



**Chumbe v National Bank of Kenya Limited (Cause 1791 of 2016)
[2022] KEELRC 1113 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1791 OF 2016
SC RUTTO, J
APRIL 28, 2022**

BETWEEN

DENNIS ODUOR CHUMBE CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The undisputed facts as can be drawn from the evidence on record is that the claimant was employed by the respondent as a Relationship Manager, business banking within the corporate institutional and business banking division, with effect from July 7, 2014. He was later confirmed to the position with effect from January 8, 2015. Subsequently, he was promoted to the position of acting Head, Medium Business and later confirmed in the position on March 1, 2016. From all indication, the claimant's career was on an upward trajectory.
2. This upward movement was cut short when on May 26, 2016, the claimant was issued with a show cause letter on account of gross misconduct and misrepresentation of financial information. He was invited to appear for a disciplinary hearing on May 30, 2016. This culminated in his summary dismissal on June 22, 2015. The claimant has termed the disciplinary proceedings as a sham and his termination as both procedurally unfair and substantively unjustified. As a result, he seeks the following reliefs: -
 - a. A declaration that the decision by the respondent to terminate the claimant's employment was procedurally unfair and substantially unjustified;
 - b. A declaration that the termination of the claimant was wrongful, unfair and unlawful;
 - c. A declaration that the respondent breached the claimant's rights to fair hearing, fair administrative action and freedom from discrimination;



- d. Damages for violation of Constitutional rights of fair hearing, fair administrative action and freedom from discrimination;
 - e. An order directing the respondent to reinstate the claimant to his immediate former position;
In the alternative to (e) above
 - f. An Order directing that the respondent to issue the claimant with a Certificate of Service;
 - g. An order prohibiting the Respondent from varying the interest rate of the loans or any other term of the loan howsoever until the same has been paid in full;
 - h. An order of 12 months' salary be paid to the claimant for the wrongful and unfair termination in line with Section 49 of the Employment Act at Kshs. 5,400,000/-;
 - i. Interests on (d), (h) and (j) above at Court's rates from the date of filing this suit until payment in full;
 - j. Costs of the suit; and
 - k. Any other orders that the Court may grant in the interest of justice.
3. In opposition to the claim, the respondent denied that the claimant's termination was unfair and unlawful. It averred that the claimant's dismissal was occasioned by his reckless lending as he failed to adhere to its policies and prudential guidelines. The respondent further averred that the claimant's termination was in accordance with the law and its polices. It asked the court to dismiss the claim with costs.
4. The matter proceeded for hearing on October 4, 2021 and the claimant testified in support of his claim. The respondent did not call oral evidence despite filing a witness statement and giving an indication to that effect.

Claimant's Case

5. At the commencement of the hearing, the claimant adopted his witness statement to constitute part of his evidence in chief. He also tendered the documents filed together with his claim as exhibits before court. He asked the court to adopt the same as part of his evidence in chief.
6. The claimant's case is that during his time working with the respondent bank, he was diligent in the performance of his duties and responsibilities, thus earning himself positive reviews coupled with salary increments. That this was confirmed by his appointment as, Head, Medium Business barely a year after his employment.
7. That he was therefore shocked when he received the letter asking him to show cause why his employment should not be terminated on grounds of gross misconduct in that he had misrepresented the respondent's financial information for the year 2015. That he requested for documents to enable him respond to the show cause letter as he had been disabled from the system. That though the respondent responded to his query, it failed to supply crucial documents, he had requested for.
8. The claimant further states that he responded to the show cause letter, explaining each allegation levelled against him. That he later appeared for a disciplinary hearing, which he termed as a sham as the respondent had a predetermined position to terminate his employment even before the said hearing. That he was later issued with a letter of summary dismissal on June 22, 2016.



9. The claimant further argued that his termination was unfair as the respondent failed to consider his representation and proof from both the Capital Markets Authority (CMA) and the Banking Fraud Investigation Unit (BFIU) who had conducted their independent investigations and had in fact absolved him of any wrongdoing.
10. As a result, the claimant maintains that his termination was procedurally unfair and was substantively unfair and is therefore entitled to the reliefs sought in his Claim.
11. In conclusion the claimant urged this Court to find merit in his claim and to allow it in terms of the reliefs sought therein.

