



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Biko v National Bank of Kenya Limited (Cause 1072 of 2016)
[2022] KEELRC 4044 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4044 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1072 OF 2016
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

BONIFACE LUM AMUNGA BIKO CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed an Amended Statement of Claim on 10th January 2020.
2. He avers that he was employed by the Respondent Bank as the General Manager, Business Banking, on 2nd May 2013.
3. He earned a monthly basic salary of Kshs. 1,000,000.
4. He avers that on 7th July 2015, due to his excellent performance and reputation, he received an offer to join another Bank, Ecobank Kenya Limited.
5. The Respondent was against the Claimant's departure, and to retain him, promoted him to the position of Executive Director Corporate Institutional and Business Banking, on a contract of 5 years, with a consolidated monthly salary of Kshs. 1,675,000. He reported directly to the Managing Director and the Chief Executive Officer.
6. His new role entailed marketing Respondent's products to corporate institutions and other businesses. He was not issued a written job description. At no point however, was it his role to approve, disburse and/ or collect loans, or prepare the books of account.
7. On 29th March 2016, he was 9 months into his new role. He received a letter from the Respondent, referenced 'disciplinary hearing and show cause notice.' He was alleged to have failed to take appropriate action to ensure that the state of the Respondent's loan book, reflected the correct position.



8. He replied on 30th March 2016, requesting for minutes of the Board meetings held on 23rd March 2016 and 24th March 2016. The minutes were not availed.
9. A sham disciplinary hearing followed. It took about 5 minutes. The Board of Directors simply told the Claimant that his response had been considered. He was told that the decision of the Board would be communicated in due course. He was called on 13th April 2016, and issued a summary dismissal letter.
10. The Respondent published the Claimant's dismissal in the Daily Nation of 29th April 2016. The publication was defamatory and amounted to character assassination of the Claimant. It was preceded by multiple adverse articles appearing in the press on the affairs of the Respondent. The Claimant's reputation within the closely knit banking industry, was damaged. His career was ruined.
11. The Respondent wrote to the Central Bank of Kenya on 15th May 2017, while this Claim was already before this Court, asking that the Claimant be prosecuted in the Criminal Court. The Claimant was consequently arrested on 7th December 2017, and prosecuted before the Chief Magistrate's Court.
12. In addition, the Respondent instigated action before the Capital Markets Authority with respect to the same matters. These actions were, in the view of the Claimant taken by the Respondent, with a view to laundering its unlawful actions against the Claimant.
13. The Capital Markets Authority investigated the matters and interviewed the Claimant. On 20th April 2018, the Authority wrote to the Claimant absolving him.
14. The Claimant asks the Court to declare that termination was unfair and unlawful because: accusations against the Claimant were not related to his role, conduct and capacity; termination was not based on operational requirement; the letter to show cause did not specify the allegations; he was given notice of 1 day to prepare for disciplinary hearing; he was not advised on his right to be accompanied to the hearing; there were no specific accusations at the hearing, just a rehash of the Claimant's reply to the letter to show cause; and the dismissal letter did not give reasons for the decision.
15. The Claimant was unable to meet his loan repayments to the Respondent upon dismissal. The loans included: -
 - a. House loan at Kshs... 18,491,488.
 - b. Agricultural loan at Kshs. 9,522,646.
 - c. Car loan at Kshs. 4,985,074.
 - d. Personal loan at Kshs. 1,639,4425 [?].
16. Reasons wherefore, the Claimant seeks Judgment against the Respondent for: -
 - a. Declaration that termination was unfair.
 - b. Notice of 3 months, at Kshs. 5,025,000.
 - c. Salary for the remainder of the contract period at Kshs. 84,425,000.
 - d. 12 months' salary in compensation for unfair termination.
 - e. Permanent injunction prohibiting the Respondent from changing the rate of interest on Claimant's loans from employee rates, to commercial rates.
 - f. General damages for defamation.



