



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 833 OF 2019**

**DOUGLAS WAKIIHURI WANJOHI.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 834 OF 2019**

**JOSEPH GICHEHA WANYENJI.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claims were consolidated with ELRC Cause No. 833 of 2019 being the lead file. The 2 Claimants sued their former employer Barclays Bank of Kenya for their alleged unlawful dismissal. Mr. Douglas Wakiihuri Wanjohi (hereafter 1<sup>st</sup> Claimant) and Joseph Gicheha Wanyenji (hereafter 2<sup>nd</sup> Claimant) instituted separate suits in December 2019 against the Respondent, Barclays Bank of Kenya and later filed Amended Memoranda of Claim dated 10<sup>th</sup> February 2020. The Claimants aver that they joined the Respondent on 29<sup>th</sup> August 2006 and 27<sup>th</sup> November 1990 respectively. The 1<sup>st</sup> Claimant averred that he was offered a new role of Supervisor Document Preparation, Grade BA3 vide a contract of employment dated 24<sup>th</sup> April 2015, with a base salary of Kshs. 1,372,002.50 per annum effectively from 1<sup>st</sup> May 2015. He averred that he had previously worked in the acting Supervisor position from 24<sup>th</sup> July 2014 to 14<sup>th</sup> August 2014 which was further extended from 22<sup>nd</sup> September 2014 to 2<sup>nd</sup> October 2014. The 2<sup>nd</sup> Claimant on the other hand averred that after working in various branches of the Respondent bank, he later joined VPC Processing Department in June 2018 and started training on VPC CAS desk in February 2019 and that he had worked on the said desk for about 2 months by the time of the alleged incidence that led to unfair termination of his employment.

2. The Claimants aver that the Respondent unreasonably suspended them from work for 30 days on the unfounded allegation that they had irregularly paid fraudulent cheques from a joint customer account on various dates between 11<sup>th</sup> April 2019 and 21<sup>st</sup> May 2019. They averred that they were accused of being negligent in processing the stated cheques by failing to conduct proper checks and verification thereby failing to notice that the signatures on the cheque differed with the ones maintained in the bank system. The Claimants averred that the Respondent extended their suspension for a period of 60 more days and invited them on 1<sup>st</sup> July 2019 and 24<sup>th</sup> July 2019 respectively to appear before a Disciplinary Hearing Committee on 29<sup>th</sup> July 2019 to respond to the allegations made against them in their show cause letters. The 2<sup>nd</sup> Claimant averred that he duly responded to his show cause letter to the effect that he had confirmed the cheque was okay in terms of the Payee's name, amount and figures indicated, the signature and mandate and there being a receiving bank stamp at the back of the cheque. The 2<sup>nd</sup> Claimant averred that he further referred the cheque for secondary check (call-back) which was made by Tabitha Ochiel who confirmed the cheque was okay.

3. The Claimants further aver that during the disciplinary proceedings, no witnesses and/or evidence was led by the Respondent against them in support of the purported allegation and that the Respondent failed to supply them with any evidence. They contend that the decision to terminate their employment was predetermined and constituted an unfair labour practice and that the Respondent basing the termination on the proceedings of their disciplinary hearing was wrongful, unlawful and unfair. They further aver that there existed no valid reason to justify their termination of employment and that their appeals against the termination decision were unsuccessful. The Claimants claim a total of Kshs. 2,691,713.00 and Kshs. 6,775,467.00 respectively as against the Respondent being: severance pay at 15 days for each completed year; special damages for their entitled union money which the Respondent failed to pay them; and 12 months' salary compensation for unfair termination. The Claimants further pray for judgment against the Respondent for: a declaration that the Respondent's decision to terminate their Employment Contract was wrongful, unfair and unlawful; general damages for breach of employment contract; claims owing to them as enumerated in their Claims; and any other relief this Honourable Court may deem fit and just to award.

4. The Claimants stated in each of their Witness Statement that contrary to the express undertaking by the Respondent that they would be allowed to be represented by a fellow employee of their choice, they were not allowed to exercise that right at the hearing. That it is clear from the minutes of the proceedings and the subsequent letters of termination that the purported hearing was a smokescreen being used to justify and legalize the malicious and unlawful termination of their employment contracts. They assert that their appeal was heard on 21<sup>st</sup> August 2019 but was unsuccessful.

