



**Miano v African Banking Corporation Limited (Cause 12 of 2021)  
[2022] KEELRC 13556 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13556 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE 12 OF 2021  
ON MAKAU, J  
DECEMBER 15, 2022**

**BETWEEN**

**CHRISTOPHER MUNYUA MIANO ..... CLAIMANT**

**AND**

**AFRICAN BANKING CORPORATION LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent in the year 2007 and rose through the ranks to become respondent's Operations Manager at Meru Branch. His salary was Kshs.126,000.00 per month and he was also entitled to 26 days leave per years. He was aggrieved by termination of his services on 20<sup>th</sup> December, 2019 and brought this suit on 8<sup>th</sup> March 2021 seeking the following reliefs;
  - a. A declaration that the Respondents purported termination of his contract of employment was unlawful, null and void;
  - b. a declaration that the Respondent has destroyed the claimants career though the purported letter of termination dated 20th December 2019;
  - c. a declaration that the Respondents have contravened the claimant's rights under articles 27, 29,37,40, 41 and 50 of the *Constitution* of Kenya, 2010;
  - d. compensation of salary for Kshs.126,000/- multiplied by 12 months totaling to Kshs.1,512,000/-
  - e. general damages;
  - f. exemplary damages;
  - g. The costs of this suit;



- h. Any other relied that this Honourable court may deem fit to grant.
2. The respondent denied liability vide a defence filed on 23rd April, 2021. It averred that the dismissal of the claimant was due to his gross misconduct, negligence, lack of integrity, deception, forgery and theft of funds. It further averred that the dismissal was done through a fair procedure because the claimant was afforded a chance to defend himself both in writing and orally before a committee. Consequently, the respondents saw no merits in the suit and prayed for the same to be dismissed with costs.
3. The parties agreed to dispense with the formal hearing and adopted the written witness statements and bundle of documents as evidence and filed written submissions.

### **Evidence**

4. The claimant's written statement is dated 26th February, 2021 and it reiterates the facts set out above, that he was employed by the respondent in 2007 on permanent and pensionable terms; that his salary was Kshs.126,000.00; that he served for 12 years without any record of indiscipline; and that he won awards for thwarting a fraud of Kshs.4 million and Kshs.5.2 million which targeted the bank's customers.
5. He further stated that he was suspended by the letter dated 14th March 2019 for 14 days to facilitate investigations into the matter herein. On 30th March 2019, Jonah Gichuha wrote to him a personal apology dissociating him from the loss of the Kshs.210,000.00 but after sharing the same with the employer, no consideration was taken on it.
6. Instead, he was served with a show cause letter dated 20th May 2019 and attended a disciplinary hearing on 4th June 2019. On 21st July 2019 the minutes of the disciplinary hearing were sent to him and he wrote email to Mr.Julius Muhia about some of the matter raised in the meeting but not captured in the minutes.
7. Again no response was made and instead a second show cause letter dated 28th August 2019 was sent to him and he only received it on 25th September 2019. He sought leave to write a late response to the show cause letter and it was grudgingly given and he did so on 5<sup>th</sup> October 2019. On 13<sup>th</sup> November 2019 he attended the second disciplinary hearing to answer the allegations contained in the show cause letter dated 28<sup>th</sup> August 2019.
8. When he received the written minutes, they contained false information and omission of important information discussed during the hearing. Therefore he declined to sign and raised the errors with Mr.Muhia again. He denied any wrong doing and maintained that the respondent did not tender any evidence at the disciplinary hearing to show that he falsified any document whatsoever.
9. He contended that the allegation was impractical since according to operations of the bank, once a transaction is initiated, it is final and no one can change the date, not even the system administrator. He also stated that the customer at the centre of the fraud was not his cousin Mr.Charles Mathenge and maintained that there was CCTV records for investigations.
10. He stated that transactions at the bank are always verified and that once the cashier initiates, processes and posts a transaction, no one can modify, delete or reset the same. He contended that KYC details were collected as per the taxing voucher before printing and that was explained to the disciplinary committee and the HOO was to confirm that phenomenon from finacle. Finally he contended that strong room keys were handed over on the same day and evidence is the keys register.