- g. Interest.
 - h. Costs.
 - i. Any other relief the Court deems fit to grant.
17. The Respondent filed a Statement of Response, amended on 4th September 2020. It is not contested that the Claimant was employed by the Respondent. The Respondent is a public entity, listed at the Nairobi Securities Exchange. It is regulated by Capital Markets Authority and the Central Bank of Kenya. Its shareholding includes the N.S.S.F, the Permanent Secretary Treasury, and Individual and Institutional Shareholders. The Respondent has reporting obligations imposed by its regulators. It is required to report within prescribed timelines.
 18. The Respondent engages external Auditors Deloitte and Touché, who audit the Respondent's accounts annually. There was uncovered in the external audit of 2015, a huge difference between the internal financial results presented to the Board and the regulators, and the audited accounts.
 19. The Board and the Management held meetings on 23rd March 2016 and 24th March 2016. It was found that the Respondent's internal financial results reported an annual profit of Kshs. 3.2 billion. The audited result from Deloitte and Touché showed a loss of over Kshs. 1.6 billion. Non-performing loans were misrepresented by the Respondent as performing. In 2014, non-performing loans stood at Kshs. 525 million. In 2015, there was a huge rise to Kshs. 3.7 billion.
 20. Re-booking of loans was abused by staff under the Claimant. They avoided making provision for non-performing loans. Re-booking was supported by the Claimant, among others. He caused the irregular origination of loans to customers. He responded to the letter to show cause, and was aware of the issues against him. There was clarity on those issues.
 21. His role as the Executive Director, Institutional and Business Banking included ensuring that the Respondent's loan book, reflected the correct position. Misrepresentation of some of the customer accounts occurred under his management.
 22. The Respondent did not defame the Claimant. It does not publish newspapers.
 23. The Respondent complied with the Sections 41 and 45 of the *Employment Act*. Disciplinary action was taken against the Claimant, and other involved Employees, without discrimination.
 24. The Capital Markets Authority and the Police acted independently. The Respondent does not enjoy the powers of arrest and prosecution. The Central Bank and the Capital Markets Authority regulate the Respondent. The Respondent and its Employees are subject to the laws governing banking and capital markets. The fact that the Capital Markets Authority opted not to take action against the Claimant is irrelevant, the present dispute being an employment matter. The findings of the Capital Markets Authority are not binding on anybody exercising an independent mandate.
 25. The Respondent pleads, in a crucible, that the Claimant was dismissed for lawful cause; the prayer for anticipatory salary is baseless, as the contract had a termination clause; compensation for unfair termination is unavailable, as termination was based on valid reason; and the prayer for general damages is unfounded.
 26. The Claimant testified and rested his case, on 15th July 2021. Non-Executive Director of the Respondent, Linnet Mirehane, testified for the Respondent on 18th February 2022 when the hearing closed. The Claim was last mentioned in Court on 22nd June 2022, when Parties confirmed the filing and exchange of their Final Arguments.



27. The Claimant adopted his Witness Statement and Documents on record, in his evidence-in-chief. He clarified that the Respondent instigated a criminal case against him, after summarily dismissing him, based on the same facts. He was tried and acquitted. At page 8 of the proceedings of the Criminal Court, Respondent's Manager, Financial Controls, Pauline Wanjiru stated that the Claimant had acted regularly. The Chairman of the Bank intimated to the Criminal Court that he had no knowledge of malpractices. The Trial Court observed that the Respondent was not the complainant.
28. Cross-examined, the Claimant told the Court that he was the Executive Director, Banking. He was not aware of the role he was to discharge. He acted on instructions of the Managing Director. He mainly supervised reports. The Claimant was the General Manager Business Banking, from 2013. He became Executive Director in 2015. Before him, in the position of Executive Director, was Robert Kibara. The Claimant reported to Kibara. He did not know what Kibara did daily
29. The Respondent had an audit process. The Claimant did not give information during the process. Deloitte carried out an audit in 2015. The Claimant did not have a draft of the report, before the final report. He however sat in a meeting with Deloitte, before the report was released. The meeting involved the Board, Management and Deloitte.
30. Nothing specifically touched on the Claimant's portfolio. He did not recall exactly what issue was raised. He recalled it was mentioned that loans were not reconciling. The letter to show cause reached the Claimant about 5 days after the meeting. It refers to financial reconciliation. The Claimant replied to the best of his ability. He said that the loans were secured, and recovery was not impossible. He got additional securities from the relevant customers. Central Bank was kept informed about recovery progress. The Claimant acted on instructions from the Managing Director.
31. The Claimant confirmed that he attended disciplinary hearing as shown in the minutes dated 31st March 2016. He was advised on his terminal dues. He left on 13th April 2016. He was paid salary for days worked, and accrued leave.
32. At one time, the Claimant did not report to the Managing Director. He supervised his team, ensuring they went out marketing Respondent's products/ facilities. There were loan portfolios mentioned by Deloitte. There were Employees managing different accounts. They were under the Claimant.
33. The Director of Public Prosecutions prosecuted the Claimant. The Respondent instigated prosecution. The Claimant was acquitted. The Court held that the Central Bank, not the Respondent, was the complainant. The Claimant was acquitted because the Central Bank did not testify. Capital Markets Authority carried out investigations. It found that bank assets were mismanaged. Agents were paid without justification. It was found that there was interest manipulation and failure to make provision for bad loans. There was irregular write off of loans. Capital Markets discharged the Claimant. His colleagues were found guilty.
34. The Claimant told the Court that he filed a Petition at the High Court in Nairobi, seeking to stop malicious prosecution. The Petition was pending, at the time the Claimant testified before the E&LRC.
35. Audited results showed the Respondent sustained a loss of Kshs. 3 billion. This was not occasioned by improper reporting. Auditors presented their findings. They did not apportion blame. They did not say that re-booking was faulty. All loans were secured. The Claimant pointed out non-performing loans, in his reply to the letter to show cause. He agreed that loans were not being serviced regularly. The loans were under Credit Department. The Claimant managed a pool of Managers, who oversaw the loans.



