



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 38 OF 2017**

**ALLAN KARARE.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant was employed by the respondent with effect from 11<sup>th</sup> June, 2007 as a direct sales representative. All seemed well in the employment relationship until 21<sup>st</sup> August, 2014 when the claimant was arrested together with other persons at the Jamii Bora Bank, by the Banking Fraud Investigations Unit (BFIU) on suspicion of fraud. Thereafter, everything went on a downward spiral culminating in his termination from employment on 2<sup>nd</sup> October 2014. It is that termination that triggered the instant claim through which the claimant now seeks the following orders: -

- a) A declaration that the termination was unlawful;**
- b) Terminal benefits due;**
- c) General Damages for unlawful dismissal, lost opportunities and financial embarrassment;**
- d) An order directing the Respondent to recall the adverse report it forwarded to the Credit Reference Bureau;**
- e) Costs; and**
- f) Interest on (b) and (c) above.**

2. The respondent disputed the claim through its Memorandum of Defence dated 13<sup>th</sup> April 2017 and through which it avers that the claimant's termination was lawful and fair as it was informed by his breach of the employment contract.

3. The matter proceeded for trial on 15<sup>th</sup> November, 2021, with each side calling oral evidence.

**Claimant's Case**

4. The claimant testified as CW1 and at the outset, adopted his initial witness statement, further witness statement and bundle of documents, which he asked the court to admit as part of his evidence in chief. He also produced the bundle of documents filed together with the initial claim, as exhibits before court.

5. The claimant testified that he began working for the respondent bank as a sales representative and rose through the ranks and at the time of his termination, was holding the position of a customer adviser. That his gross monthly salary prior to his termination was Kshs. 91,667/=.

6. It was his testimony that on 1<sup>st</sup> September 2014, he was suspended on grounds of financial misconduct, in that he had borrowed money from another institution (Jamii Bora Bank), which allegation he states was false. The claimant denied ever engaging in any dealings with Jamii Bora Bank and neither had he ever borrowed any money from the said bank. He further denied being awarded any tender by the United Nations. It was his further testimony that he did not contravene the respondent's policies or become involved in any misconduct.

7. He further testified that prior to the incident that led to his termination, he had never faced any disciplinary action and was an overall good

performer.

8. In addition, the claimant told court that he had a loan with the respondent bank and following his termination, he had experienced challenges servicing the same, as the repayment rates were enhanced to march up with those prevailing in the market. That as a result, the respondent had caused him to be listed at the Credit Reference Bureau. He concluded his testimony by stating that he was not allowed to go for the disciplinary hearing with a union representative or a fellow employee.

### **Respondent's Case**

9. The respondent tendered oral evidence through its Head of Employee Relations, Mr. Vaslas Odhiambo, who testified as RW1. Mr. Odhiambo adopted his witness statement and the bundle of documents filed on behalf of the respondent, to constitute part of his evidence in chief. The documents were also produced as exhibits before Court.

10. RW1 informed court that the claimant got acquainted with one of the respondent's customers by the name Ms. Joy, while in the course of duty. That the claimant thereafter corresponded with the said Ms. Joy through his official email and together, they were to supply some items under a tender to the United Nations. That in order to supply the items, the claimant used a company by the name JIMCO.

11. It was his further testimony that the claimant was arrested by the BFIU, at Jamii Bora Bank in the company of other persons while he was awaiting to process payment for a tender for the supply of items to the United Nations. That the claimant's arrest was on account of the fact that the documents presented to the Jamii Bora Bank in respect of the tender, were fraudulent.

12. RW1 further testified that the claimant had brought disrepute to the respondent bank in that he had used his official email to correspond in the deal which turned out to be fraudulent. That it was on the foregoing basis that the claimant was suspended and thereafter taken through a disciplinary process. That at the disciplinary hearing, the claimant admitted that he had used a friend's company, (JIMCO) to supply the tender items to the United Nations. That the amount of money he was to obtain as LPO financing from Jamii Bora Bank, was Kshs. 8 Million. RW1 averred that the claimant was taken through a disciplinary process that was fair, all the way upto the appeal stage.