11. He reiterated that the above matters were raised during the hearing but the committee did not take them into consideration. Therefore he maintained that the termination was unlawful and he is entitled to the damages sought in the suit because the allegations against him were false and he was not accorded the disciplinary process set out under respondent's HR Policy Chapter 11 section 14.2, rules of natural justice and the constitution.
12. The respondent relied on the statement written by its Head of Human Resources Ms. Lucy Wariara dated 22<sup>nd</sup> April 2022. The witness admitted that the claimant was employed by the respondent in 2007 and rose through the ranks to become Branch Operations Manager, Meru Branch. She highlighted the key roles of claimant as;
  - a. Processing of all counter transactions, record keeping and ensuring that physical cash held at any given time balances with the general ledger account.
  - b. Cross sell Banks products.
  - c. Maintain a healthy business environment through strict compliance with money laundering prevention guidelines.
13. She further stated that the claimant was dismissed for his own gross misconduct, negligence, lack of integrity, deception, forgery and theft of funds. She stated that on 22<sup>nd</sup> February 2019, Mr. Jonah Njoroge was the only teller in Meru Branch and he reported to the claimant that he had a short fall of USD 2100 (an equivalent of Kshs.210,000.00). As a matter of procedure, the claimant ought to have reported immediately to the Head of Operations of the Bank, post the same to the Bank's Finacle system and document the difference in the teller balancing form on the date of the transaction.
14. However the claimant failed to report or post the said short fall of USD 2100 immediately as required by the Bank's cash Handling Procedures until 25<sup>th</sup> February 2019 when it was reported and posted as if it had occurred on that day. The claimant and the teller further stated that the shortfall resulted from a walk-in customer, who came to exchange USD 2100 for Kenya shillings and the teller allegedly paid the customer the Kshs.210,000.00 together with the USD 2100 that had he come to exchange.
15. The witness stated further that, upon investigations by the Bank's security team, it was established that the breakdown of USD cash at hand was not stated on the teller balancing form to demonstrate the discrepancy in the difference. The USD ledger account had a closing balance of USD 2,200 on 22<sup>nd</sup> February 2019, while the opening balance was USD 100 meaning that the amount received was USD 2100. Therefore according to the witness, the cash balance form for the day was expected to show a closing balance of USD 100 and short fall of USD 2100. However that was not the case meaning that the cash short fall was not documented as per the Bank's cash Handling procedures.
16. The witness further stated that the investigation team discovered that the claimant had scanned copy of the transaction slip which he alleged that it had been stolen. It was also discovered that the claimant was in contact with the dollar customer Mr. Charles Mathenge and that the claimant had instructed the teller not to take details/information of customer as mandatorily required and also to give the customer both the dollars and the exchange amount.
17. The witness stated that on 8<sup>th</sup> March 2019, the claimant was called to give his side of the story but he walked out and in the following day he alleged that he was sick but failed to produce material evidence. During the disciplinary hearing, he confessed that the reason he walked out of the meeting on 8<sup>th</sup> March was because his temper went high. She contended that the claimant was the architect of the whole fraud and collusion with the teller, failed to declare the cash shortfall with intention to defraud the Bank.