36. If a big loan which was not performing came to Claimant's attention, he would contact the customer. He would be involved, if the customer wished to restructure the loan. The Credit Department and Executive Credit Committee would be involved.
37. There were audited and un-audited accounts. At the end of the financial year, there were audited accounts. It was normal to have discrepancies between audited and un-audited accounts. There would be reconciliation. It was not abnormal to have huge profits declared, followed by huge losses declared with respect to the same financial period. The Claimant did not issue letters to show cause to other Employees. Such letters issued in March 2016, but were recalled by the Chief Executive Officer.
38. Redirected, the Claimant told the Court that he had been offered a job by Ecobank Limited. The Managing Director refused to let the Claimant leave, stating that the Claimant was performing well for the Respondent. It was at this point that the Claimant was given the position of Executive Director. Details of customers' accounts were not availed to the Claimant, to enable him make appropriate reply to the letter to show cause. He was given 24 hours to respond. He asked for documents including minutes of the Board meetings. They were not availed. Hearing took about 5 minutes. He was told the letter to show cause was the subject of the meeting. Termination letter refers to documents which were not availed to the Claimant. He was told charges had been proved. The Respondent made reference to the charge sheet in the criminal proceedings. The Petition at the High Court did not have similar remedies with the Claim herein. The Claimant was rated on a scale of 1-5, 5 being excellent, at 5. He was at the top. On loans, he was at 98%. He was not availed the Audit Report and would not have been able to make informed comments on it. He only interacted with the Report when it was presented at the Board-Management- Deloitte meeting, in power- point.
39. Mirehane adopted her Witness Statement, original and supplementary Documents filed by the Respondent, in her evidence-in-chief. Her position in the Respondent was different from the Claimant's. She was a Non-Executive Director. She, unlike the Claimant, was not involved in running of the Respondent, on day-to-day basis. She sat in the Board. She sat in the Board with the Claimant when the Audit Report was discussed. The Claimant represented Management. He was involved in the audit. He was issued letter to show cause. He replied. He did not complain about the short notice.
40. Cross-examined, Mirehane told the Court that the Claimant represented Management. Non-Executive Director Hassan, chaired the disciplinary hearing. The Claimant had a job description. Development Team originated various facilities. The Board approved financial positions on quarterly basis, in accordance with Central Bank Guidelines. There was no Witness from Deloitte, to clarify the Audit Report.
41. The Claimant supervised accounts on day-to-day basis. Relations Managers contacted customers. Mirehane was conversant with credit approval. Relations Managers originated credit. There were various approvals in the process. Credit above Kshs. 250 million, was approved by Management. Anything above Kshs. 500 million, was approved by the Board. Decisions of the Board Credit Committee were made through member voting, in event there was no consensus. Mirehane told the Court this was her thought, but she was not certain that this was the correct procedure. She was a voting member.
42. Restructuring of loans was allowed, not so re-booking. The Claimant's performance rating by the Respondent on loans, was at 98%. Other ratings were quite high. On one instance it was 104%. Overall rating was 103%. Mirehane was in the Board which rated the Claimant. Non-Executive Directors were allowed to rate the Claimant, but did not rate other Employees.



