



**Sewe v Housing Finance Corporation Limited (Cause 1011 of 2015)
[2022] KEELRC 1195 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1011 OF 2015
NZIOKI WA MAKAU, J
JUNE 27, 2022**

BETWEEN

GODFREY OTIENO SEWE CLAIMANT

AND

HOUSING FINANCE CORPORATION LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this claim vide a Memorandum of Claim dated June 9, 2015 suing the Respondent for unlawful and unfair termination of his employment. He avers that the Respondent employed him from May 16, 2014 as a Branch Manager of the respondent's Kisumu branch and that at no time during his service with the respondent did it make any complaint on his performance or discipline. The claimant avers that he was formerly employed by Chase Bank as a Bank Manager and only left the said employment upon accepting the respondent's offer to engage his services.
2. It is the claimant's averment that on May 7, 2015, he attended a Branch Manager's meeting at the Head Office of the respondent at the end of which he was informed that two customers had raised complaints about him and he was required to record a written statement with the Forensic Auditor of the respondent, explaining his business relationship with the said customers. The claimant avers that he was also summoned to the General Manager Human Resource's office on the same issue and suspended for a period of two weeks with effect from May 7, 2015 to May 23, 2015. The claimant avers that his requests for a copy of the complaint by the alleged Customers as well as other supporting documents to enable him prepare a defence went unanswered. He avers that on May 26, 2015 he reported to the respondent's head office at around 10.00am and at about 1.00pm, his immediate line manager and the HR Manager met him and handed him a letter to show cause on the various allegations listed thereunder by latest 3.30pm of the same day. The claimant avers he sought in writing for an extension of time to give his explanation but the respondent went quiet on him. The claimant avers that the respondent has never informed him whether his employment has been terminated or whether he is still on suspension and that should the respondent terminate his employment, he would not be in a



position to repay his personal loan facility of Kshs. 2,360,000/- that the respondent had taken over from Chase Bank. The claimant further avers that his claim against the respondent is for: a declaration that the termination of his employment by the respondent was unlawful; 1 year's wages compensation for loss of employment; three months' pay in lieu of notice; damages for unfair disciplinary action, hostile treatment, loss of career growth and exposure to a harsh working environment; a certificate of service; costs of this suit and interest on the foregoing until payment in full.

3. In his witness statement dated May 29, 2019, the claimant asserts that he had been arbitrarily dismissed through the notice to show cause dated May 27, 2015 as a result of disciplinary proceedings conducted on the same day in his absence and without notice. He states that the respondent never issued him with a hearing notice for purported disciplinary proceedings and neither did it accord him a chance to defend himself against the complaints levelled against him. The claimant states that as a result of the hostile treatment the respondent subjected him to, he suffered immense mental anguish and was subject of ridicule by his colleagues about his actual job status. He states that it was unfair of the respondent to successfully persuade him to live his former employment with Chase Bank to engage his services and then start frustrating his employment one year down the line and eventually unlawfully terminate him.
4. The respondent filed a Memorandum of Response dated August 17, 2015 denying that the claimant was a Branch Manager at the respondent Company as pleaded. It avers that it terminated the claimant's services on May 27, 2015 after he failed to adhere to the terms of his employment and that it served him with a termination letter dated May 27, 2015. It avers that the claimant is not being honest to the court as he was aware that a complaint was made sometimes in April 2015 regarding his conduct and his suspension thereafter was to pave way for investigations. The respondent avers that it is the claimant who blatantly refused to reply to the Show Cause letter it had issued to him or attend a disciplinary hearing and that it thus had no choice but to dismiss him. It submits that in this regard, the claimant absconded duty without a justifiable reason on May 25, 2015, part of May 26, 2015 and May 27, 2015 and it denies not informing him of his termination. It further denies that the claimant was subjected to hostile treatment as alleged and avers that it lawfully dismissed the claimant who is thus not entitled to any relief as sought. It prays that the claimant's claim to be dismissed with costs to the Respondent.
5. The respondent also filed a witness statement made by its Human Resource Business Partner one Gloria Lilechi. She asserts that among the terms the claimant was to receive upon employment was a personal loan facility on favourable terms. That however as per the Application form the claimant signed on August 28, 2014 and approved by the Bank, the preferential terms were neither open ended nor did they entitle the claimant to breach other terms of employment. It is her statement that in early April 2015, the Bank received a complaint from one of its customers that the claimant used the customer's bank statements to secure a loan facility from another bank. She states that the matter was referred to the relevant department for inquiries and the claimant gave his explanation through an email of April 28, 2015 to the then Security Manager, Mr. James Lelesara. She further asserts that upon the Claimant being given the show cause letter dated May 26, 2015, he did not reply the letter nor turn up for work on May 27, 2015 also for a disciplinary hearing scheduled on the same date. She states that the hearing thus proceeded in his absence and the committee recommended that the Bank summarily dismisses the claimant. She asserts that the dismissal letter was sent to him by Registered Post on May 27, 2015 and he received on June 11, 2015 an extra copy later dispatched by Fargo Courier.
6. Claimant's Submissions

The claimant submits that fair labour practices as envisioned by the Constitution includes, but is not limited to the protection and enforcement of an employee's rights as stipulated in legislation. The claimant submits that section 45(2) of the Employment Act clarifies that termination is unfair if an employer fails to prove that the reason for termination is valid and fair and in accordance



with fair procedure. The Claimant submits that in this regard, the Respondent wrongfully and unfairly terminated him without a valid reason as per section 43 of the Act and without following proper procedure as per section 41 of the Act. He submits that the alleged complaints of fraud and forgery were serious enough for the respondent to be obliged to investigate and report their findings to the relevant authorities before acting on the same. The claimant submits that the respondent failed to produce findings of its own internal investigations and to institute criminal proceedings against him and that without a conclusive report, the respondent had no valid reason to dismiss him. Furthermore, the respondent failed to demonstrate by way of evidence or testimony, how the claimant's transport business activity was conflicted with the respondent's business and therefore fell short of demonstrating how the claimant's actions amounted to gross misconduct warranting his dismissal.