18. The witness stated that the investigations by the security team established that the claimant colluded with the teller Mr. Jonah Njoroge to defraud the bank as a ploy to cover up previous cash shortage which was not reported as per the bank's policy and procedures; that he had done transaction verification on Finacle System without a transaction slip; that he endorsed the transaction slip on 25<sup>th</sup> February 2019 for a transaction done on 22<sup>nd</sup> February 2019 and which slip did not have the details and/or the information of the subject customer; that he gave false and contradicting information; that he absconded duty and frustrated the investigation process; and that he violated the HR policy on staff Code of Ethics on financial embarrassment/ misconduct by introducing a junior staff to shylock business and borrowing by staff from customers or related stakeholders.
19. She further stated that the claimant was taken through disciplinary proceedings by being given sufficient opportunity to present his defence both in writing and verbally. She pointed out that the claimant was served with show cause notice on 20<sup>th</sup> May 2019 and he responded on 23<sup>rd</sup> May 2019 via email. He was then accorded a hearing on the allegations contained in the show cause letter on 4<sup>th</sup> June 2019.
20. On 28<sup>th</sup> August 2019, another show cause letter was issued to the claimant because of new issues that arose during the disciplinary hearing on 4<sup>th</sup> June 2019. After some delay, the claimant responded on 4<sup>th</sup> November and a further hearing was conducted on 18<sup>th</sup> November 2019.
21. The witness maintained that the reason for which termination was being considered was explained to the claimant, he was given the opportunity to defend himself and that his explanation was considered before his dismissal on 20<sup>th</sup> November 2019. The claimant also filed an appeal but after consideration, the appeal was dismissed and the dismissal was upheld. She prayed for the suit to be dismissed with costs.

### Submissions

22. The claimant submitted that his dismissal was unfair and unlawful because the serious allegations levelled against him were never investigated and charges pressed against him in a court of law. He maintained that the respondent has not proved that the termination was grounded on valid and fair reasons as required by section 45 (2) of the *Employment Act*.
23. As regards procedure, the claimant submitted that the procedure set out under section 41 of the *Employment Act* and HR Policy Chapter 11 Section 14.2 ( V,XII) on Staff Code of Ethics was not followed. He contended that the disciplinary process he was subjected to contravened the said policy, rules for natural justice and Article 50 of the Constitution on fair trial.
24. For emphasis, he relied on several judicial precedent including *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd* (2014) eKLR and *Walter Ogal Onuro v Teachers Service Commission* (2013) eKLR where the court underscored that before termination of employment contract, the employer must have a valid and fair reason to justify the decision and, a fair procedure must be followed by according the employee fair hearing before the dismissal.
25. The claimant urged the court to find that his dismissal was unfair and award him damages.
26. The respondent, on the other hand submitted that the claimant had the burden of proving unfair termination as per section 47(5) of the *Employment Act*. It was submitted that the claimant has failed to adduce evidence to prove his allegation that he was dismissed unfairly.
27. The respondent further submitted that it has adduced evidence to prove its claim that it paid the claimant all his dues upon termination his employment on account of gross misconduct, fraud and



theft. It maintained that the reasons for the termination were valid as demonstrated by the evidence on record; and that a fair procedure was followed before the dismissal.

28. In view of the foregoing matters, the respondent submitted that the claimant is not entitled to the reliefs sought in the suit and prayed for the suit to be dismissed with costs. For emphasis it relied on *Amos Kitavi Kivite v Kenya Revenue Authority* (2020) eKLR where the court declined to award reinstatement or compensatory damages because the claimant failed to discharge his burden of proof of unfair termination under section 47(5) of the *Employment Act*.

### **Analysis and Determination**

29. There is no dispute that the claimant was employed by the respondent and that he was dismissed on 20<sup>th</sup> December, 2019 for alleged gross misconduct. The issues for determination are;
- a. Whether the termination was grounded on a valid and fair reason.
  - b. Whether fair procedure was followed.
  - c. Whether the reliefs sought are warranted.

### **Reasons for the dismissal**

30. The reason for dismissal is cited in the termination letter dated 20<sup>th</sup> November 2019 as follows;

“African Banking Corporation Ltd

Our Ref: ABC/HO/HR/961/2019

Date: 20<sup>th</sup> December 2019

Christopher Munyua Miano

Operations Manager

African Banking Corporation Ltd

Meru Branch

Dear Mr.Miano,

REF: Termination Letter

Reference is made to the show cause letter dated 28<sup>th</sup> August 2019 Ref: ABC/HO/HR/705/2019; your response to the show cause letter dated 4<sup>th</sup> November 2019; and to the disciplinary hearing held on 18<sup>th</sup> November 2019 at the ABC Bank House, Mezzanne Floor Boardroom following the below charges:

- a. Verifying the transaction (DC 1306) on Finacle core banking system without KYC documents and the transaction slip from the teller.
- b. Signing a transaction slip printed on 25<sup>th</sup> February 2019 for a transaction that happened on 22<sup>nd</sup> February 2019 without raising an alarm forwarded the same scanned copy to security team.
- c. On 8<sup>th</sup> March 2019 you walked out of an investigation by the security team and left without handing over the vault and car keys which you left on a table and switched off your cell phone.



- d. Introducing a subordinate staff to shylock back in the year 2017 to borrow money to meet a financial need.

After analyzing your response to the aforementioned show cause letter, your submissions during the disciplinary hearing held on 18<sup>th</sup> November 2019 as well as your email of 26<sup>th</sup> March 2019 which you sent to the Head of Operations below were your admission to the fact that;

1. You did not conduct due diligence while authorizing forex transaction in the branch.
2. You introduced a subordinate staff to a shylock in the year 2017 to meet a financial need.

In the light of the foregoing, the bank has reached a decision that your acts in respect to the above charges contravene The Human Resource Policy Chapter 14 (Staff Code of Conduct & Ethics). Section 14.2 subsection IV (Bank standards), Subsection v (Integrity) and subsection XVIII (Financial Embarrassment/Misconduct).

Consequently, The Bank has opted to terminate your employment in accordance with your letter of appointment and The services terms. This letter therefore serves as a 30 days notice of termination of your employment effective 20<sup>th</sup> December 2019.

You are expected to immediately handover any Bank property which you have in your possession including the Bank's identification card and the medical cards for yourself and your family members to the Human Resource Department and clear with the Bank. Your final dues including salary in lieu of notice will be credited into your account with the Bank less statutory deductions that may be lawfully effected and any liability you may have with the Bank. Your pension benefits will be processed by the provider and made accessible to you upon your clearance from the Bank.

Should you wish to appeal this decision, you are advised to make a formal appeal application through the GCEO's office no later than seven (7) days from the date of receipt of this letter.

Yours faithfully

Lucy Wariara

Head Of Human Resource

Cc: Head of Operations

Branch Manager-Meru Bracnh

Group Chief Executive Officer

County Labour Officer

Acknowledgment by employee

I.....thereby acknowledge that I have received and understood the contents of the letter dated 20<sup>th</sup> December 2019 Ref: ABC/HO/HR/961/2019.

Signature..... Date.....

31. The letter states that the claimant admitted vide email dated 26.3.2019 and during the disciplinary hearing on 18<sup>th</sup> November, 2019 he did not conduct due diligence while authorizing forex transaction



in the branch, and that he introduced a junior staff to a shylock to a shylock in the year 2017 to meet a financial need. The letter further stated that the said actions by the claimant in the said charges contravened the HR Policy Chapter 14 (Staff Code of Conduct & Ethics), Section 14.2 subsection IV (Bank Standards). Subsection v (Integrity) and subsection XVIII (Financial Embarrassment/Misconduct).

32. Although the letter alludes that the claimant admitted the offence vide his letter dated 25<sup>th</sup> February 2019, my observation is that he denied any wrong doing and maintained that he reported the shortage to the HOD on 22<sup>nd</sup> February 2019 and on 25<sup>th</sup> February 2019 helped the teller in the unsuccessful attempt of tracing the fraudulent customer from the road construction works in Meru Town.
33. I have also not seen any admissions in the claimant's email dated 23<sup>rd</sup> May 2019 and the letter dated 7<sup>th</sup> March 2019. By his email dated 4<sup>th</sup> November 2019 he denied that allegation that he introduced a junior staff to shylock. However I find the statement by Mr. Jonah Njoroge (the teller) dated 8<sup>th</sup> March 2019 quite damaging the claimant's case in relation to this integrity.
34. The statement is duplicated herein

“Concerning the matter in question I wish to state that around mid January 2019, I experienced a cash shortage from my till (teller no.1) of Kshs.180,000.00. I escalated the matter to my supervisor Christopher Miano about the incident. Miano informed me that we needed to confirm from my day's transactions if the shortage could be traced before escalation to Head of Operation.

