



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1465 OF 2015

BETWEEN

DOREEN MUTITU.....CLAIMANT

VERSUS

EQUITY BANK [KENYA] LIMITED.....RESPONDENT

*Rika J*

*Court Assistant: Emmanuel Kiprono*

*John Mburu & Company, Advocates for the Claimant*

*Mburu Maina & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed her Statement of Claim on 21<sup>st</sup> August 2015. She states, she was employed by the Respondent Bank on 3<sup>rd</sup> July 2008 as a Bank Clerk, earning a salary of Kshs. 25,000 monthly. By the time she left employment, she held the position of Senior Relationship Officer, earning a salary of Kshs. 67,000 monthly.

2. She was suspended by the Respondent on 3<sup>rd</sup> March 2015, on the allegation that she had been in contact with a former Employee of the Respondent, Sam Ongiri, who had been dismissed by the Respondent in 2009 over fraud. The Claimant was summarily dismissed on 10<sup>th</sup> March 2015, over the allegation. She states that she was not issued a letter to show cause and was not heard. There was no notice and valid reason or reasons, given to her.

3. She claims from the Respondent: -

- a. Notice of 1 month at Kshs. 67,000.
- b. Leave at Kshs. 67,000.
- c. Leave allowance at Kshs. 3,000.
- d. Salary from 1<sup>st</sup> March to 3<sup>rd</sup> March [ no year pleaded] at Kshs. 6,843.
- e. Half salary for suspension period at Kshs. 6,843.
- f. Service pay equivalent of 12 months' salary at Kshs. 804,000.
- g. Declaration that termination was unfair and unlawful.

h. Damages for unfair termination.

i. The Respondent is compelled to recall the letter of termination.

j. Letter of service.

k. Costs and interest.

4. The Response is that the Claimant was indeed employed by the Respondent as pleaded. Her position of Senior Relationship Officer-Account Opening, allowed her access to critical customer information. The Respondent is a bank, highly dependent for its success, on customer trust.

5. On or about January 2015, the Respondent noted there was suspicious communication between the Claimant and one Sam Ongiri, a former Employee of the Respondent. Ongiri had been dismissed some years back, for involvement in fraud. He had tampered with customer information.

6. The Claimant was summoned by Management on 3<sup>rd</sup> March 2015, and informed about the suspicious communication from Ongiri. She denied knowledge of Ongiri and his calls. Investigations carried out by the Respondent, determined that the Claimant had consistent communication with Ongiri. On further questioning, she admitted she knew Ongiri; she had met him physically; she had numerous text messages with him; and had tele-conversation with him, as suspected by the Bank.

7. The Respondent gave the Claimant 7 days to make full disclosure of her contact with Ongiri, detailing all information shared with Ongiri and any of his associates. She did not make any disclosures within the given period, and the Respondent summarily dismissed her in the end. Dismissal was in conformity with Section 41 of the Employment Act and her letter of employment. The Claimant was advised that her terminal dues would be released, once she handed over Respondent's property. The Claimant was the author of her own misfortune. The Respondent prays for dismissal of the Claim.

8. The Claimant, and Respondent's Senior Officer Employees' Relations Winnifred Mwendu Kyalo, gave evidence on 9<sup>th</sup> July 2021 closing the hearing.

9. The Claimant restated in her evidence-in-chief, the contents of her Statement of Claim, and Statement of Witness, as summarized at the outset in this Judgment. She adopted her documents numbered 1 to 11.

10. Cross-examined, she agreed that her position was based on trust and confidentiality. She was not to disclose customer information. Head Office enquired from the Claimant, if she knew Ongiri. She was issued suspension letter. She was initially employed in 2008, at Respondent's Moi Branch, Nairobi. Ongiri worked there too. She knew him as Machel. The Claimant supplied Safaricom call logs to the Respondent as requested. She did not have them in Court. She explained that the call logs are confidential. There was no opportunity given by the Respondent to her, to explain her position. Termination was not on the ground that she failed to supply the call logs. It was illegal to supply customers' details to 3<sup>rd</sup> Parties. She has not cleared with all of the Respondent's Departments. This is because she came to Court. She will do so once the Claim is concluded. She applied for a job with the Central Bank of Kenya. It was denied to her on account of adverse reference from the Respondent. She did not have any document to show this. She did not get the Certificate of Service, because she has not cleared with the Respondent.

11. Kyalo confirmed that the Claimant was employed by the Respondent as pleaded. It is true that the Respondent terminated her contract. She was tasked with enlisting new customers. She was prohibited from sharing out customer information with 3<sup>rd</sup> parties. The Respondent was aware that some of its Employees were colluding with fraudsters, mostly ex-Employees, to defraud the Respondent and its customers. The fraudsters would receive customer information from within the Respondent.

12. The Claimant was in contact with Ongiri. She was asked to provide her call logs to the Respondent within 7 days. She did not do so. The Respondent met the Claimant on 3<sup>rd</sup> March 2015. She was confronted with details of contact with Ongiri. She was suspended. Ongiri was a former Employee of the Respondent who had been dismissed in 2009, after transferring a customer's money fraudulently. The Claimant's contract was therefore terminated for breaching Respondent's policy. She did not clear with the Respondent, to be paid terminal dues and to receive her Certificate of Service. The Respondent pay this and avail the Certificate of Service, upon clearance.