43. The Claimant was given an opportunity to respond to the Audit Report. He was not given the Audit Report, because of its sensitivity. It is the same Report exhibited before the Court.
44. He reported to the CEO. The CEO filed a Claim against the Respondent after he was dismissed. Mirehane did not know what the Court determined in that Claim.
45. The time given to the Claimant to respond to the letter to show cause was sufficient. He was to respond on re-booking and origination. These were not in the letter to show cause. He requested for minutes of the meetings held by the Board. He asked for Board deliberations. They were not availed because of the sensitivity of the matter. He ought to have asked for more time.
46. Mirehane did not recall how long the disciplinary hearing took. She did not chair the meeting, although she alleged to have done so, in her Witness Statement. Details of the customers whose accounts were being probed, were mentioned in the minutes of the Board meeting. Details of the reasons justifying termination, were not stated in the letter of termination. It refers to review of voluminous documents. They relate to accounts that were misrepresented. They were not availed to the Claimant. Mirehane was not aware of the decisions made by the Criminal Court and the Capital Markets Authority in relation to this dispute. Page 32 of the Criminal Court Judgment states that the Respondent was not the complainant. It states that Mohammed Hassan, the Chairman, confirmed there was no malpractice. He chaired the disciplinary hearing. He terminated the Claimant's contract. Mirehane was not aware that the Claimant was absolved of wrongdoing by Capital Markets Authority. There are termination letters of other Employees on record. The Chairman asked that termination with respect to these other Employees is put on hold. The Board allowed the affected Employees to continue working.
47. Redirected, Mirehane told the Court that termination letters issued to other Employees are dated March 2016, when the disciplinary hearing against the Claimant was underway. Audit Report by Deloitte was shared with the Board. Details were given. Issues against the Claimant flowed from the Audit Report. Claimant attended the Board meeting. He addressed all the issues raised by Deloitte. Names of affected borrowers were blacked out at the top of the Report because of banking confidentiality. The Claimant did not seek more time preceding the disciplinary hearing. Mirehane described herself as the chair to the disciplinary hearing, in her Witness Statement through error. She did not chair the disciplinary hearing.
48. The issues as traditionally is with Claims for unfair termination are: whether the Claimant was dismissed for valid reason or reasons; whether the Respondent observed fair procedure; and whether the Claimant merits the remedies pleaded. The relevant law governing these issues is contained in Sections 41, 43, 44, 45 and 47 of the [Employment Act](#), 2007.

The Court Finds:-

49. The Claimant was employed by the Respondent Bank, in May 2013 as General Manager, Business Banking. He is a career Banker, having worked previously for who-is-who in the Kenyan banking industry, including Barclays Bank, Standard Chartered, and Cooperative Bank.
50. He was appointed as the Executive Director, Corporate, Institutional Business Banking, on 7th July 2015. He was summarily dismissed while in this position, on 13th April 2016. His consolidated monthly salary at the time of dismissal was Kshs. 1,675,000.
51. Although the Claimant told the Court that he did not have a job description in his new position, he identified some of his duties in his letter to the Respondent's Board Chairman, dated 30th March 2016, replying to the letter to show cause.



52. His duties included overall responsibility of sourcing for clients to the Respondent and maintaining existing ones; strategy for corporate, institutional and business banking; overseeing overall business growth; people management, including talent search and development; improving loan processes and products, control framework, customer-value proposition and end to end service delivery; and product design, re-engineering and product life-cycle management.
53. The duties are also restated at paragraph 8 of the Claimant's Amended Statement of Claim, amended on 31st December 2019.
54. Apart from his own identification of his duties, there is a document exhibited in the Supplementary List of Documents dated 17th September 2017, titled Executive Director, Corporate Institutional and Business Banking. It contains Job Information. It restates the roles identified by the Claimant in his reply to the letter to show cause. He was to offer strategic leadership; conduct periodic review of clients' accounts in accordance with established procedures; oversee control and management of all operational and reputational risk; and ensure there is compliance with bank and business policies.
55. In his letter of appointment dated 4th June 2015, it was mentioned that he would be provided with a detailed job description, and a balanced scorecard, reflecting his functional title, upon his assumption of office. His reply to the letter to show cause, and the job information exhibited by the Respondent, suggest to the Court that the Claimant was well aware of his role. He did not at any time during employment, ask the Respondent to clarify his role.
56. The Court does not think therefore, that the Claimant, was discharging his role, without a roadmap.
57. Validity of reason. Through a letter dated 29th March 2016, the Board Chairman Mohammed A. Hassan wrote to the Claimant, notifying him of a disciplinary hearing to be held 2 days later, on 29th March 2016.
58. The same notification served as a letter to show cause why his contract of employment should not be terminated, for failure to take appropriate action, to ensure that the Respondent's loan book reflected the correct position.
59. It was disclosed in the notification that the Respondent's Board, Management and external Auditors Deloitte, had a meeting on 23rd March 2016 and 24th March 2016, where the Auditors disclosed material differences between the Respondent's financial statements [unaudited accounts] and the annual audited accounts for the year 2015.
60. The presence of misrepresented financial results was confirmed by Deloitte. Yet when he was cross-examined, the Claimant told the Court that, "I do not recall what issue was exactly raised."
61. The Claimant went on to say that he explained about the loan book in his reply to the letter to show cause. He gave a comparative analysis of the happenings in other Banks. He had obtained additional securities from defaulters and kept the Central Bank informed. He acted on the instructions of the Managing Director.
62. The financial position internally generated by the Respondent, was that the Respondent had made a profit of over Kshs. 3.2 billion, as at September 2015. The audit by Deloitte showed a loss of over Kshs. 1.6 billion, as at 31st December 2015.
63. This difference in the financial position is, even to the untutored non-finance outsider, mind-boggling. The Claimant told the Court on cross-examination that it is normal to have discrepancy between unaudited accounts and audited accounts. It was not abnormal to have a huge profit declared, and a huge loss declared soon thereafter, in respect of the same financial period.



