



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2585 OF 2016**

**ALEX GIKONYO KINIARU.....CLAIMANT**

**VERSUS**

**UWEZO MICROFINANCE BANK.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim against the Respondent is for wrongful dismissal and failure to pay terminal dues. The claim is contained in a Memorandum of Claim dated 16<sup>th</sup> December 2016 and filed in court on even date. The Respondent filed a Response on 25<sup>th</sup> January 2017.
2. At the trial, the Claimant testified on his own behalf and the Respondent called Leonard Mwakalu Kilambo. Both parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent on 7<sup>th</sup> September 2015, as a Debt Collector. He earned a monthly salary of Kshs. 30,000. He worked as such until 12<sup>th</sup> July 2016, when he was summarily dismissed, on allegations of fraud and poor performance.
4. The Claimant further states that upon being given the dismissal letter, which was signed by the Respondent’s non-executive Chairman, he was physically and forcefully removed from the place of work, by one Desmond Illavo, on instructions by the Chairman. The Claimant was arrested and detained at Central Police Station from 9.00 am to 6.00 pm.
5. The Claimant denies engaging in any of the alleged fraudulent activities enumerated in the letter dated 12<sup>th</sup> July 2016. He adds that he was not given an opportunity to defend himself.
6. The Claimant maintains that his dismissal was wrongful and unfair. He therefore claims the following:
  - a) Damages equivalent to 12 months’ salary.....Kshs. 360,000
  - b) 1 month’s pay in lieu of notice.....30,000
  - c) Pay in respect of untaken leave of 6 days.....6,000
  - d) Housing allowance.....49,500
  - e) Severance pay.....15,000
  - f) Certificate of Service
  - g) A fine of Kshs. 100,000 against the Respondent for failure to comply with the mandatory provisions of Section 51 of the Employment Act
  - h) Unpaid salary for July 2016

i) Punitive and aggravated damages

j) Costs plus interest

### **The Respondent's Case**

7. In its Response dated 24<sup>th</sup> January 2017 and filed in court on 25<sup>th</sup> January 2017, the Respondent admits having employed the Claimant as a Debt Collector but states that his tenure in the said position was marred by fraudulent dealings, poor performance and negligent conduct, as a result of which the Respondent suffered great losses, forcing it to summarily dismiss the Claimant.

8. The Respondent states that its Chairman was empowered by the Board to sign the Claimant's dismissal letter.

9. The Respondent denies that the Claimant was physically and forcefully removed from his workplace and contends that the Respondent merely handed over the Claimant to the police, upon reasonable suspicion of conspiracy to defraud the Bank.

10. The Respondent's case is that the Claimant's summary dismissal was executed in accordance with the applicable law, upon reasonable suspicion of fraud. In this regard, the Respondent contends that it fully complied with all relevant constitutional and statutory provisions.

11. According to the Respondent, it was not required to issue the Claimant with any notice to show cause, in view of the serious suspicions of fraud against him.

12. The Respondent states that the Claimant's fraudulent and negligent conduct amounted to poor performance on his part, thus forcing the Respondent to dismiss him from employment.

### **Findings and Determination**

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

14. The Claimant was dismissed by letter dated 12<sup>th</sup> July 2016, stating:

*"Dear Alex,*

#### **Summary Dismissal**

*The above subject refers.*

*The Company has taken a decision to summarily dismiss you due to fraud and poor performance.*

*It is noted that during your tenure as the Debt Collector, the Company's Portfolio at Risk has grown to over kes 53 Million mostly attributed to your negligence and fraud.*

*You have also been involved in the following fraudulent activities:-*

- I. Stealing four files belonging to customers with debts in order to defraud the Company,*
- II. Stealing various documents from customers files in order to make it difficult to trace the debtors,*
- III. Colluding with customers who have defaulted in loan repayments so that they hide vehicles given as collaterals to avoid repossession of the vehicles and payment of the loans,*
- IV. Colluding with customers and getting handouts in order to delay repayment of loans when the loans become due,*
- V. Collecting cash from customers and not limiting (sic) to the Company on time,*

*You are required to immediately do the following:-*

- I. Handover all Company assets and documents in your possession,*

II. Pay all money which you owe the Company,

III. Make a detailed report on all the customers' accounts you have been handling,

The above must be done before the close of business today.

The above issues will be handled (sic) to our CEO Mr. Edward Mwithalii.

Note that a Forensic Audit shall be carried out to determine the level of losses the Company has incurred due to your fraudulent activities and criminal charges will be instituted against you in due course to recover the losses.

You are also cautioned not to interfere with any client and staff member.

Yours Sincerely

(signed)

Paul Kinuthia

Chairman Uwezo Micro Finance Bank Ltd,"

15. This letter accuses the Claimant of negligence and fraud. However, no particulars were provided and no evidence was led to support any of the accusations made against the Claimant. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee. The Respondent's witness, Leonard Mwakalu Kilambo was unable to confirm any of the charges levelled against the Claimant in the dismissal letter.

16. Moreover, none of these charges were placed before the Claimant for his response at the shop floor, as dictated by the procedural fairness requirements of Section 41 of the Employment Act. Indeed, the Respondent itself suggests that the Claimant was not entitled to due process because of the perceived seriousness of the allegations levelled against him.

17. As held in *Kenya Union of Commercial Food and Allied Workers Union v Meru North Farmers Sacco Limited [2014] eKLR* the procedural safeguards provided under Section 41 apply with equal force, in cases of summary dismissal as in termination with notice.

18. I do not need to say more on this issue; the only conclusion to make is that the Claimant's dismissal was substantively and procedurally unfair and he is consequently entitled to compensation.

#### **Remedies**

19. Pursuant to the foregoing, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the circumstances surrounding the dismissal, violation of the Claimant's right to be heard and the finding that he did not contribute to the dismissal.

20. I further award the Claimant one (1) month's salary in lieu of notice.

21. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

22. In opposing the claim for salary for July 2016, the Respondent produced a payslip generated on 23<sup>rd</sup> January 2017, long after the dismissal. A payslip, without more, is not evidence of payment of salary. This claim therefore also succeeds and is allowed.

23. The Claimant further claims house allowance. Clause 3 of his letter of appointment provides for a monthly salary, which would ordinarily be inclusive of house allowance. The fact that the payslips provide for a basic pay does not change this fact. The claim for house allowance is therefore declined.

24. No basis was established for the claims for severance pay, punitive and aggravated damages which are consequently disallowed.

25. I decline to entertain the claim for Kshs. 100,000 as fine for failure to issue a Certificate of Service, in these proceedings.

26. In the end, I enter judgment in favour of the Claimant as follows

- a) 6 months' salary in compensation.....Kshs. 180,000
- b) 1 month's salary in lieu of notice.....30,000
- c) Leave pay for 6 days.....6,000
- d) Salary for 12 days in July 2016.....12,000

**Total.....228,000**

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Claimant is also entitled to a Certificate of Service plus costs of the case.

29. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kamotho for the Claimant

Mr. Mugambi for the Respondent