13. Cross-examined, Kyalo told the Court that the Claimant was informed that she was in touch with Ongiri, verbally. She was not told so in writing. The Respondent established that Ongiri was a fraudster. Ongiri was dismissed in 2009. He communicated with the Claimant in 2014. The Claimant was not represented in the meeting of 3<sup>rd</sup> March 2015. The Respondent carried out internal investigations. Kyalo did not have the resultant report.

14. The issues in dispute are whether the Respondent terminated the Claimant's contract of employment fairly under Sections 41, 43 and 45 of the Employment Act; and whether she merits the remedies sought.

**The Court Finds: -**

15. The Claimant was employed by the Respondent Bank on 3<sup>rd</sup> July 2008 as a Clerk. She was promoted to the Senior Relationship Officer-Account Opening, a position she held as of 10<sup>th</sup> March 2015, when the Respondent terminated her contract. It is not disputed that her last monthly salary was Kshs. 67,000.

16. She was suspected of being in contact with Sam Ongiri, a former Employee of the Respondent, who had been dismissed in 2009, after defrauding the Bank. She was asked to avail her call logs, to discount that she was in communication with the fraudster Ongiri. She was to do so within 7 days. She failed to do. She did not supply the logs to Court, citing confidentiality. The Respondent was not required to establish valid reason or reasons to justify termination on a standard beyond reasonable doubt; section 43 only requires that the reason or reasons, for termination of a contract, are matters that the Employer, at the time of termination of the contract genuinely believes to exist, and which caused the Employer to terminate the services of the Employee.

17. The Claimant was familiar with Ongiri, having worked with him at Moi Branch Nairobi in 2008, when the Claimant was a fresher. She knew him as Machel. She was aware that Ongiri had been dismissed over fraud. The Respondent is a Bank, with the duty to protect its customers' accounts. Customers base their trust in the bank, to protect their accounts. The Claimant was in a very sensitive docket, a position of confidentiality, where customers supplied her their personal details, in opening accounts. Why would she renew her acquaintance with Ongiri in 2014, while she was aware he was an ex-Employee, blacklisted by the Respondent over fraud?

18. The Claimant's relationship with the Respondent was defined by trust and confidentiality. Her conduct indicated breach of trust and confidentiality, which elements were the cornerstone of her contract. Section 44[3] allows an Employer to summarily dismiss an Employee, when that Employee's conduct indicates that the Employee has fundamentally breached obligations arising under the contract of service.

**19. *The Respondent has shown valid reason or reasons, justifying termination, under Sections 43, 44[3] and 45 of the Employment Act.***

20. Procedure was definitely flawed. The Respondent confronted the Claimant with the allegations of being in contact with the fraudster, on 3<sup>rd</sup> March 2015. She was suspended and required to supply her call logs within 7 days. She did not do and was summarily dismissed.

21. The meeting of 3<sup>rd</sup> March 2015 was not a disciplinary hearing as contemplated by Section 41 and 45 of the Employment Act.

22. The disciplinary clause 14.5 in the Respondent's Human Resource Manual was not observed. The process entails show cause letter; response from the Employee within 2 working days; the period can be extended to 3 days depending on the nature of the offence; and there is a right of appeal, which presupposes a right of initial hearing. The Respondent did not adhere to Sections 41 and 45 of the Employment Act and clause 14.5 of its Human Resource Manual in handling the Claimant.

**23. *Procedure was flawed, and to this extent, termination was unfair.***

24. The Claimant worked for the Respondent for close to 7 years. Her record was blotted through her engagement with a fraudster. She contributed in large, to the decision made by the Respondent to end the relationship.

**25. *The Court allows her prayer for compensation for unfair termination, at equivalent of 3 months' salary, at Kshs. 201,000.***

26. She does not merit notice, the Respondent having shown ground to warrant summary dismissal.

27. There is no evidence to support the prayers for outstanding annual leave, leave allowance, salary from 1<sup>st</sup> March to 3<sup>rd</sup> March [ no year pleaded] and service. Her contract shows she was, upon successful completion of probation, entitled to Staff Contributory Pension Scheme. The contract also shows that she was subscribed to the N.S.S.F. She does not merit service pay. Even if it was merited, it is not computed at equivalent of 12 months' salary, as the Claimant has pleaded.

28. There is no merit in her prayer for the letter of termination to be recalled by the Respondent. Letters of termination, even when orders of reinstatement are made, are not normally recalled. These are employment records whose custody the Employer is mandated to retain.

29. Other benefits offered by the Claimant, and supply of the Certificate of Service, are available to the Claimant upon clearance. She conceded that she did not clear with the Respondent, because she came to Court.

**IN SUM, IT IS ORDERED: -**

***a. Termination was founded on valid reason or reasons, but flawed procedure, and to that extent unfair.***

***b. The Respondent shall pay to the Claimant equivalent of 3 months' salary in compensation for unfair termination at Kshs. 201,000.***

***c. No order on the costs.***

***d. Interest allowed at court rates from the date of Judgment, till payment is made in full.***

Dated, signed and released to the Parties electronically at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 24<sup>th</sup> day of March 2022.

**James Rika**

**Judge**

