



**Wagunya v Equity Bank Limited (Cause 575 of 2016)
[2022] KEELRC 1347 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 575 OF 2016**

**B ONGAYA, J
JULY 15, 2022**

BETWEEN

KEPHA HENIA WAGUNYA CLAIMANT

AND

EQUITY BANK LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 04.08.2016 through Oduor Siminyu & Co. Advocates. It is not in dispute that the respondent employed the claimant with effect from 14.13.2006 as a Cashier and deployed him at Harambee Branch in Nairobi. In May, 2007 he was transferred to Malindi Branch as a Branch Accountant. In January, 2008 he was transferred to Mombasa Moi Avenue Branch as the Branch Accountant. In May, 2009 he was transferred to Ukunda Branch as the Relationship Manager, Operations. It is his case that on 13.05.2014 he was unfairly terminated without any justifiable reasons. His further case is that he was arrested on 13.03.2014 and arraigned in Court to face charges of attempted stealing in Criminal Case 259 of 2014 in the Magistrate's Court at Kwale. Further, on March 13, 2014 the trial Magistrate released him on a cash bail of Kshs. 2 Million. It is his case that he went through the trial and on February 22, 2016 he was exonerated by acquittal of the charges under Section 87(a) of the Criminal Procedure Act.
2. The claimant further case is that he was terminated without being given an opportunity of being heard on the offence alleged as against him and especially when the matter was subject of a court proceeding. Such termination is urged to have amounted to unfair labour practice in breach of section 44(4)(f) of the *Employment Act* and Article 50 of *the Constitution* of Kenya. His further case is that the termination was contrary to the International Labour Organization Convention No. 158. Termination of employment Convention of 1982; under Article 3.4 of the convention the term termination of employment means termination of employment at the initiative of the employer. Under Article 4 the employment of workers shall not be terminated unless there is a valid reason for



such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking established or service.

3. It is his case that principals of natural justice were violated.
4. The claimant prayed for Judgment against the respondent for:
 1. That the Honourable Court finds the termination of the grievant by the respondent to be unfair and award general damages to the claim.
 2. One month's salary in lieu of notice.
 3. That the respondent be ordered to pay the claimant his terminal dues being 12 months' compensation salary for unlawful termination Kshs. 1,711,008.00.
 4. The respondent to issue the claimant with a certificate of service.
 5. Costs of this claim and interest thereon.
5. The respondent filed the reply to the memorandum of claim on October 26, 2016 through Kithi & Co. Advocates. The respondent admitted employing the claimant in the capacity of a Bank Clerk with effect from March 14, 2006. Further, as an employee he was expected to conduct his duties diligently with integrity and in accordance with the respondent's Human Resource Policy Manual, 2010.
6. Further, in performance of his duties, he was expected to act with due care and skill; knowledge and experience; good faith and honesty free from fraud or conspiracy; to comply with the respondent's employment policies and not to engage in collusion or conspiracy, and to promote honesty and integrity.
7. The respondent's further case is that there were some discrepancies in the rates of exchange of foreign currency. The Bank conducted internal investigations and also reported the incidence to the Banking Fraud Investigation Unit. In response to the allegations, the claimant was arrested and charged by the Director of Public Prosecution in the said Criminal Case 259 of 2014 at Kwale which was a process purely under the independent investigation by the Banking Fraud Investigation Unit and the Director of Public Prosecution.
8. It is the respondent's case that it undertook its own internal investigations and he was subsequently lawfully dismissed after following due procedure. In particular, it is the respondent's case that the claimant was afforded the opportunity to be heard and the decision to dismiss him was within the purview of the law.
9. Further, he was given a letter to show cause dated 28.03.2014 and he replied by his letter dated 31.03.2014. Subsequently, he was invited to a disciplinary meeting held on 03.04.2014 and on the same date, the decision of the disciplinary committee was conveyed to the claimant by the letter of summary dismissal dated April 3, 2014. Further, the claimant's Advocate wrote a demand letter dated 25.11.2015 which the respondent replied by the letter of March 1, 2016.
10. It is the respondent's case that the claimant was given an opportunity to be heard and he was afforded the rules of natural justice. Further, the acquittal in the Criminal Case did not amount to exculpation of the claimant under the administrative disciplinary process. The respondent's case is that the allegations of unfair termination were a non-starter and had no basis in law because the grounds for termination were valid and the procedure was fair and proper.
11. Further, the claimant breached the contract of employment by failing to perform his services diligently, and in the exercise of due care; by failing to act in the best interest of the respondent; by failing to



comply with the respondent's employment rules and regulations; by failing to act in good faith; by acting in collusion with others to defraud the respondent and by placing personal gain ahead of his duties.