64. The Court does not think that this position by the Claimant is correct, or supported by the evidence surrounding the misreporting of the financial position of the Respondent, by the Respondent and its leadership, of which the Claimant was part of.
65. The Respondent as is a public entity, listed at the Nairobi Securities Exchange. It is owned by Pensioners through the National Social Security Fund [N.S.S.F] with 48.05 % shareholding; the Government of Kenya through the Treasury at 22.50%; and Individuals and Institutions, at 29.45.
66. As explained by PricewaterhouseCoopers [PwC] in ‘Understanding a Financial Statement Audit [2017 PwC], the need for companies’ financial statements to be audited by external auditors, has been a cornerstone of confidence on the world’s financial systems. The benefit of an external audit is that it provides assurance that Management had presented a true and fair view of the company’s financial performance. An audit underpins the trust and obligation between those who manage a company and those who own it.
67. The Respondent is regulated by the Central Bank of Kenya and the Capital Markets Authority.
68. There were two issues surrounding the reasons stated in the Claimant’s letter to show cause, and by extension the termination letter, which were brought to the attention of both regulatory authorities.
69. The Capital Markets Authority [CMA] examined allegations of misrepresentation of financial statements, where profits were overstated. In issue was whether what was presented by Management was a fair and true financial position. It was the position of the CMA, that there was premature recognition of sale of assets amounting to Kshs. 800 million; there was under-provisioning of loan amounts; and there was wrongful recognition of interest income. This misrepresentation led to overstatement of profit.
70. The second limb of allegations against the Board and Senior Management, and investigation undertaken by CMA, related to embezzlement of funds. The Respondent had in place a deposit mobilization program. Agents were contracted to mobilize depositors. Upon deposit, they would be paid a commission. CMA found out that commissions were paid to private agents, on deposits made by Government agencies, in their normal conduct of business. It was established that 90% of commissions so paid, may have found their way back to some persons related to the Respondent.
71. The N.S.S.F which is a majority shareholder of the Respondent Bank made deposits. Commissions were paid out, even though the N.S.S.F was a shareholder and a Government agency, making deposit in the ordinary course of its business. The CMA found out that there was collusion between some of the Respondent’s officers, agents and N.S.S.F officers. Among the beneficiaries was none other than the Managing Director of the N.S.S.F.
72. It was on the second limb that various persons were sanctioned by CMA and recommended for prosecution. They were found to have actively been involved in the embezzlement scheme.
73. The Claimant was not among the persons who were sanctioned by CMA, for the reason that he was not found actively involved in the commissions fraud. He was issued a notification of enforcement decision by CMA, dated 20th April 2018, advising him that it had been resolved no enforcement action is taken against him. The letter clarified that the decision by the CMA against the Claimant, was restricted to the administrative process, carried out by the CMA.
74. The Court does not think that the Claimant was absolved of the allegations relating to misrepresentation of financial position, which can be segregated from the commissions fraud.



75. It is true he was charged in the Magistrate's Court at Milimani Nairobi Criminal Case No. 2044 of 2017, alongside 4 other persons, who included the commission agents. The criminal case revolved around the commissions fraud. It was not about misrepresentation of financial statements.
76. The Claimant and his colleagues were acquitted on the specific charges of fraud and stealing. It was also the conclusion of the Trial Court that the complainant in the matter was the Central Bank of Kenya, and that Central Bank had failed to present evidence.
77. The Court does not find any link between the Claimant's acquittal, and his failure in ensuring that the loan book reflected the true financial position of the Respondent. The criminal trial was about the commissions fraud, not misrepresentation of the financial position.
78. The Claimant addressed the mind of the Court to the fact that the Trial Court in the criminal proceedings, found that Respondent's Chairman, Hassan Mohammed intimated he had no knowledge of any malpractice.
79. Mohammed did not testify in the Criminal Court. It is alleged that he declined to testify. There is no reason stated in the proceedings, why he was not compelled to testify. The position attributed to him by the Court, and which the Claimant relies upon here, was not supported by evidence. In the Police Inquiry File No. 315 [D]/ 2016, Mohammed confirmed that there were inconsistencies between the internal financial results presented by the Management to the Board, and those presented by Deloitte. He also told the police that the Board was aware of deposit mobilization program, but that the same was abused by some members of Management.
80. In the absence of the Respondent's Chairman from the criminal proceedings, the statement attributed to him by the Claimant, had no exculpatory effect in relation to accusations against the Claimant, as contained in the letter to show cause and the letter of termination. The Chairman did not give evidence stating that there was no malpractice.
81. Neither does the finding of the EL&RC in *Munir Sheikh Ahmed v. The National Bank of Kenya Limited* [2020] e-KLR, cited by the Claimant in supporting his Claim, establish that there was no valid reason, in termination of the Claimant's contract.
82. Ahmed was the Chief Executive Officer, under who the Claimant worked. He was among the Officers sanctioned by the CMA and dismissed for the same reasons the Claimant was dismissed.
83. He successfully petitioned the Court for unfair dismissal and was awarded compensation, at Kshs. 26,520,000. The Court concluded that Ahmed had exercised his leadership role properly, and that he was not found culpable by the police upon investigations.
84. Based on the evidence before this Court, it is the position of the Court that the Respondent had valid reason in terminating the Claimant's contract. His job description placed him at the centre of the corporate failure, in generation of true and fair financial report. He need not have been found culpable by the Police, for the Respondent to conclude that he was involved in an employment offence. The reason or reasons for termination of a contract of employment are matters, under Section 43 of the *Employment Act*, that an Employer at the time of termination of the contract, genuinely believes to exist and which cause the Employer to terminate the services of the Employee. The Respondent was within its mandate, to act, without reference to processes at the Police, the Criminal Court or the CMA.
85. Misrepresentation of financial reports at the Respondent Bank, has been established in this Claim, and in other Claims handled by this Court, such as Edwin Beiti Kipchumba v. The National Bank Limited [2018] e-KLR. The Claimant Beiti, was a lowly Relationship Manager, who was based at Mombasa. He was pressured by the Respondent's Management and Board at Nairobi, to resign, after he had spilled