I checked all my vouchers, Finance, and physical cash but could not retrieve the shortage. I requested Christopher to report the shortage but he said that his image as my superior would be tainted. Miano went further and informed me that we needed to get cash from somewhere and clear the shortage without bringing the matter to attention of our superiors at Head Office.

Christopher then in his own way volunteered to help me get cash Kshs.180,000.00. After about two weeks, Christopher got to a shylock and borrowed Kshs.180,000.00 at a repayment rate of 15% interest of the principal amount within 14 days. Miano then informed me that I was the one to recover the money to refund the shylock within the 14 days's period. The amount was totaling to about Kshs.210,000.00. The period elapsed very fast and my efforts to get money to repay the shylock were futile. Miano was mounting pressure for me to get the money as he would face dire consequences from the shylock. Miano had given a blank post dated cheque as a security to the shylock and therefore he feared that if the shylock owner deposited the cheque then it would bounce with reason insufficient funds in his account which is against the banks policy.

20<sup>th</sup> February 2019, was the deadline for the shylock to get his dues finally, I informed Miano that I could not get the cash and had no other plans of getting the cash. Miano quarreled me for my inefficiency despite all his efforts to help me in settling my problems. On 22<sup>nd</sup> February 2019, Miano came to me that he was sending a 'customer' unknown to me for Dollar conversion. He ordered that once the man presents the dollars, I change for him at rate of 100.0. He further cautioned me that the 'customer' KYC details would not tally his original identity. Either way I was to proceed with the transaction. Miano specifically ordered me that once the transaction was done, I was to give the 'customer' both the ksh and the dollar currencies. I never queried Miano's orders but took it strictly as advised.



On the material day around 1400 hours, an adult male came to my counter and requested for Dollars Ksh conversion. I was the only male cashier that day and therefore the customer came straight to my counter. I picked the dollar notes and with my hands I confirmed they were totaling to USD 2100. I never ran them on the note counter but proceeded to confirm from the forex board the day's exchange rate which was around 101.2. Miano had earlier ordered me to use a conversion rate of 100.0. I went ahead to my till got ksh 210,000.00 and together with the USD 2100 packaged the two currencies in one envelope. I gave the man all the cash and he left the branch. I did not generate the receipt as it was above my teller limit. At around this time Miano had stepped out of the branch probably to intercept the funds from the man he had sent and further settle shylock's debt. Later Miano authorized the transaction on Finacle system and warned me not to tell anyone about the whole matter which I did. During my end of day, I informed Miano that I had a cash shortage of Kshs.210,000.00 which he was fully aware. He informed me that I had no choice but to declare a shortage of USD 2100.00 in my till which I did. Through an email, Miano reported the alleged cash shortage to Head of Operations.

On 25<sup>th</sup> February 2019, Security department asked for the receipt and KYC documents for the UDS 2100 conversion transaction which from our end was not available. Miano gave me a fictitious ID Number and a Mobile number purporting to belong to the customer who did the transaction so that I input before generating a receipt for the USD 2100 transaction. The ID Number was 20245350 and the mobile number 0728 104295 without giving the names of the person. I did input the mobile and ID Nos, printed the receipt and Miano told me to sign since I was the person who initiated the transaction which I did. The matter was taken over by security department and Head of Operations on 26<sup>th</sup> February 2019, security department asked me to do a statement on the incidence. I asked Miano to advise me on the way forward and he wrote a statement on my behalf and forwarded to security team since I was not accessing any PC computer. Later security team replied that the statement was not exhaustive and I needed to shed more light on the whole incidence of which Miano did a second statement on my behalf. In the statement, Miano gave a fictitious elaboration of events which I signed as true to my knowledge.

