



**Mathenge v KCB Bank (K) Limited (Cause 118 of 2020)  
[2022] KEELRC 13346 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13346 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 118 OF 2020  
J RIKA, J  
NOVEMBER 30, 2022**

**BETWEEN**

**PAUL MUCHIRI MATHENGE ..... CLAIMANT**

**AND**

**KCB BANK (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed his statement of claim, on February 26, 2020.
2. He states that he was employed by the respondent Bank, on March 3, 2014, as a Regional Supervisor, on a monthly salary of Kshs 100,000.
3. He supervised 19 branches of the respondent, and sold and marketed insurance policy covers.
4. On July 25, 2014, he was at work at KCB Gateway Branch, Mombasa Road. 2 officers from the Forensic Audit Department visited and searched the claimant's desk. They took the claimant with them to the Head Office. They interrogated him, about some money which was alleged to have been stolen. The officers attempted to have the claimant sign a statement accepting liability, which the claimant declined.
5. The respondent made a criminal complaint against the respondent for stealing. The claimant was charged, tried and acquitted for want of evidence.
6. He was suspended by the respondent on July 25, 2014. He has exhibited a letter of summary dismissal dated August 18, 2014. He states that he was unaware of the letter of summary dismissal, and received a copy only on November 19, 2019, when he went to retrieve a copy of the suspension letter, which he had misplaced.
7. He prays for judgment against the respondent for: -
  - a. 1-month salary in lieu of notice at Kshs 100,000.



- b. 12 months' salary in compensation for unfair termination at Kshs 1,200,000.
  - c. Unpaid half-salary for the period of suspension, up to the date he was informed about termination in November 2019 at Kshs 1,350,000.
  - d. General damages for pain, emotional suffering and trauma, at Kshs 3,000,000.
  - e. Loss of job opportunities at Kshs 5,000,000.  
Total. Kshs 10,650,000.
  - f. Interest.
  - g. Costs.
8. The respondent filed its statement of response dated September 25, 2020. It is conceded that the claimant was employed by the respondent through a letter dated March 3, 2014. He was Regional Supervisor, Bancassurance. He was still on probation when, between June and July 2014, the respondent received information from its Branches in Mwea, Nanyuki and Thika implicating the claimant with fraudulent withdrawal of Kshs 900,000, and attempted withdrawal of Kshs 3,400,000 from various customers' accounts.
  9. The claimant was issued a letter to show cause, dated July 25, 2014. Internal Investigations were carried out. His explanation was not satisfactory. He was suspended. Investigations by the respondent's Forensic Department found that the claimant had repeatedly accessed the accounts in question. The respondent filed a criminal complaint with the Police against the claimant. He was arrested on July 25, 2014. The respondent issued a letter of termination to the claimant through registered mail, on August 18, 2014.
  10. The Respondent lastly submits, that the claimant was still under probation when he was involved in acts of gross misconduct, and when the respondent terminated his contract. Section 41 did not apply to the claimant.
  11. The respondent prays the court to dismiss the claim with costs.
  12. The claimant gave evidence and rested his case, on November 26, 2021. The respondent's Head of Human Resources and Wellness, Robley Ngoje gave evidence on June 28, 2022 when hearing closed. The claim was last mentioned on September 27, 2022, when respondent confirmed filing and service of its submissions. The claimant was granted 7 days to file and serve his submissions. None was filed. On the eve of delivery of this judgment, that is to say yesterday, the November 29, 2022, the claimant's Advocate approached the court virtually, asking to be allowed to file his submissions. Such submissions do not assist the court, as judgment has already been prepared, and is ready for delivery today.
  13. The claimant adopted his witness statement, and 5 documents exhibited as number 1-5 in his evidence. He confirmed on cross –examination that his contract provided for probation of 6 months, beginning April 1, 2014, to October 1, 2014. He was to be confirmed upon successful completion of probation. He was not confirmed. He conceded that he accessed, Japheth Otinga Ombaya's bank account, but could not recall how many times he did so. He was not aware of fraudulent withdrawal of Kshs 900,000, and attempted withdrawal of Kshs 3,400,000 from various customer accounts. He was to receive half salary during suspension. It was not paid to him. He was told by the Bank to wait until the criminal case was finalized. He was arrested on July 25, 2014 and released from custody after 30 days, on August 25, 2018. He was aware of the respondent's right to dismiss him, under section 44 [4] [f] of the [Employment Act, 2007](#). Due procedure was not followed. The claimant told the court that a certificate of posting, exhibit E6 of the respondent's document, which according to the respondent transmitted



the letter of termination, did not have the correct address. He considered that he was on suspension for 5 years.