- the beans on the irregularities that were going on, to the Central Bank, Banking Fraud Investigation Unit [B.F.I.U].
86. Beiti informed the Court that in one instance, an account belonging to Rising Star Limited was credited and debited the same day in the amount of Kshs. 500 million. The misrepresentation was that the client had cleared the old loan, and acquired a new loan of the same amount.
 87. The Court found that Beiti was called by the Managers from Nairobi, and asked to consolidate accounts belonging to Respondent's clients, T.S.S. Limited and Juja Limited. He was asked to grant moratorium on the accounts, either on the principal sums or the interest. The clients had exhausted their credit limits. All their loans had matured and were in arrears. The Claimant declined to doctor financial records, but was surprised later, to receive a copy of Facility/Extension Amendment from Nairobi, showing falsely, that he had signed the forms, restructuring the loans. The Leadership in the Respondent Bank applied the tools of rebooking and restructuring existing loans, to allow accounts which were in arrears, to appear like they had been settled.
 88. In his reply to the letter to show cause, the Claimant acknowledges defaults in the Rising Star, T.S.S. and Juja accounts, alleging he had taken action in securing the Respondent's position. He could not shift blame away from himself to other officers, having been directly involved, in these accounts which were mentioned by Beiti, in the litigation at Mombasa. It is incorrect for the Claimant to say that he was not involved in correct provisioning of loans, or in ensuring the correctness of financial reports.
 89. There was doctoring of financial records at Nairobi, with the intention of concealment of the true and fair financial position of the Respondent. The Respondent, owned largely by Kenyan Pensioners, did not get adequate protection of its Board and Management, from the ravages of market failures and debt delinquents.
 90. The Claimant's duties included oversight of Respondent's corporate, institutional and business banking; and improvement of loan processes and products. It included proper classification and loan provisioning as guided by the Central Bank of Kenya Prudential Guidelines. The Claimant was not right in claiming that it was not within his docket, to guarantee correctness of financial reports.
 91. Financial Reports generated by the Respondent from June to December 2015, were shown to contain gross misinformation and were misleading. Huge losses were reported as profits running into billions of shillings. Debt delinquents and market failures were accorded moratoria and their loan agreements reactivated. Books of account were grossly doctored, and as shown in the case of Beiti, lowly officers were prevailed upon by the mandarins from the Respondent's Head Office, to implement doctoring of select accounts.
 92. The Respondent established adequate, fair and valid reason, to justify termination of the Claimant's contract of employment.
 93. Procedure. The Respondent was being closely observed by the Central Bank, as the events which led to the Claimant's dismissal, unfolded.
 94. The Director of Bank Supervision at Central Bank, George Nyaoma had raised concerns about the Respondent exceeding lending limits, in contravention of Section 10[1] of the *Banking Act*, through his letter to the Respondent, dated 2nd December 2015.
 95. The Respondent was asked to aggregate certain accounts including the T.S.S. and Juja accounts. The Respondent was asked also, to ensure full compliance by 31st December 2015. The Board was to execute a Memorandum of Understanding and the Certificate of Awareness by appending its signature and forwarding the same to the Central Bank by 14th December 2015.