On 28<sup>th</sup> February 2019, the Head of Operations through my supervisor Miano ordered me to leave the branch to go and look for the cash so as to step up the recovery process. On 6<sup>th</sup> March 2019, I reported back to the branch but I had not gotten any cash. On 7<sup>th</sup> March, 2019 I managed to get Kshs.50,000.00 and I gave the amount to my supervisor Miano who deposited to the cash recovered ledger. Later security team arrived at the branch and interviewed Miano in the afternoon. On 8<sup>th</sup> March 2019, I was called to the branch manager's office and security team present where I was interviewed and I gave a confession. Later I recorded a statement on the same.

That is all I wish to state.

Sign.....

Names: Jonah Gichuha Njoroge

ID No.27852314

35. The above statement gives a picture of a naïve or gullible teller who could be easily manipulated. I would say that he was incompetent and a risk hand in the serious business of banking. In my opinion he was and still is not fit to serve as a banker.



36. On the flip side, I wish to observe that the statement by the teller shows a dark side of the claimant as a banker and more so as a supervisor. One would expect that the operations manager maintains hawk eyes on every coin in the bank while ensuring that there is strict record keeping and reporting. He should be undeterred in blowing the whistle whenever there is short falls in cash while in the custody of tellers.
37. In this case however and although the claimant alleges that he reported the short fall to the HOO via email on 22<sup>nd</sup> February 2019, no such email was produced as evidence herein. Consequently the court finds that the allegation that the claimant did not report the short fall on 22<sup>nd</sup> February 2019 has not been rebutted.
38. The claimant has not given any justifiable reason as to why Mr.Jonah Njoroge (the teller) would write the said length statement accusing him of dishonest and lack of integrity. Having considered the statement by Mr.Jonah Njoroge, the minutes of the disciplinary hearing, and the investigations Report dated 15<sup>th</sup> July 2019, I find that the respondent has proved on a balance of probability that the claimant grossly misconducted himself by failing to comply with the respondent's banking policy and procedures with respect to the fraudulent transaction of USD 2100 (Kshs.210,000.00) on 22<sup>nd</sup> February 2019.
39. The weight of the evidence on record point to gross misconduct, dishonest and lack of integrity on the part of the claimant which is not compatible with banking business. Consequently the court is satisfied that the employer has discharged the burden of proof under Section 43 and 45(2) of the [Employment Act](#) by demonstrating by evidence that the termination of the claimant's services was justified by valid and fair reasons.

#### **Procedure followed**

40. Section 41 of the [Employment Act](#) provides that;
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
41. In this case there is no dispute that the matter herein was investigated by the security team of the Bank and the claimant was interrogated. Thereafter the claimant was served with show cause letter and he responded in writing. There is also evidence that the claimant was accorded disciplinary hearing before a committee where he gave his defence. Thereafter his representations were considered before a decision to separate was reached. The decision was communicated vide the letter dated 20<sup>th</sup> November 2019 which gave one month termination notice.
42. The claimant was also given the right of appeal which he exercised. The appeal was considered but the separation was upheld vide the letter dated 21<sup>st</sup> February 2020. Having considered the evidence before me, I am satisfied that the termination of the claimant's services was done in accordance with a fair



procedure because he was given a hearing on the allegations levelled against him and he was also served with a termination notice of one month as required under clause 6 of his letter of Appointment dated 28<sup>th</sup> April, 2011.

### **Reliefs**

43. In View of the finding that the respondent has proved that there was valid reason for terminating claimant's employment, and that a fair procedure was followed, I decline to make declaration that the termination was unlawful, null and void.
44. For the same reasons, I also decline to make declaration that the respondent has destroyed the claimant's career and/or violated his rights under article 27, 29, 37, 40, 41 and 50 of the Constitution of Kenya, 2010. Consequently the claims for compensation, general damages and exemplary damages are declined.
45. In conclusion the suit is dismissed for lack of merit with cost to the respondent.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022.**

**ONESMUS N. MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

Onesmus N. Makau

Judge