12. The respondent alleges that by reason of the claimant's breach of the contract of employment, the respondent suffered a loss of Kshs. 1,124,805.00 which the claimant benefited from in an irregular manner. It was prayed that the claimant's memorandum of claim dated August 2, 2016 be dismissed and the Court to issue such other and further relief as the Honourable Court shall seem mete.
13. The claimant testified to support his case and the respondent failed to call a witness. The documents filed for parties were admitted in evidence as filed by a consent order in that regard. Final submissions were filed for the parties.
14. The court has considered all the material on record and returns as follows:
 1. There is no dispute that the parties were in a contract of service. As pleaded for the claimant and admitted for the respondent, the claimant worked for the respondent in various capacities from March 14, 2006 to April 3, 2014.
 2. The contract of service was terminated by reason of the letter of summary dismissal dated April 3, 2014 on account of the claimant's manipulation of exchange rate by negotiating a higher rate with the Treasury than the negotiated rates with customers. The further reason for the dismissal as per the letter was that the claimant personally benefited from the difference in exchange rate manipulation on diverse dates totalling to Kshs. 1,124,805.00. The letter stated that the same amounted to gross misconduct as the claimant's integrity and credibility had been severely compromised and the Bank had lost confidence in the claimant as an employee.
 3. The Court returns that the claimant has established that the procedure leading to the termination by the letter of summary dismissal was unfair. In particular, the claimant's witness No. 2 (CW2) was C.I. Alex Mwangera Mathiu, Forensic Document Examiner of the Directorate of Criminal Investigation. His evidence established that the claimant's alleged signature on the minutes of the disciplinary committee proceedings did not belong to the claimant. In particular, the report by CW2 of April 9, 2018 stated that the alleged claimant's signature on the minutes dated April 3, 2014 was not authored by the claimant. The claimant's evidence was that he was charged in Court and released on 14.03.2014. Further, on 03.04.2014 he was dismissed. Further, he testified that the letter to show cause dated 28.03.2014 was served upon him and he was not required to acknowledge the receipt and he replied denying the allegations as had been levelled against him. He denied receiving the invitation to attend the disciplinary hearing. He also urged that if he had been invited for the disciplinary hearing and if he had attended the same then there would be evidence of his being provided transport and accommodation to facilitate his attendance. Further, he had not signed the minutes of the disciplinary committee hearing as was alleged in the minutes exhibited for the respondent. The Court has considered the claimant's testimony and that of CW2. The respondent having failed to provide rebutting evidence, the Court returns that on a balance of probability, the claimant was not invited for the disciplinary hearing and further he did not therefore attend at the hearing. Accordingly, the procedure adopted by the respondent to dismiss the claimant breached section 41 of the *Employment Act*, 2007 requiring a notice, presence of a representative at the hearing and affording the claimant the hearing. As urged for the claimant, the rules of natural justice were breached as envisaged in section 41 of the Act. In making that finding the Court has observed that the letter of summary dismissal does not refer to the



disciplinary committee hearing or such other due processes leading to the issuance of the letter of summary dismissal. Thus, it is found that the procedure was unfair.

4. Under section 47(5) of the Act, the burden of justifying the grounds for the termination or dismissal of the claimant rested on the respondent as the employer. Further, under Section 43 of the Act, the respondent was required to prove the reason or reasons for the summary dismissal existed as at the time of the dismissal and failing to do so, the dismissal is deemed to have been unfair within the meaning of Section 45 of the Act. The claimant's testimony was that the allegations against him were false because the transactions were initiated invariably on the system by a person with access as assigned. He testified that he did not have such access to the system. Further, no money had been lost as alleged and levelled against him because if a lower exchange rate of 85.2 was used it offered a higher gain to the bank than if an exchange rate of 86.0 per US Dollar had been used.

Further, his testimony was that if the exchange rate was 86.0 then the system would not exchange at 85.2 which was not the rate in the system. His further testimony was that the Branch Manager negotiated a rate and then the Bank used a ticket showing the exchange rate. Further, in the present case the Bank Treasury issued an exchange rate of 86.0 per Dollar and he had not negotiated an exchanged rate for the customer in issue to be at 85.2 because it was impossible at the material time whereby every staff was assigned duties and the system allowed the specified individuals to execute the duties. Further, as Operations Manager he did not negotiate the exchange rates or have rights to access the system to initiate the exchange transaction such as the one in issue and which could only be undertaken by a Cashier or a Teller. The Court has considered that evidence and returns that the respondent has failed to show that the reasons for summary dismissal existed as at the time of dismissal as envisaged in Section 43 of the Act. Further, the respondent has failed to show the reasons justifying unfair termination under Section 45 of the Act.

5. As submitted for the claimant, the claimant has established that the termination was unfair. The Court has considered the factors in Section 49 of the Act. The claimant had served for a long period of time with a clean record. He desired to continue in employment. The aggravating factor against the respondent is that the claimant was not afforded the due process as envisaged in Section 41 and 45 of the Act. The further aggravating factor is that it appears that the respondent pretended to have undertaken a disciplinary hearing but which was not the case in this matter whereby very serious allegations, under which the claimant had been arrested and charged, were in issue. The Court considers the respondent's conduct to have been seriously prejudicial to the claimant who was otherwise a good employee in a long clean service with the respondent. The Court therefore returns that the claimant has established a case for maximum compensation as was prayed for in the memorandum of claim. He is also entitled to Kshs. 142,584.00 being payment in lieu of the termination notice.

15. In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the summary dismissal was unfair.
2. The respondent to pay the claimant a sum of Kshs. 1,853,592.00 (less PAYE) by September 1, 2022 failing interest to be payable thereon at Court rates from the date of this Judgment until full payment.
3. The respondent to deliver to the claimant a certificate of service within 30 days from the date of the Judgment.



4. The respondent to pay the claimant costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS
FRIDAY 15TH JULY, 2022.**

BYRAM ONGAYA

JUDGE

