



REPUBLIC OF KENYA



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**Odek v Co-operative Bank Limited (K) (Cause E015 of 2020)
[2022] KEELRC 1430 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1430 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E015 OF 2020
CN BAARI, J
JUNE 23, 2022**

BETWEEN

ERICK OLOO ODEK CLAIMANT

AND

THE CO-OPERATIVE BANK LIMITED (K) RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this suit through a Memorandum of Claim dated 9th October, 2020, and filed before court on 30th October, 2020. The Claimant seeks a declaration that his termination is unfair and unlawful. He further prays for orders that he is paid two months' salary in lieu of termination notice, salaries withheld from the day he was suspended to the date of his termination, compensation for unfair termination, gratuity pay, a certificate of service and costs of the suit.
2. The Respondent filed a response to the memorandum of claim together with a counter claim dated 16th March, 2021, wherein, she prays that judgment is entered against the Claimant for Kshs.3,776,088.00, being money owed to the Respondent arising from facilities offered to the Claimant by virtue of his employment, and the interest accrued thereon.
3. The suit was heard on 9th November, 2021. The Claimant testified in support of his case, while the Respondent presented one Ben Mwaura Ndegwa, to testify in support of her case.
4. Parties were allowed 21 days each to file and serve their written submissions. The Claimant filed his submissions, the Respondent did not file submissions in the matter

The Claimant's Case

5. The Claimant's case is that he was an employee of the Respondent since April, 2007, and that he was confirmed on permanent terms of employment in February, 2008.



6. It is the Claimant's case that he received a letter from the Respondent on 6th July, 2018, terminating his services. The Claimant further states that his termination is premised on grounds that on 12th April, 2017, he processed a personal loan of Ksh.1,624,037.50 for the Respondent's customer one Caroline Akoth, which the Respondent claims to have exposed it to potential losses.
7. The Claimant states that he duly discharged his duty as a Credit Officer in processing loans to one Caroline Akoth Anyago, a customer of the Respondent, who according to the Respondent's credit policy, qualified for a loan as supported by her payslip.
8. The Claimant further states that the customer was an employee of Homa Bay County Government, and that the Respondent has a Memorandum of understanding with the customer's employer for issuance of credit facilities to her employees.
9. The Claimant's further case is that his duty was limited to ensuring that customers met the requirements and/or qualify for the credit facility before processing the loan, and which the Claimant did. The Claimant further states that before processing the loan facility, he was required to make a call back to the Customer's employer to ensure that the customer was employed by that employer.
10. The Claimant states that all the credit facility approvals, and disbursements are done at the Respondent's Head Office in Nairobi. The Claimant states that he processed the loan for the customer and the application was sent together with others, to the Respondent's Head Office for approval, and the Respondent disbursed the Credit facility to the customer as approved.
11. The Claimant states that the Respondent suspended him from duty on 24th May, 2018, on grounds that he acted in conflict of interest by processing the credit facility for Caroline Akoth, who they alleged was the Claimant's wife.
12. The Claimant further avers that at the time the Claimant was processing the loan facility for the Respondent's customer Caroline Akoth, he was not married to her as alleged by the Respondent, and that in any event, the Claimant knows that he acted in the best interest of Respondent by processing the credit facility as the customer, Caroline Akoth has been servicing the loan facility without failure which payments have brought profits to the Respondent.
13. The Claimant avers that the action of the Respondent terminating his employment is not only discriminatory but also unfair, and malicious as the Claimant appealed and his appeal was dismissed without being heard.
14. It is the Claimant's case that the Respondent's actions are reckless, discriminatory, illegal and contrary to the rules of natural justice. The Claimant further states that Respondent's action was made in bad faith, only intended to cause the Claimant loss of livelihood
15. The Claimant prays for judgment to be entered in his and against the Respondent for the awards listed in his statement of claim.
16. On cross-examination, the Claimant confirmed having been previously issued with two warning letters, one dated 27th April, 2017, and another of 24th August, 2017. He further confirmed receipt of a show cause letter and an invitation to attend a disciplinary hearing, which he confirmed attending.
17. The Claimant further confirmed on cross-examination that he signed a discharge form when leaving the employ of the Respondent. He states that although a computation of his benefits was produced as evidence in this case, he did not sign the computation and neither was the money credited to his account.