96. The Respondent was from then, acting on a short leash. Deloitte was called in and uncovered the misreporting of financial statements. On 23rd March 2016 and 24th March 2016, Deloitte shared its findings with the Board and Management. The Claimant was in these meetings, and was taken through the audited report. He states though, that this was done through PowerPoint and he was never given a copy of the report for his close scrutiny.
97. He was issued a letter to show cause dated 29th March 2016. His offence was clearly stated in the letter, to be his failure to take appropriate action, to ensure that the state of the Respondent's loan book, reflected the correct financial position.
98. The letter to show cause, was merged with notification of disciplinary hearing, scheduled to take place on 31st March 2016.
99. This procedure was flawed, notwithstanding that the Respondent was acting on a short leash. A letter to show cause precedes notification of disciplinary hearing. The Employee is given an opportunity to show to the Employer, why he should not be taken through a disciplinary hearing. That opportunity must be real, and the Employer must objectively consider what the Employee has stated. There should be a response by the Employer to the Employee, either declining the explanation given by the Employee, or accepting the explanation. This would pave the way for disciplinary notification and hearing.
100. The Respondent prejudged the Claimant by issuing letter to show cause simultaneously with the notification of disciplinary hearing. The Claimant was going to be taken through disciplinary hearing, irrespective of what he told the Respondent in answer to the letter to show cause. What purpose was served, by the letter to show cause?
101. The Claimant complains that the time given to answer to the letter to show cause, and to prepare his defence was inadequate. There was clear prejudice suffered by the Claimant, by being taken through a disciplinary hearing, within the same day by which, he was being asked to respond to the letter to show cause.
102. He needed adequate time to prepare his defence. There were financial records he needed to be availed, in particular, the audit report by Deloitte, which the Claimant complained to have become acquainted with, only through a PowerPoint presentation. There were tonnes of documents necessary, for the Claimant to mount a reasonable defence.
103. He was heard on 31st March 2016. He states, and the Court has not seen any evidence to contradict him, that hearing constituted a frail reaction by the Respondent, to his reply to the letter to show cause. He was told his reply was not satisfactory, in a process that took about 5 minutes.
104. There was prejudgment against the Claimant, and objectivity was not sustained. The Respondent went into the hearing with a closed mind.
105. The Respondent communicated its decision to summarily dismiss the Claimant, through Chairman Hassan's letter, dated 13th April 2016. The Chairman regretted that the Respondent had not been able to deliver its verdict within a week, as had been promised to the Claimant, due to the seriousness of the matters raised, and the volumes of documents the Respondent had to review.
106. The Claimant submits persuasively, that this disclosure by the Chairman, confirms that there were volumes of documents, which the Claimant should have been availed at the inception, to facilitate his defence. If the Respondent was unable to conclude review of documents in a week, why did the Respondent deny the Claimant those documents from the beginning, and compel the Claimant to



proceed with a sham hearing the same day by which, he was meant to have responded to the letter to show cause? Why did the Respondent think that the Claimant could conduct his defence within 5 minutes, without necessary documents, while the Respondent could not reach a decision, owing to the sheer volume of documents to be reviewed, within 7 days?

107. The Respondent does not appear to have provided the Claimant with necessary documents and time, to sufficiently defend the allegations against him. There were documents which were categorized as confidential in nature, and unavailable to the Claimant. The Claimant had asked the High Court in *Boniface Lum Amunga Biko v. Director of Public Prosecutions & 3 Others* [2021] e-KLR, that he is availed minutes of the meetings held by Deloitte, the Board and the Management of the Respondent. There was a ruling that the Respondent has an obligation to maintain the confidentiality and privacy of its clients' information, and therefore the confidential documents were not available to the Claimant.
108. This High Court case appears to have been related to the criminal trial before the Magistrate's Court.
109. The Court does not think that there ought to have been a blanket denial of documents to the Claimant, on account on bank confidentiality. The Respondent could not use documents that were alleged to be confidential, to nail the Claimant, without allowing the Claimant to have a view, even a redacted view, of the same documents.
110. He complained that on 23rd March 2016 and 24th March 2016, he was in the meeting attended by Deloitte, the Board and Management. At some point, Management was asked to leave the meeting and Deloitte and the Board continued meeting. It is principally the minutes of the meeting that took place without the Management, that the Claimant wished to have, alongside the other voluminous documents which were reviewed by the Respondent on termination.
111. The Claimant was an Executive Director in charge of corporate, institutional and business banking, not a 3rd Party against whom bank clients' information was to be protected. He was familiar with T.S.S., Rising Star, Juja and others. He had access to all client accounts. At stake was the interpretation of the transactions relating to such accounts. He was being charged on account of his role in these accounts and misrepresentation of financial statements. How would his access to all documents, have infringed bank-client confidentiality? His right of fair hearing and access to the relevant information, ought not to have been sacrificed at the altar of bank confidentiality. He ought to have been made aware of what transpired in his absence, in the meetings of 23rd March 2016 and 24th March 2016. He ought to have been availed all the documents, to enable him defend his position.
112. The Court does not think that the Respondent would be deemed to have flouted Section 31 [2] of the *Banking Act* and clause 4.2.5 of the Prudential Guidelines, by availing to the Claimant the documents he had asked for. The Claimant was not a 3rd Party, a stranger, but part of the Respondent institution who was on his way out, but who was not unfamiliar with the accounts and financial records over which he was being disciplined. It was important that he is availed Deloitte's and the Board's full documents, to enable him understand Deloitte's and the Board's interpretation of those documents, and to enable him give his own view of the documents.
113. The Claimant had a right of appeal, but as concluded in the case of *Munir Ahmed*, it was not practicable to appeal to the same Board, which had overseen the disciplinary hearing. The Board members and the CEO were affected by the scandal and most were, like the Claimant, on their way out.
114. Termination was based on valid reason, but flawed procedure.
115. Publication of the scandal in the Daily Nation, and mention of the Claimant in the press reports, has not been shown by the Claimant to have constituted defamation. There is no basis for the