### **Submissions**

13. The claimant submitted that his termination was unfair within the meaning of Section 45(2) of the Employment Act. He further urged that the respondent did not have a valid reason to terminate him as there was no proof that he had indeed borrowed money from another financial institution. He placed reliance on the case of **Pamela Nelima Lutta vs Mumias Sugar Co. Ltd (2017) eKLR**.

14. He further submitted that the respondent did not comply with the provisions of Section 41 of the Employment Act and that the disciplinary process he was subjected to, fell short of a fair hearing as he was not given an explanation of the charges against him and was not furnished with any of the documents that was to be relied upon by the respondent during the disciplinary hearing. He invited the court to consider the determination in the case of **Janeth Chepkemai Machira & another vs Laikipia University (2021) eKLR**.

15. On the other hand, the respondent submitted that the claimant's termination was lawful and fair since he was found to be of questionable integrity and in breach of his employment contract. That therefore it had a valid and fair reason for the claimant's termination as he had acted in a manner that brought disrepute to the respondent.

16. The respondent further submitted that the termination was reached after conclusive investigation that the claimant had been involved in personal financial business transactions while riding on the respondent's time, resources and name. In support of its submissions, the respondent placed reliance on the case of **Abraham Nyambane Asiago vs Barclays Bank of Kenya limited (2019) eKLR**.

### **Analysis and Determination**

17. From the pleadings on record as well as the evidence placed before me, this court is being called to resolve the following questions: -

**a) Whether the respondent had justifiable reason to terminate the employment of the claimant?**

**b) Whether the claimant was accorded a fair hearing prior to termination?**

**c) Whether the claimant is entitled to the reliefs sought?**

### **Whether the respondent had justifiable reason to terminate the employment of the claimant?**

18. In determining this question, the port of entry is **Sections 43 and 45 (2) (a) &(b)** of the Employment Act (Act). Under section 43(1), an employer has the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Further and pursuant to subsection (2), such reasons are those it genuinely believed to exist at the time of the employee's termination.

19. Additionally, **section 45 (2)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

20. The reasons for which the claimant was terminated are captured in his letter of termination as follows: -

*“Following investigations and the disciplinary hearing conducted on 19<sup>th</sup> September, 2014, regarding your financial misconduct of borrowing from another financial institution and putting the banks name into disrepute. I am satisfied that you have failed to follow the bank’s laid down regulations contrary to the terms and conditions of employment. In view of this, the bank is not prepared to have you continue in its service and with effect Thursday, 2<sup>nd</sup> October, 2014, your services are terminated...”*

21. The claimant has vehemently denied the allegations and maintained that;

- i. He has never been engaged in any dealings with Jamii Bora Bank;*
- ii. He has never borrowed money from Jamii Bora Bank and has never presented any statements at the said bank for purposes of obtaining a loan;*
- iii. He has never been awarded any tender at the United Nations;*
- iv. He is neither a shareholder nor director of JIMCO Office Suppliers and has no affiliation whatsoever with the said company; and*
- v. He was not party to the fraud orchestrated at Jamii Bora Bank.*

22. In order to resolve this question, it is imperative to consider the evidence on record, which upon evaluation, brings forth the following facts;

- i. There is a copy of a visitor’s pass to the United Nation’s offices in the claimant’s name with the host being named as Mwakitele.*
- ii. There is an email from [dickson.mwazuna@unops-procurement.org](mailto:dickson.mwazuna@unops-procurement.org) to [alan.karare@gmail.com](mailto:alan.karare@gmail.com) and copied to [alan.karare@barclays.com](mailto:alan.karare@barclays.com), which reads in part:- **“welcome to UNGM. Your UNGM user name is gimcosuppliers@gmail.com and your UGM number is...Tender Alert Service.. subscribing to the tender alert services will allow you to receive notification of relevant notices directly by email...”***
- iii. There is a “Supplier Code of Conduct Acceptance”, from the United Nations website which lists the company name as JIMCO Office Suppliers and the authorized official is named as Alan Karare.*
- iv. There is also an email from [alan.karare@barclays.com](mailto:alan.karare@barclays.com) to [dickson.mwazuna@gmail.com](mailto:dickson.mwazuna@gmail.com) with the subject matter being “CONTRACT BETWEEN UNOPS and JIMCO”. The body of the email reads as follows; **“Kindly confirm point of delivery.”***
- v. There is yet another email from [Andrew.Kagume@jamiiborabank.co.ke](mailto:Andrew.Kagume@jamiiborabank.co.ke) to [alan.karare@gmail.com](mailto:alan.karare@gmail.com) with the subject being **“confirmation of supplier payment details-JIMCO Office Suppliers.”***
- vi. There is an offer letter dated 18<sup>th</sup> August, 2014, from Jamii Bora Bank addressed to one Mr. James Githu Muiruri t/a JIMCO Office Suppliers. The letter is for LPO financing in respect of the United Nations Office for Project Service (UNOPS) to the tune of Kshs 8,000,000.00.*