14. Redirected, the claimant emphasized that he was acquitted by the court. He was advised by the bank Assurance Accountant that he should cease reporting while on suspension. He had been reporting thrice a week. The criminal case ended on September 5, 2018. The bank was aware that the claimant was in police custody for the days he was absent, after his arrest.
15. Ngoje similarly adopted as his evidence, his witness statement and documents filed by the respondent. The claimant accessed customer account 18 times on July 10, 2014 and 6 times on July 11, 2014. It was abnormal, suggesting that the customer had visited the bank, as many times. On July 10, 2014, Kshs 900,000 was withdrawn from the account. On July 11, 2014 there was an attempted withdrawal of Kshs 3,400,000 from the same account. The customer refuted that he had made withdrawals or authorized withdrawals. The claimant was implicated, issued letter to show cause, and suspension letter. He was advised to keep reporting to his Line Manager, while on suspension. He ceased reporting against advice. He did not provide his contacts while on suspension. He was dismissed on August 18, 2014. The respondent did not pay half- salary because suspension ended with the dismissal. His letter of termination was sent via registered mail.
16. Ngoje told the court he did not know if the claimant was acquitted. The respondent was not a party to the criminal proceedings. The respondent had personal details of its employees. These were however, subject to change. Dismissal letter is addressed to PO Box number 4708/11, while dismissal letter was addressed to PO Box number 13399-00400. It was not the same address. The letter actually went to the claimant. He was in remand by August 18, 2014. Redirected, Ngoje told the court that people change their addresses, and that 4708/11, was the number contained in the claimant's file.
17. The issues as understood by the court are: whether the claimant was on probation by the time of termination; whether he could validly claim that his contract was unfairly terminated; whether, if in the affirmative, his contract was unfairly terminated; and whether he merits the remedies claimed.

#### **The Court Finds: -**

18. It is not disputed that the claimant was employed by the respondent as a Regional Supervisor, on a monthly salary of Kshs 100,000. It is not contested that he was arrested on allegations of theft and attempted theft, on July 25, 2014. He was arraigned in court on July 28, 2014. He was acquitted on September 5, 2019.
19. It is not disputed that he was suspended as soon as he was arrested, on July 25, 2014. The respondent stated that it issued the claimant a letter of summary dismissal dated August 18, 2014 through registered post. The claimant disputes receipt of this letter, and states the address on the certificate of posting exhibited by the respondent, does not contain his address, which was correctly stated in the letter summary dismissal.
20. Probation clause 1 of the contract of employment concluded by the parties on March 3, 2014, required the claimant to serve probation of 6 months.
21. The period would run from April 1, 2014, to October 1, 2014.
22. The claimant was suspended from employment, while still on probation. He disputes receiving the letter of summary dismissal at the time indicated in the certificate of posting. He told the court that he received the letter on November 7, 2019, when he went to the respondent's office to retrieve a copy of the letter of suspension, which he had misplaced.



23. Section 42 [1] of the *Employment Act*, ousts the application of section 41 of the Act, to probationary contracts. Section 41 itself restates that it does not apply to probationary contracts under section 42 of the *Employment Act*.
24. The court has held in decisions cited by the respondent such as *Danish Jalang'o & another v Amicabre Travel Services Limited* [2014] e-KLR; and *Carolyn Nyambura Thiga v Oxfam* [2013] e-KLR, that employees whose contracts are terminated while still on probation, are not entitled to claim under section 41 of the *Employment Act*.
25. For the respondent to successfully argue that the claimant was summarily dismissed while still under probation, the respondent must show when the decision to summarily dismiss the claimant, was received by the claimant.
26. Termination of employment takes effect, only when the employee has knowledge of the decision. In other words, the Effective Date of Termination, [EDT], is that date, when the employee is made aware by the employer, that his contract has been terminated.
27. This is not the date the employer chooses to indicate on the letter of summary dismissal or letter of termination. It is the date when termination decision is received by the employee.
28. In this dispute, the letter of summary dismissal is dated August 18, 2014.
29. The claimant was in custody, between July 25, 2014 and August 25, 2014. The respondent acknowledged it was aware, that the claimant was in police custody at the time it issued the letter of summary dismissal. Ngoje conceded that the best place to look out for the claimant, to effect service of the letter of summary dismissal, would have been at the Police Station.
30. The address on the letter of summary dismissal, was not the address used, in the certificate of posting. The letter of summary dismissal is addressed to PO Box 13399-00400 Nairobi, while the certificate of posting shows addressee at PO Box number 4708-11.
31. These inconsistencies would lead any reasonable person, exercising his mind judiciously, to conclude that the letter of summary dismissal did not reach the claimant within the probationary period. The alternative date when summary dismissal became effective, is the date when the claimant alleged he was handed the letter of summary dismissal at the respondent's office, on November 7, 2019.
32. Consequently, section 42 of the *Employment Act* would not apply to the claimant, because the EDT went beyond the probationary period. The decisions invoked by the respondent on probationary contracts above, do not apply to this dispute, because termination did not occur within the probationary period. The claimant is entitled to claim that his contract was unfairly terminated.
33. Validity of reason. The claimant was in a supervisory role at the respondent bank. He accessed a customer account for an incredible 18 times on July 10, 2014, and 6 times on July 11, 2014. Kshs 900,000 disappeared from the unfortunate customer's account on July 10, 2014, while Kshs 3,400,000 was the subject of an attempted fraudulent withdrawal, on July 11, 2014. The claimant did not deny accessing the account at the time the crimes were committed, but alleged it was not 18 times that he gained access.
34. He further trumpets the outcome of the criminal case, where he was acquitted of the offences relating to the fraudulent transactions, as having absolved him of any wrongdoing.
35. The standard of proof for criminal cases, is not the same as the standard of proof in employment offences.