7. He further submits that an employer shall, before terminating the employment of an employee or summarily dismissing an employee, hear and consider any representations which the employee and the person chosen by the employee, if any, may make on the grounds of misconduct or poor performance. the claimant cites the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers SACCO Limited* [2014] eKLR where the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right. As regards the short notice to respond to the show cause and lack of notice for the disciplinary hearing, the claimant cites the case of *Peter Kamau Mwaura & another v National Bank of Kenya* [2020] eKLR where the court relied on the Court of Appeal case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where it was held that section 41 of the *Employment Act* sets up a mandatory and elaborate process requiring notification and hearing before termination. In submitting that the Respondent failed to follow the proper procedure in his termination by failing to give him an opportunity to represent and defend himself and was therefore unjust in terminating him, the claimant relies on the case of *Joshua Rodney Marimba v Kenya Revenue Authority* [2019] eKLR.
8. It is the claimant's averment that he has proved on a balance of probabilities that the respondent unlawfully and unfairly terminated him by failing to follow mandatory statutory procedure in his dismissal, that is, wilfully terminating him without a valid reason and submitting him to an unfair disciplinary process. He submits that to this end, he is entitled for judgment against the respondent to the remedies provided under the Act for wrongful termination. He submits that in giving an award under section 49 of the Act, a court of law is expected to exercise judicial discretion on what is fair in the circumstances as was echoed in the Supreme court decision in *Kenfreight (E.A.) Limited v Benson K. Nguti* [2019] eKLR. He submits that he should be awarded 12 months' wages since he has been unable to obtain employment for a about 7 years and has been unable to offset his outstanding loan due to the respondent's acts of commission and/or omission. On the issue of costs, he submits that courts have assessed damages in a similar manner. He cites the case of *Maureen Atieno Puma v Njuca Consolidated Company Limited* [2018] eKLR wherein the court took into consideration the respondent's actions in the termination transaction in awarding salary in compensation. He further submits that he is entitled to notice pay as under section 36 of the Act.
9. Respondent's Submissions
The respondent submits that the claimant admitted on cross-examination that he understood the gravity of the complaint and agreed that due to the same, the suspension was not only foreseeable, but also proper and in line with the respondent's *modus operandi*. That it has demonstrated it adhered to due procedure but the claimant absented himself and even failed to attend his disciplinary hearing. It submits that the documentary evidence adduced before this court, coupled with the testimony of all parties concerned demonstrates that the claimant was justly terminated summarily and that the



procedure for dismissal that followed was conducted fairly and within reason, given the circumstances. That this being so, it prays that the claimant's claim for compensation should surely fail and in the alternative, if the court should feel compelled by the claimant's arguments, it must consider the Court of Appeal's finding in *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR that in determining the award of damages, the court must be based on judicial principles and sound reasoning. The respondent submits that in the instant case, the court should consider the claimant's conduct as not forthcoming from the onset as he not only registered, but also operated a business which was parallel to his duties at the respondent's company. The respondent further submits that to claim payment under multiple headers is a misuse of this court process and that if the claimant is to be compensated, even though he certainly should not, he could be entitled to one month's pay in lieu of notice which is Kshs. 350,000/-.

10. The claimant was dismissed after being taken through a disciplinary process he asserts was unfair. The claimant had prior to being subjected to a show cause on May 26, 2015. The claimant was accused by a customer one Pamela Odwessa of using her bank statement with NIC Bank to obtain a loan facility without authority. She asserts that this was consequent to her meeting the claimant in late 2014 and he proposed that she obtains a loan at the respondent bank and share the loan proceeds with him. She complained in writing on May 7, 2015 which letter was received by the respondent, per the stamp appearing on the face of the letter, on May 8, 2015. There was corroboration of the complaint from one Jackline Ouma who was also present at the disciplinary hearing whereat Pamela gave her testimony. The claimant from the record was allowed extra time to respond to the complaints directed at him in the show cause letter and as such he was neither ambushed nor surprised by the complaints. He had ample time to respond to the issues arising in the complaint levelled by the employer and as such the provisions of section 41 on substantive and procedural fairness were met. The claimant was dismissed for cause and as such his claim was a misstep since he cannot recover from the respondent. As a consequence of his dismissal, the claimant suffered the ignominy of a commercial rate of interest for the facility he had with the respondent. One of the perks of being employed by the respondent was a favourable rate of interest and this was expected to be taken away in the event of a dismissal as happened in his case. There is nothing he can get by way of reprieve as his suit lacks merit and is accordingly dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