18. The Claimant denied receipt of a certificate of service, and further denies having utilized his leave for the year 2018.
19. The Claimant admitted that one Caroline Okoth is now his spouse, but denies that she was his spouse when he processed her loan facility. The claimant admitted having had a son with Caroline Okoth in 2008 and further admits that the letter from the area chief confirming his marriage to Caroline Okoth, is correct.
20. The Claimant in response to the Respondent's counter claim, admitted having been advanced loan facilities on various dated amounting to Kshs.1, 650,000.00/- He denies that the loan has since accumulated to Kshs.3,776,088.00/- on the basis that he was servicing the loan from the year 2013, until his termination.
21. The Claimant denies receipt of a demand for the loan balance and further states that he has not been issued with a statement stating what his current loan balance is.
22. The Claimant told the court that the marriage affidavit presented in evidence by the Respondent was drawn on 7th June, 2017, after Caroline Okoth had already been give the loan facility.
23. The Claimant confirmed on re-exam that an employee of the Respondent cannot advance a loan to his spouse.

The Respondent's Case

24. The Respondent's case is that she employed the Claimant in the year 2007, and confirmed him to her permanent and pensionable employment in 2008.
25. It is the Respondent's position that she terminated the Services of the Claimant on 6th July, 2018, on account of violating her Business Code of Conduct and Ethics, specifically; for processing a loan facility for his spouse contrary to the Respondent's business code.
26. The Respondent states that prior to the Claimant's termination, she issued him with two warning letters. The Respondent avers that the Claimant was given a show cause letter, a hearing and thereafter informed of his right of appeal.
27. The Respondent states that although the Claimant appealed against her decision to terminate him, the appealed was disallowed.
28. The Respondent states that the Claimant was personally bound by the provisions of the Respondent's Business code of Conduct and Ethics and the Public Officers Ethics Act 2003.
29. The Respondent's further case is that the Claimant was expected to co-operate and promote harmonious relation for the accomplishment of the Respondent's goals and objectives, and that she invokes the doctrines to any averments to the contrary.
30. The Respondent states that the Claimant acted in total affront of the provisions of the Respondents Business Code of Conduct and Ethics, and more specifically Clause 3.0 on Conflict of Interest and Clause 14.0 on Bank Assets and Transactions. The Respondent further avers that the acts and/or conduct and/or omissions by the Claimant did not only subjected the Respondent to reputational risk but also risk of financial loss.
31. The Respondent denies that the Claimant was discriminatorily, unfairly, and maliciously terminated from the Respondent's employment.



32. The Respondent further avers that it dismissed the Claimant from employment in accordance with provisions of the *Employment Act* 2007, and more specifically Clause A5 of the Collective Bargaining Agreement which lists act that constitutes gross misconduct and/or serious neglect and shall justify lawful grounds for summary dismissal.
33. The Respondent states that the Claimant was subjected to the disciplinary process set out under Section 41 of the Act as well as Clause A5 of the Collective Bargaining Agreement between the Claimant and Kenya Bankers Association and further in accordance with the Respondent's Disciplinary Policy and Procedures.

The Claimant's Submissions

34. It is submitted that the Claimant's termination is devoid of fair procedure such as informing the Claimant of the charges against him and giving him an opportunity to be heard. The Claimant had reliance on the holding in *Jared Aimba- Versus - Fina Bank Limited* [2016] eKLR to support this position.
35. The Claimant submitted that the Respondent failed to call in a witness from their end to explain the procedure in issuing and approving loans, yet they had the capacity to shed light on the issue. Such failure has been discussed by the Courts in several occasions that in law when a party who has in his possession vital evidence chooses not to give that evidence, it is presumed that that evidence will be to his own detriment.
36. It is submitted for the Claimant that the Respondent terminated the Claimant unfairly and unlawfully and even failed to verify some points of contention raised by the Claimant on the issue as to who approves loans and where the conflict of interest did come or if any loss would have been occasioned.

Analysis and Determination

37. I have considered the pleadings, the witnesses' oral testimonies and the Claimant's submissions. The issues for determination are: -
 - i. Whether the Claimant was terminated unfairly
 - ii. Whether the Claimant is entitled to the remedies sought.
 - iii. Whether the Respondent is entitled to the Counter-Claim.