Respondent's Case

12. In its Memorandum of Response, the respondent denied any wrongdoing. It maintained that the claimant's termination was valid both procedurally and substantively. It further asserted that it adhered to the due process provided for under the *Employment Act*, 2007 as read together with its Policies hence it accorded the claimant a fair hearing prior to arriving at the decision to terminate his employment.
13. The respondent further maintained that the claimant having been summarily dismissed, is not entitled to any of the reliefs sought in his Claim and the same should be dismissed.
14. In conclusion, the respondent urged this Honourable Court to find the Claim without merit and to dismiss the same with costs.

Submissions

15. In his submissions, the claimant maintained that his termination was procedurally unfair as the respondent failed to comply with the mandatory provisions of Section 41 of the *Employment Act*, 2007. To buttress this argument the claimant cited several authorities including *New Kenya Co-operative Creameries Limited v Olga Auma Adede* [2019] eKLR, *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR and *Kenya Petroleum Oil Workers Union v Kenya Petroleum refineries Limited* [2013] eKLR where the Courts emphasised on the need for an employer to comply with the mandatory provisions of Section 41 of the *Employment Act*, 2007 for a termination to be procedurally fair and valid.
16. The claimant further submitted that the respondent failed to state with clarity the charges that had been preferred against him for purposes of mounting a defence on his part. He further maintained that the respondent failed to provide all necessary documentation in support of its claim against him despite his request. That as a result, his termination was unlawful and unfair. In support of this argument, the following cases were relied upon: *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR and *David Wanjau Muboro v Ol Pejeta Ranching Limited* [2014] eKLR.
17. The claimant further urged that the disciplinary hearing conducted by the respondent was a mere sham and that he was not accorded an opportunity to defend himself. It is on this basis that the claimant submitted that his termination was unfair. To fortify this argument, he cited the case of *Veronica Oteri vs Barclays Bank of Kenya* [2018] eKLR.
18. On the issue of substantive justification, the claimant submitted that the respondent failed to justify the reason (s) for his termination as no evidence was adduced before Court detailing the financial loss and/or misrepresentation as alleged. The case of *Bamburi Cement Ltd v William Kilonzi* [2016] eKLR was cited to fortify this issue.



19. The claimant further urged the Court to make a finding in his favour on the basis that the respondent failed to call any witnesses to adduce evidence on how the disciplinary process was conducted and/or call any witnesses for purposes of cross examination. He urged this Court to be guided by the findings of the Court of Appeal in the cases of *Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited* [2019] eKLR and *Stanely Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR.
20. On the other hand, the respondent submitted that the claimant's termination was lawful and was done in accordance with the provisions of Section 44 of the *Employment Act*. It was the respondent's further submission that the claimant was accorded an opportunity to defend himself in line with the provisions of Section 41 of the *Employment Act*, prior to his termination.
21. The respondent further submitted that the claimant did not adduce evidence to prove that he had been cleared of any wrongdoing by the CMA and BFIU. It further submitted the claimant had not discharged the burden of proving that he was denied due process at the time of termination.
22. In further submission, the respondent urged that the cumulated sum of Kshs. 7,334,850/= was not specifically pleaded nor proved hence it asked the Court not to award the same.
23. The respondent placed reliance on the several authorities including *IEBC v Stephen Mutinda Mule & others* Nairobi Civil Appeal No 219 of 2013 [2014] eKLR, *John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* Kisumu Civil Appeal No 278 of 2010 [2013] eKLR, *Hon. Daniel Toroitich Arap Moi, CGH v Mwangi Stephen Muriithi & another* Nairobi Civil Appeal No 240 of 2011 [2014] eKLR, *Kenya Ports Authority v Fadhil Juma Kisuwa, Mombasa* Civil Appeal No 76 of 2016 [2017] eKLR and *Kenya Revenue Authority v Menginya Salim Murgani*, Nairobi Civil Appeal No 108 of 2010 [2010] eKLR.

Analysis and Determination

24. Upon considering the record before me constituting the pleadings, evidence and submissions, the following issues fall for the Court's determination;
 - a. Whether the claimant's termination was unfair and unlawful?
 - b. Is the claimant entitled to the reliefs sought?

Unfair and unlawful Termination?

25. The two elements that need to be satisfied in order for an employer to prove fair termination are; substantive justification; and procedural fairness.

(i) Substantive justification

26. Substantive justification entails proof of reasons that led to the termination of an employee. The same is addressed under Section 43(1) of the *Employment Act* (hereinafter the Act), which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. The reason for termination of contract is the matter that the employer at the time of termination of the contract, genuinely believed to exist and which caused the employer to terminate the services of the employee.
27. Further, section 45 (2)(a) and (b) 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 is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.