23. From the foregoing facts, it is evident that;

- i. the claimant indeed visited the United Nations (UN) offices and corresponded with persons at the said offices and in particular, Mr. Dickson Mwazuna;*
- ii. the claimant registered for a tender with the UN under JIMCO Office Suppliers;*
- iii. the claimant used his official email address ([alan.karare@barclays.com](mailto:alan.karare@barclays.com)) to correspond with other parties in regards to the tender; and*
- iv. the claimant was connected to JIMCO Office Suppliers and was the person behind the tender with the UN.*

24. As a confirmation to the foregoing, the claimant in a 6 page handwritten statement dated 29<sup>th</sup> August, 2014 and which was in response to the allegations at hand, stated in part: -

*“Early this year, I met a customer at my desk Joy Wangari Kamau, after she finished making a deposit, we talked and she told me she does supplies (general), I told her I would want to also do something in my free time ...last month she called and told me she has a lead of some opening at the UN which I can try we agreed she will make arrangements we visit the UN for discussion with the persons she knew. On 29/07/2014, we agreed to meet with her at the UN.... Joy called someone Mr. Mwakitele... he said he works for programmes but knows someone in procurement who could help. He called Dickson Mwazuna...after introduction, we told him we would like to do tender for the UN but we don’t know how to go about it. He told us the first thing would be to have a company that has been in existence for more than 5 years and has all the documentation in place...I don’t have a company so I called a friend if he could assist James Githiru Muiruri (JIMCO OFFICE SUPPLIERS) he agreed and gave me all the documents*

requested which I gave to Joy to take to the UN office...I got a call from Dickson that the company has been registered and I should check in the website to confirm...Dickson called me and told me they have a tender...On Monday, 11<sup>th</sup>, we met with a friend of mine whom we shared the details of the project and he agreed to take us to Jamii Bora Bank the next day where he can negotiate for funding since he is a good customer there...we sat down with Luke, Sam, the supplier and Andrew of Jamii Bora Bank and Andrew assured him that he would be paid as soon as the process was complete...Andrew called me and told me the offer letter was ready and it requested (Jimco) to sign and stamp. I called Jimmy to come and sign...The next day I dropped them at Jamii Bora early in the morning and also scanned a copy to the supplier .... we need to go with Jimmy (JIMCO) for signing of the RTG. I called him and we were arrested after we signed the form that would have been used to make the transfer. We were interrogated by anti-fraud unit which I gave all the details...I was very sure of this project because I personally visited the UN and I have evidence that Mr. Mwakitele was our host where we met Dickson Mwazuna...below is a list of those I engaged with in the project Mwakitele 07\*, Joy 07\*, Dickson (UN) 07\*, Jimmy (JIMCO) 07\*...Andrew Jamii 07\*..”

25. In a nutshell, the claimant by his own admission confirmed the following issues;

- i. that he met a customer by the name Ms. Joy Wangari Kamau, who talked him into considering doing supplies;
- ii. Ms. Joy led him to the UN offices where he met Mr. Mwakitele and Mr. Dickson Mwazuna who was purportedly in procurement;
- iii. he intimated to the said Mr. Dickson that he was interested in obtaining a tender with the UN;
- iv. he needed to have a company through which he could transact hence he requested his friend by the name James Githiru Muiruri (JIMCO OFFICE SUPPLIERS) to assist him in this regard;
- v. the said James Githiru Muiruri accepted his request and gave him all the documents requested;
- vi. that he handed over the company documents to Ms. Joy who then took the same to the UN offices;
- vii. in order to finance the tender, a friend introduced him to Jamii Bora Bank where he obtained an offer letter, and which he in turn presented to James, who was the owner of JIMCO;
- viii. he was arrested at Jamii Bora Bank together with others as he was in the process of undertaking a RTGS; and
- ix. he engaged in the project with among others, Mr. Mwakitele, Ms. Joy, Mr. Dickson (UN), Jimmy (JIMCO) and Andrew (Jamii Bora Bank).