Whether the Claimant was terminated unfairly

38. A determination of whether or not a termination is fair is hinged on the employer's adherence to the twin requirements of procedural fairness and substantive justification. In the Case of *Walter Ogal Anuro v Teachers Service Commission* Cause No.955 of 2011, it was held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
39. Courts have largely settled that for a termination/dismissal to pass the procedural fairness test, an employer must meet the principles of fair hearing set out under Section 41 of the *Employment Act*, 2007. These principles are sacrosanct, and must be met irrespective of the employer's reason for terminating an employee. In the case of *Loice Otieno v Kenya Commercial Bank Limited* Cause No.1050 of 2011, it was held that summary dismissal even in the face of a fundamental breach of the employment contract or gross misconduct, must not be resorted to without complying with



procedural fairness/natural justice. An employer who summarily dismisses an employee without a hearing will be falling a foul of Section 41(2) of the *Employment Act*.

40. The principles of fair hearing include notification that the employer is considering termination/dismissal, a hearing and a right to representation. (See *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR).
41. The Respondent's case is that the Claimant was issued with a show cause letter, an invitation to the disciplinary hearing and his right of appeal. The Claimant acknowledged receiving the show cause letter and having filed a response to the show cause. He further admitted attending and/or participating in the disciplinary hearing process, and subsequently lodging an appeal against the Respondent's decision to terminate his services.
42. There is no doubt in my mind that the Respondent adhered to the provisions of Section 41 of the Employment, 2007, in arriving at the decision to terminate the Claimant. In the Nigerian Supreme Court decision in *BA Imonikbe v Unity Bank PLC* S.C 68 of 2001 it was held:

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”
43. I find and hold that the Claimant's termination met the procedural fairness test.
44. The second limb in determining fairness in a termination, is the question of substantive justification. The employer has a legal and evidential burden of proof of reasons for termination where an employee alleges that termination lacked sound legal justification per Sections 43, 45(2) and 47(5) of the *employment Act*, 2007.
45. Section 47 (5) of the Act provides the procedure to be followed in matters of complaints of unfair termination as follows:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”

46. The provisions of Sections 43, 45 and 47, obligates an employer to establish the validity or correctness of the reasons for termination, but only after the employee has discharged the burden by proving that he was indeed terminated, and that the termination was unfair. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR stated:

“That, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): “to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”(emphasis mine).



47. The Claimant was terminated on account of violation of the Respondent's Business Code of Conduct and Ethics on conflict of interest. Clause 8.11 of the Code states:
- “Where any individual within the Bank, has interest in an application due to a relationship or connection with the borrower, he/she should declare such interest and not participate in the approval process.”
48. The Claimant's position is that he was not yet married to the beneficiary of the loan facility at the time of processing the loan, but admits that they had a son together at the time he processed her loan facility. The provision of the Code in relation to conflict of interest refers to “a relationship or connection with the borrower” and not necessarily marriage.
49. The evidence adduced before this court indicates that the Claimant was in a relationship with Caroline Akoth, and indeed, was a beneficiary of the loan, and had drawn a substantial sum of the loan from the account to which the loan was remitted, having himself been a signatory to the account.
50. This in my opinion, is sufficient proof that the Claimant had an interest in the loan facility that he processed for Caroline Akoth, an interest he ought to have declared, and which he did not. This is a violation of the Respondent's Business Code of Conduct and Ethics for which the Claimant as an employee of the Respondent was subject to in his dealings with the Respondent's customers.
51. In my view, the Claimant has not proved to this court that his termination from the service of the Respondent is unfair so as to require the Respondent to prove the reason or reasons for the termination per Section 43(1) of the [Employment Act](#), 2007.
52. I find and hold that the Claimant's termination was both procedurally and substantively fair.

Whether the Claimant is entitled to the remedies sought.

53. The Claimant seeks a declaration that his termination is unfair and unlawful. He further prays for orders that he is paid two months' salary in lieu of termination notice, salaries withheld from the day he was suspended to the date of his termination, compensation for unfair termination, gratuity pay, a certificate of service and costs of the suit.

Compensation for unfair termination

54. Compensation for unfair termination is only tenable where a termination is found to be unfair. In the instance case, the termination has been found not to be unfair, and hence the prayer for compensation fails and is dismissed.