36. Section 43 of the *Employment Act* requires an Employer to prove the reason, or reasons justifying termination. The reason or reasons for termination are the matters that the employer at the time of termination, genuinely believed to exist and which caused the employer to terminate the services of the employee.
37. The claimant accessed a customer's account on multiple occasions. He did not tell the court why he did so. Even bank insiders are not allowed to access customer accounts freely, or just for fun. There must be a proper reason, related to account-holder's instructions, or perhaps a request from the bank management, to warrant access. Access on 18 occasions in a day, raises considerable doubt, on the innocence of the accessing bank Officer. The customer was not involved in the transactions and had not visited the bank, or authorised any transactions.
38. The respondent had genuine reason, or reasons to suspect that the claimant was involved in the fraudulent transaction. The respondent need not have proved, as the prosecution was expected to prove, that the claimant was involved in the offence beyond reasonable doubt. It was sufficient that the respondent satisfied the standard in sections 43 and 47[5] of the *Employment Act*, in establishing valid reason or reasons.
39. The court is satisfied that termination was fair in substance.
40. Procedure: As observed above, the claimant was arrested on July 25, 2014. There is no record of any disciplinary hearing after his arrest. He was not presented with any charges at the workplace. He was not asked to defend his position, in the mode contemplated by section 41 and 45 of the *Employment Act*. A decision to summarily dismiss him, was made without a hearing when the claimant was still in police custody. The letter communicating the decision, appears to have been sent to 'whom it may concern,' with incorrect address, while it would have been easier to find the claimant at the Police Station. Even when the claimant was out of custody, going on with the criminal proceedings, the respondent had the opportunity to engage him personally. The respondent is indicated as the complainant in the charge sheet. There was room to contact the claimant appropriately, and to even convene a disciplinary hearing against him. The respondent denied the claimant a fair hearing on the pretext that he had ceased to report as instructed, while on suspension. Dismissal was a hurried affair, without regard to the procedural guarantees and protections due to the claimant.
41. Termination was unfair on account of procedure.
42. Remedies: The claimant's prayer for general damages for pain, emotional suffering and trauma, pleaded at Kshs 3,000,000 has no factual foundation and is declined. If the claimant went through pain and trauma as a result of his involvement in an employment offence, he can only blame himself, not the respondent. The pain and trauma was self-inflicted.
43. He did not give evidence to show that he lost job opportunities. He did not state which jobs he applied for, and was denied the jobs, as a result of any adverse reference made by the respondent. He invokes decisions of the court where employability of the involved employees, is shown to have been injured. But he has not shown through evidence, that his employability was injured, and his stock in the labour market diminished, as a result of anything done unlawfully by the respondent.
44. The court has concluded that the respondent had valid reason or reasons, to justify termination. However, termination was marred with procedural missteps. The claimant no doubt played a sizeable role, in circumstances leading to termination of his employment. He had worked actively, for a short period of about 4 months. The court grants him ½ month's salary in compensation for unfair termination at Kshs 50,000.



45. The respondent had valid reason which warranted summary dismissal, and notice is not payable.
46. He pleads unpaid half-salary for the period of suspension, between September 2014 and November 7, 2019, when he learnt about his summary dismissal. The court has affirmed that the EDT was November 7, 2019, when the claimant was handed the letter of summary dismissal physically. The contract was alive, until the claimant was informed of its demise. It follows that he would be entitled to the withheld salary, because he was still contractually engaged to the respondent, over this period.
47. Although suspension was on July 25, 2014, he claims half salary in arrears from September 2014 to November 2019. He appears to have received his salary for August 2014. Kshs 50,000 over a period of 5 years, would yield a figure higher than the pleaded 1,350,000. The claimant is bound by his pleadings, and the court has no reason to award a higher amount is salary in arrears than that, which is pleaded. He is allowed the prayer for withheld salary, over the period he was technically still under suspension, at Kshs 1,350,000.
48. No order on the costs.
49. Interest allowed at court rates, from the date of judgment till payment is made in full.
- 50 It is ordered: -
- a. Termination was based on valid reason or reasons, but flawed procedure.
  - b. The respondent shall pay to the claimant equivalent of a half month's salary in compensation for unfair termination at Kshs 50,000; and salary arrears claimed at Kshs 1,350,000 – total Kshs 1,400,000.
  - c. No order on the costs.
  - d. Interest allowed at court rates, from the date of judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 30<sup>TH</sup> DAY OF NOVEMBER 2022.**

**JAMES RIKA**

**JUDGE**