26. These issues confirm that despite his denial, the claimant was deep in the neck in the transaction involving the UN, JIMCO Office Suppliers and Jamii Bora Bank and he cannot turn around and disown the processes which by all indication revolved around him. Indeed, it is apparent that he was the central and common person at every stage of the process.

27. The claimant’s employment contract provides as follows in regards to **“Exclusivity and Other Obligations”**

*“During the term of your employment you shall not, without the prior written permission of Barclays, be directly, temporarily or permanently employed or engaged by or do any business with individual(s) or companies other than Barclays, and you shall be prohibited from trading in your own coconut during this period”*

28. As such, by his own conduct as demonstrated through the series of events herein, the claimant had contravened the terms of his employment contract.

29. That further and as it turned out, the entire transaction was fraudulent and the claimant having transacted through his official email address, had directly or indirectly dragged the name of the respondent into the issue. In the circumstances, the respondent cannot be faulted for claiming that the claimant had brought its name into disrepute.

30. The total sum of the foregoing is that the claimant by his very own conduct availed the respondent valid and fair reasons to terminate his employment.

31. Having found as such, I now turn to consider whether the claimant was accorded a fair hearing.

#### **Whether the claimant was accorded a fair hearing prior to termination?**

32. Under **section 45 (2) (c)** of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act provides the specific requirements of fair procedure. In this regard, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative of his own choice.

33. The claimant in this case has averred that he was not accorded a fair hearing. The respondent disagrees. It is thus necessary to evaluate the process undertaken by the respondent, based on the evidence before court.

34. From the record, the claimant was notified of the allegations he was facing through the letter of suspension dated 1<sup>st</sup> September, 2014. The same allegations would later constitute the basis of the disciplinary process he was taken through.

35. He was granted an opportunity to tender his written explanation, which he did through a detailed statement of response dated 29<sup>th</sup> August, 2014. He was later invited to appear before a disciplinary panel through a letter of invitation dated 9<sup>th</sup> September, 2014. Through the letter of invitation, he was advised of the date, venue, time and panel members who will be present at the hearing. He was also advised of his entitlement to be accompanied to the hearing by a colleague serving in BA1 or BA2 or a union representative who was a serving employee of the bank.

36. From the record of the disciplinary proceedings, the claimant was asked before the commencement of the hearing, whether he was ready to proceed without being accompanied, to which he responded in the affirmative.

37. Following the verdict of the disciplinary panel, the claimant had another shot at the appeal stage but the same was unsuccessful hence his termination was upheld.

38. From the foregoing, it is apparent that the hearing was in compliance with the requirements of section 41 of the Act.

39. The claimant has also faulted the respondent for not availing him the documents that were to be used against him during the disciplinary hearing. This does not seem to be the case. Why do I say so? In the letter dated 1<sup>st</sup> September, 2014 and through which he was suspended, the claimant was advised as follows;

*“If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible. If you require access to the premises or computer network for this purpose please let me know as we may agree to arrange this under supervision.”*

40. Accordingly, it is clear that the claimant was given an opportunity to request for whatever documents he may have required and which he thought were relevant to the case. In short, he was granted access to information. He has not demonstrated by way of evidence, that this was not actualized, in that he requested for information and the same was withheld from him.

41. In view of the foregoing, the court is persuaded that the claimant was accorded a fair hearing within the terms of section 45(2) (c) read together with section 41 of the Employment Act.

42. Against this background, I find that the respondent had valid and fair reasons to terminate the claimant’s employment and in so doing, accorded him a fair hearing. As such, his termination cannot be termed as being unfair and unlawful.

#### **Orders**

43. In conclusion, I find that the claimant is not entitled to the prayers sought hence I dismiss the claim in its entirety and make no orders as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> day of March, 2022.**

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**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For the Claimant                      Ms. Mukami

For the Respondent      Mr. Masese

Court Assistant      Barille Sora

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**