the Ongata Rongai Branch where he served as a Bank teller at a salary of Kshs.37,500/=.
62. On the 9th of December 2013, the Claimant was suspended on an account of being involved in fraudulent transactions to pave way for investigations, which suspension according to the respondent was extended to 23rd December, 2013 and later to 6th January, 2014.
63. The claimant testified that when he went to inquire about the outcome of the investigations on the 16th April 2014, he was issued with a summary dismissal letter.
64. The Respondent on the other hand states that internal investigations revealed that the claimant was guilty and subjected him to disciplinary hearing on the 20th March, 2016, the disciplinary committee recommended that the Claimant be summarily dismissed which was done vide the dismissal letter dated 14th April, 2014.
65. The Claimant avers that he was not subjected to any disciplinary hearing but the respondent stated that a disciplinary hearing was held on 20th of March 2014. However, no evidence was adduced in court to demonstrate that the claimant was invited for the alleged hearing and minutes of the alleged hearing were not availed to ascertain whether a hearing indeed took place as alleged by the respondent.
66. Equally, the respondent did not produce a copy of the notice to show cause.
67. It is not in dispute that the claimant was charged together with another person on 23rd April, 2014 for conspiracy to defraud contrary to section 317 of Criminal Procedure Code and Stealing by servant



contrary to section 281 of the Criminal Procedure Code, but charges were withdrawn on the 19th May, 2016 under Section 87(a) of the Criminal Procedure Code.

68. The dismissal letter dated 16th April, 2014 read in part;

“Investigations have established that the equipment used for all deposits and withdrawals on November 30, 2013 was linked to a computer allocated to you by the Bank and its unique internet protocol address. This incident is in addition to other cases of fraud involving Money Gram and Western Union that you have been previously linked with. . .”

69. Puzzlingly, the investigations report that led to the decision to terminate the claimant’s employment was neither supplied to the claimant nor the court and as adverted to elsewhere in this judgement, the disciplinary proceedings were not availed. The court is left with nothing but the dismissal letter to determine whether the respondent had a valid and fair reason to summarily dismiss the claimant.

70. In determining this issue, the court is guided by the provisions of *Employment Act*, 2007 and case law.

71. Section 43(2) of the *Employment Act*, 2007 provides that;

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

72. Section 45(1) of the *Employment Act*, 2007 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 reasons for termination was valid.
 - b. that the reason for termination is a fair reason.

73. Similarly, Section 47(5) of the *Employment Act*, 2007 provides that;

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

74. These provisions are consistent that it is the obligation of the employer to prove that it had a valid and fair reason or substantive justification for the termination of employment.

75. In *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*, the Court of Appeal explained the provisions of Section 43(2) of the *Employment Act*, 2007 as follows;

“ . . . reasons for termination are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract. For example poor performance, insubordination and lack of loyalty are some of the grounds . . .”

76. The court is in agreement with these sentiments.

77. In the instant case, the Respondent adduced no evidence of the alleged fraudulent transactions.



78. The Claimant's transgressions are neither exemplified by a notice to show cause nor the alleged investigation report.
79. Put in the alternative, it is unclear to the court as to what the Claimant did or did not do.
80. In the absence of verifiable evidence of the alleged fraudulent transactions, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

Procedure of termination

81. Following the accusation, the claimant was suspended from work on 9th December, 2013 to pave way for investigations of the alleged fraudulent transactions and the suspension was extended on 23rd December, 2013 and 6th January, 2014 and was followed by the summary dismissal.
82. In determining whether the due process was followed, the court is guided by the provisions of Section 41 of the *Employment Act*, 2007 which prescribe the mandatory procedure to be complied with by any employer considering termination of an employee's employment or summary dismissal.
83. Section 41 of the *Employment Act*, 2007 has four components, namely; the notification- the employer must notify the employee of his or her intention, and the grounds on which the intention is founded. Second, the hearing - the employer must accord the employee adequate opportunity to prepare and defend himself against the charges levelled against him, third, right of accompaniment- the employee has the right to be accompanied to the hearing by a colleague of his choice or a union representative. Such person must be present when the charges are explained to the employee. Lastly, the employer has to consider the representation(s) made by the employee and or the person accompanying employee before making a decision.
84. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal isolated the elements of procedural fairness in the following words;

“It is our view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with ...