prayer for general damages. There was misrepresentation of financial reports by the Respondent, and the Court has been persuaded that the Claimant played a role in that misrepresentation. The press merely reported the presence of this misrepresentation and expounded on the extent of the sleaze, by highlighting the commissions fraud. It was fair media reporting, on a matter affecting a publicly listed Bank. The Respondent cannot be blamed for causing the publication.

116. In any event the Claimant has exhibited demand letter addressed to the relevant media house, seeking reparations for defamation. It would be expected that the demand was followed up with a separate Claim for defamation. It would not be necessary or safe, for this Court to engage in an enquiry and determination, with respect to alleged defamation.

Remedies.

117. The prayer for general damages has no merit. Publication of the incident in the press did not amount to defamation of the Claimant. His prosecution at the criminal proceedings and administrative action before the CMA have no bearing on this Claim. It is also noted that the Claimant initiated Nairobi High Court Petition Number 30 of 2018 against the Respondent, in which similar grievances relating to the prayers for general damages, featured.
118. The Claimant did not elaborate his prayer for permanent injunction to bar the Respondent from charging loan interest, based on commercial rates. He is no longer in employment. He did not avail to the Court the loan agreements in question. He did not establish at what rate of interest the Respondent is charging him. He did not give the Court updated statements of account of the various loans advanced by the Respondent. The prayer for permanent injunction is declined.
119. There is no justification at all, for anticipatory salaries for the remainder of the contract period, pleaded at Kshs. 85,425,000. The Claimant left employment on valid ground, in accordance with Respondent's Human Resource Manual, 2012, which includes the Code of Conduct and Ethical Behaviour; his contract of employment; and the Employment Act. It was not cast in bronze, that the Claimant would serve the Respondent to the end of the 5 years. He played a significant role, in termination of his contract before it matured.
120. His contract was terminated on account of a valid reason, which warranted summary dismissal under Section 44 [4] of the Employment Act. Once it was established that the Claimant was involved in an act of gross misconduct, the Respondent was entitled to terminate the contract without notice. Notice pay of 3 months or 1 month, is unmerited.
121. Procedural violation was quite significant. Procedural justice bears as much weight, as substantive justice. The Claimant was employed on 2nd May 2013 and was dismissed on 13th April 2016. He worked for about 3 years. He had a 5-year contract. He expected to continue working for another 4 years. He played a significant role in the circumstances leading to termination of his contract. He otherwise had a clean record, and was highly rated by the Respondent, in his performance appraisals. There is some doubt in the mind of the Court, on grading which surpasses 100% mark, in the performance appraisal of any Employee, at any workplace, and more so, in a workplace where records are prone to occasional manipulation. It is nonetheless observed that the Claimant was highly rated by the Respondent, and had a clean record over the years worked. He told the Court that he had been offered another job by Ecobank, based on his good reputation which he declined at the instigation of the Respondent, who then promoted him from General Manager, to Executive Director. His salary was enhanced to Kshs. 1,675,000 monthly.
122. The Court awards him equivalent of 5 ½ months' gross salary in compensation for unfair termination, at Kshs. 9,212,500.



123. Interest on this amount is allowed at court rates, from the date of Judgment, till payment is made in full.

124. No order on the costs.

In sum, it is ordered: -

- a] It is declared that termination was based on valid reason, but flawed procedure, and to that extent, unfair.
- b] The Respondent shall pay to the Claimant, equivalent of 5 ½ months' salary in compensation for unfair termination at Kshs. 9,212,500.
- c] Interest allowed on this amount at court rates, from the date of Judgment till payment in full.
- d] No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER 2022.

JAMES RIKA

JUDGE