28. In light of the above provision, termination of employment will be deemed unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself is not fair.
29. The claimant was terminated on grounds of gross misconduct and loss of confidence arising from: “non-adherence to the bank’s policies and procedures as well as the prudential guidelines in the restructure/rebooking of loans for respective customers under your portfolio whose full particulars are well within your knowledge. This constituted reckless lending as highlighted in the special investigation report done by Deloitte and Touché and occasioned loss to the bank as outlined in our audited accounts. Careless and improper performance of your role as head, medium business which it was your duty to have performed carefully and properly in accordance with your job description.”
30. Under section 43 of the Act, it was a requirement on the part of the respondent to prove the reason for the claimant’s termination. This entails substantiating the reasons for the termination of the claimant as contained in his letter of summary dismissal.
31. In this case, the respondent did not produce its policies and procedures as well as the prudential guidelines on the restructuring/rebooking of loans. Further, the respondent cited an investigation report by Deloitte and Touché but did not produce the same in evidence. In the same breath, the audited accounts which formed the basis for the show cause letter against the claimant, was also not proved in evidence.
32. Coupled with the foregoing, the respondent elected not to tender oral testimony through its earlier identified witness Ms. Linet Anyika hence its case as presented through the Memorandum of Response could not be tested in cross examination. In the same breath, its Business and Loan Restructure and Extension Flow was not produced as an exhibit before court. The Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR held that a document “marked for identification”, is of very little, if any, evidential value until it is formally produced.
33. In this case, the said Business and Loan Restructure and Extension Flow document was neither marked for identification nor formally produced as an exhibit before court. As such, it was of no evidential value to the respondent and did not aid in proving that the claimant indeed, breached its policies and procedures as well as the prudential guidelines on the restructuring/rebooking of loans.
34. The claimant in his response to the show cause letter had given his defence to the allegations in a detailed manner. This line of defence presented by the claimant was not challenged in evidence by the respondent either through documentary or oral evidence.
35. Simply put, the substance of the allegations against the claimant was not proved hence the respondent did not substantiate before court, the reasons for which it terminated his employment.
36. In the end, this court finds that the respondent did not produce sufficient evidence to discharge its legal burden by proving the reasons for which the claimant’s employment was terminated.

(ii) Procedural fairness

37. This entails the procedure an employee is subjected to prior to termination. The provisions of section 45 (2) (c) as read together with the provisions of section 41 of the Act are relevant in this case. Section 41 provides as follows:

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee [Rev. 2021] Employment No. 11 of 2007



31 understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

38. In the instant case, the claimant was notified of the allegations against him through the show cause letter dated May 26, 2016. The particulars of the allegations were clearly spelt out in the said letter. In response thereto, the claimant requested for access to information and various communication to enable him prepare his defence. The same was transmitted to him vide the respondent’s letter dated May 31, 2016. The disciplinary hearing was also rescheduled to June 2, 2016.
39. The claimant contended in his claim that he was not issued with all the crucial documentation to enable him present his defence. This does not seem to be the case as there is no further correspondence from him to the respondent indicating that the information furnished through the letter of May 31, 2016, was insufficient. On the converse, the claimant responded to the show cause letter and acknowledged receiving the information he had requested for and received. In the said response, he did not provide any indication that his defence was impaired for lack of information and/or documents in the possession of the respondent.
40. It is also apparent from the pleadings by both parties that a disciplinary hearing was undertaken on June 8, 2016 prior to the claimant’s dismissal.
41. From the foregoing chronology, the respondent satisfied the requirement of fair hearing as stipulated under section 41 of the Act.
42. Be that as it may, the court finds that in as much as the respondent adhered to the requirements of fair procedure, the claimant’s dismissal was unfair as the allegations against him were not proved hence substantiated.

Reliefs

43. On account of the claimant’s unfair termination, the Court awards him six (6) month’s gross salary as compensatory damages. This fact has been informed by the length of the employment relationship and the fact that the respondent failed to substantiate and prove the reasons for the claimant’s termination.
44. In view of the fact that the claimant’s employment was not disputed, he is entitled to a Certificate of Service pursuant to section 51(1) of the Act.

Orders

45. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;
- a. A declaration that the claimant’s termination by the respondent was unfair and unlawful.
 - b. The claimant is awarded compensatory damages in the sum of Kshs 2,700,000 being equivalent to 6 months gross salary.
 - c. Interest on the amount in (b) at Court rates from the date of Judgement till payment in full.
 - d. A certificate of service to issue to the claimant.
 - e. The claimant shall have the costs of the suit.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wakwaya

For the Respondent Mr. Kipkorir

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 15th March 2020 and subsequent directions of 21st 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