Four elements must thus be discernible for the procedure to pass:

 - i. An explanation of the grounds of termination, in a language understood by the employee.
 - ii. The reason for which the employer is considering termination.
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
 - iv. Hearing and considering any representations made by the employee and the person chosen by the employee.”
85. From the evidence on record, it is clear that the Claimant was not accorded an opportunity to defend himself against the serious allegations levelled against him. Failure of the Respondent to adduce evidence of the disciplinary hearing proceedings or invitation to the hearing creates the irresistible inference that the Claimant was not accorded a fair hearing before termination of employment and his rights to fair hearing was violated.



86. In *Galgalo Jarso Jillo V Agricultural Finance Corporation (2021)* eKLR the court stated that;

“The failure by the Respondent to file these minutes certainly deprives the court of evidence that the Respondent complied with the procedural strictures set out in law. Accordingly, I find that the Respondent has failed to prove that the procedure adopted to release the Claimant was fair.”

87. From the foregoing, it is the finding of the court that the respondent has failed to discharge the burden of proof under Section 45(2)(c) of the *Employment Act*, 2007 or demonstrate compliance with the provisions of Section 41 of the Act and the dismissal of the claimant on 16th April, 2014 was unfair for want of procedural propriety as held by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (Supra)* as follows;

“... On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”

Reliefs

88. On the appropriate reliefs, the court proceeds as follows;

12 month’s salary compensation

89. Having found that the termination of the Claimant’s employment was unfair, the claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007.

90. In determining the quantum for compensation the court has taken into consideration the fact that the claimant worked for the respondent for about 1 year 7 months as a Bank Teller. That during that time of employment he did not have a recorded warning letter. The Claimant did not appeal the decision or manifest his wish to continue in the Respondent’s employment.

91. In the circumstances, the court is satisfied that the equivalent of 3 months’ gross salary is adequate compensation.

Salary in lieu of notice.

92. Clause 17 of the Claimant’s employment contract provided that;

“The employment maybe terminated at any time during the contract period by the bank giving the employee one months’ notice in writing or salary in lieu of such notice.”

93. As the respondent adduced no evidence of compliance with the provisions of Section 36 of the *Employment Act*, 2007, the claimant is awarded one month’s salary in lieu of notice.

Gratuity

94. This is an amount paid by an employer to an employee in appreciation for the services rendered. It is a gratuitous payment and has a contractual justification.

95. It is either provided for by the employment contract or the terms of the collective agreement in the case of unionisable employees.

96. In this case, the Claimant’s employment contract made no provision for payment of gratuity.



The prayer is declined.

Exemplary damages

97. As explained in *Rookes V Barnard & others* (1964) AC 1129, exemplary damages are awarded in defined circumstances and the Claimant tendered no evidence to demonstrate entitlement to exemplary damages.
98. Similarly, it cannot be overemphasized that exemplary damages are not compensatory in nature and are seldom awarded in termination of employment contracts.

The prayer is dismissed.

Certificate of service

99. The Claimant worked for the Respondent for a duration of 1 year and 7 months. The Claimant is thus entitled to a certificate of service by dint of Section 51 of the [Employment Act](#). The certificate should be issued within 30 days from the date of this judgment.
100. In the upshot, judgement is entered in favour of the Claimant against the 1st Respondent in the following terms;
- a. One month's salary in lieu of notice.
 - b. Equivalent of 3 months gross salary.
 - c. Costs of this suit.
 - d. Interest at court rates from date of judgement till payment in full.
 - e. Certificate of service.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF DECEMBER 2023

DR. JACOB GAKERI

JUDGE