Salaries withheld

55. The Claimant was suspended vide a letter dated 24th May, 2018. The letter suspending him indicates that he was to be on half salary for the period of the suspension. He was also entitled to all the other benefits that applied prior to the suspension, and which is shown to have been paid through the pay slip produced before court.
56. Salaries withheld during suspension is only recoverable when an employee is cleared of the allegations subject of the investigation that necessitated suspension. Where an employee is not cleared, and does not resume duty like in the instant case, withheld salary is not payable as the employer paid half salary for months that the employee did not render service, and has been found culpable of the charges levelled against him.



57. The claim for withheld salaries likewise fails and is dismissed.

Gratuity

58. The Claimant was a member of the Respondent's staff pension scheme. The evidence before court, show that the Claimant was paid Kshs.1,577,203.03/- by the Scheme, being the benefits payable to him at the time of his termination. The Claimant executed a discharge form as acknowledgment for the payment.

59. Gratuity is therefore not payable as to do so, would amount to this court unjustly enriching the Claimant. The claim for gratuity fails and is dismissed.

Certificate of Service

60. A certificate of service is an employee's statutory entitlement and which an employer must issue irrespective of the reason (s) for separation. I do order that the Respondent issues the Claimant with a certificate of service as prayed.

Salary In Lieu of Termination Notice

61. Salary in lieu of termination notice is only payable where an employee is terminated without notice. The Claimant herein, went through a disciplinary process that culminated in his termination, and hence the situation under which he left the service of the Respondent is such that he did not warrant termination notice. The claim is dismissed.

The Counter Claim

62. The Respondent lodged a counter claim against the Claimant seeking to recover a total of Kshs.3,776,088.00/- being loan facilities accorded to the Claimant by virtue of his employment.

63. The Claimant in response to the counter claim, admitted having been advanced loan facilities on various dates amounting to Kshs.1, 650,000.00/- He denies that the loan has since accumulated to Kshs.3,776,088.00/- on the basis that he was servicing the loan from the year 2013, until his termination.

64. The Claimant further denies receipt of a demand for the loan balance and further states that he has not been issued with a statement stating what his current loan balance was.

65. The Respondent's letter terminating the services of the Claimant, and which was produced in evidence by both parties, addressed the issue of the loan facilities as follows:

“Note that facilities accorded to you by virtue of your status as a staff member of the Bank become repayable immediately and will start attracting interest at the prevailing commercial rate 30 days from the date of this letter until the same are fully paid.....in this regard, you are advised to liaise with the Head-Remedial Management Department within 30 days from the date herein to further discuss on the repayment of your outstanding liabilities below:

House Loan (New) – Kshs.2,684,856.00

Personal Loan – Kshs.251,356.00

Commercial Loan (staff)- Kshs.838,876.00....”



66. The Claimant did not challenge the amount of the loan facilities indicated in the letter of termination. He also did not show that he adhered to the invitation to discuss the repayment of the outstanding liabilities as expressly instructed in the letter of termination.
67. The preferential interest rates on staff loans are at the discretion of the employer and they fall away with the termination of the employment relationship. The foregoing view is fortified by the holding in the case of *Evans Oliver Olwali v Standard Chartered Bank Limited* [2018] eKLR where Ongaya J expressed himself as follows:
- “In the present case there was no dispute that the preferential staff interest rates subsisted on account of the employment relationship. There was no dispute that the contract of employment between the parties had been terminated. The court considers that the fringe benefit of preferential staff interest rates would resurrect only upon reinstatement or such other lawful justification after the hearing of the suit.”
68. In a further case of *Boniface Lum Amunga Biko –Versus- National Bank of Kenya Limited* [2017] eKLR, Mbaru J stated:
- “..... where the court makes a finding that indeed the Respondent was justified in terminating the employment of the claimant, the due loan facilities can be recalled with all applicable and appropriate interest rates based on the date of termination.”
69. I find the Respondent’s Counter Claim to have merit, and Judgment is entered for the Respondent as against the Claimant for the full amount of the Counter Claim.
70. In whole, the court finds and holds as follows: -
- i. That the Claimant’s claim lacks merit and is hereby dismissed in its entirety.
 - ii. That the Respondent’s Counter Claim is merited and is hereby allowed in the sum of Kshs.3,776,088/-
 - iii. Considering that the Claimant is currently unemployed, I order that each party bears their own costs of both the suit and the Counter claim.
71. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Otieno h/b for Mr. Obach for the Claimant

N/A for the Respondent

Christine Omollo- C/A