5. The Respondent filed its Memorandum of Defence dated 7<sup>th</sup> December 2020 averring that the Claimants were earning a consolidated salary of Kshs. 145,498/- and Kshs. 255,000/- respectively at the time of termination of his employment. It averred that the Claimants were career bankers conversant with the Respondent's policies, particularly those of authenticating/verifying/fating cheques before payment but were nevertheless negligent in authenticating cheques and which led to the Respondent incurring a loss totalling to Kshs. 4,775,000/- (by 1<sup>st</sup> Claimant) and Kshs. 450,000/- (by 2<sup>nd</sup> Claimant). That the Claimants were given an opportunity to explain the unprocedural approval of the fraudulent cheques and further defend the charges at a disciplinary hearing but their explanations were found wanting leading to termination of their employment. It averred that on or about 21<sup>st</sup> May 2019 a whistle blower informed it of the said fraud of cheques which had successfully been processed by an account holder of the Respondent and which were fraudulent because the drawer thereof was deceased. That its investigations revealed that 20 counterfeit cheques drawn by Dr. Wilson M. Muchiri (deceased) worth Kshs. 18.541 Million had successfully passed for payment to 2 beneficiaries between 11<sup>th</sup> April 2019 and 20<sup>th</sup> May 2019. That 3 out of the 20 counterfeit cheques were flagged because they were not yet in the Respondent's system since the co-owner of the joint account had a pending application for a new cheque book at its Hurlingham Branch when the first 3 cheques were presented for payment. That such flagging would require superior verification and the Claimants were thus expected to scrutinize and verify that any previous cheques issued in the same series as the one presented for payment were above board. The Respondent averred that the said investigations further revealed that of the counterfeit cheques, the Claimants had authenticated and undertaken 'callback' on 5 cheques and 1 cheque respectively and approved them for payment without following company policy and without exercising due diligence. The Respondent averred that the investigators thus recommended that disciplinary action be taken against all employees who had been adversely mentioned in the investigation, including those who had fated the remaining 14 counterfeit cheques. The Respondent further averred that the Claimants in response to their show cause letters admitted they had fated 5 cheques and 1 cheque respectively before approving the same for payment. That the 1<sup>st</sup> Claimant informed the panellists in his disciplinary hearing of how his work was overwhelming and he found it difficult to verify the signatures of every cheque that he was required to fate, verify and authenticate. That the 2<sup>nd</sup> Claimant on the other hand admitted to processing a cheque that was not in the Respondent's system during his disciplinary hearing. That the disciplinary panel established that the Claimants were grossly negligent in the performance of their duties and recommended they be terminated from the Respondent's employment on the said grounds. The Respondent averred that the Claimants were also invited to an appeal hearing upon filing their appeal but the appeal panel found no merit in their appeal and upheld the termination of employment. It averred that the Claimants were paid their terminal benefits. The Respondent averred that the Claimants are consequently not entitled to compensation because the termination was both substantially and procedurally fair. The Respondent averred that the Claimants are not entitled to general damages because the same is not supported by any evidence and further, general damages are not payable in a claim for unfair termination. That it does not comprehend the prayer for 'special damages for the entitled union amount' which is further not supported by any evidence and that severance pay is inapplicable in this case because the Claimants were not declared redundant. The Respondent prays that this Court finds that Claimants' termination was fair and to dismiss the suit with costs to the Respondent. The Respondent also filed a Witness Statement made on 3<sup>rd</sup> February 2021 by its Employee Relations and Wellness Manager, Vaslas Odhiambo whose statement reiterated the averments made in the Respondent's Defence.

6. The Claimants filed a Reply to the Respondent's Defence wherein they aver that they did not breach any known Respondent's policy as alleged and that they followed the laid down procedure to the letter. They submitted that they did not approve any cheque for payment but referred them to further checks to their supervisors and call back as stipulated in the procedure manual. They pray that the Memorandum of Defence be struck out and judgment be entered as prayed in their Amended Claims. The Claimants submit that their dismissal was done without following a fair procedure and was predetermined. That author of the investigation report did not attend the disciplinary hearings and that they were thus not given the opportunity to challenge any evidence against them. They submit that they did not choose the representatives to accompany them but the Respondent indicated which representative they would call for the hearing. They cited the case of **Patrick K. Maina v Tusker Mattresses Limited [2018] eKLR** where the Court held that:

*"Section 41 of the Act are mandatory as set out above. The employee faced with termination of employment must be invited to such a disciplinary hearing and present must be an employee of person of his choice. This is a right for the employee to enjoy. The witness to be called should be at the discretion of the employee. This right is critical to an employee. Such is to guarantee the employee the benefit of the law at the shop floor."*

7. The Claimants further submit that Section 43 of the Employment Act places the burden of proving the reasons for terminating an employee's contract of service on an employer in any legal proceedings challenging the termination and that under Section 45(2) of the Act, termination of employee's employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the operational requirements of the employer. Further, that Section 43(2) of the Act provides that the reasons for termination are those matters which the employer genuinely believed to exist at the time when the termination of employment occurred. They submitted that the evidence they tendered point out to an act of prudence because they took every step in the book to verify the cheques. They cited the case of **Grace Gacheri Muriithi v Kenya Literature Bureau [2012] eKLR** where the Court held that:

*".....the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further, the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."*

8. The Claimants submitted that in view of the above, the Respondent was fully aware of the fraud which was penetrating in their system imposed by the imposters but failed to rectify the same. They submitted that the reasons cited for dismissing them were invalid and the Respondent has failed to justify them and they rely on the Court of Appeal case of **Pius Machafu Isindu v Lavington Security Guards Ltd [2017] eKLR** which affirmed that the employer must prove the reasons for termination/dismissal per Section 43 and further prove that the reasons are valid and fair. The Claimants submitted that the evidence before the Court is that before the cheques reach VPC desks, they have been proved to be genuine and that if they are not genuine, they go to different queue. That under clause 4.2.4 of the Procedure Manual Technical Queue at page 35 of the Respondent's list of documents required the Claimants to critically verify the cheques. The Claimants submitted that both their and the Respondent's evidence that calls not picked even if made over 50 times are not recorded for any reference. The Claimants submitted that such lapse in the Respondent banking system could not be visited adversely upon the Claimants and that the Respondent must bear the responsibility alone without terminating the Claimants' services on those grounds. They further submitted that the Respondent witness did not know anything about the technical verification department nor was he an expertise on the technical issues and that he was therefore an incompetent witness and that the only relevant witness for this case should have been an IT witness who is well conversant with the procedures for technical verification of a cheque and who would have enlightened the Court on the flex-cube system that was in use then and how they would have narrowed the negligence to the Claimants and no one else. They submitted in their Further Submissions that the fact that the investigation findings were not shared with them is indicated in the minutes of the hearing. The Claimants urge this Court to find that the dismissal of the Claimants was unfair and unjustified and they be granted reliefs as sought in the Amended Memorandum of Claim dated 10<sup>th</sup> February 2020. The Claimants further urged the Court to dismiss the Respondent's Defence since it has not put any documentary evidence to support the Respondent's averments.

9. The Respondent submitted that the termination of the Claimants were conducted in accordance with fair procedure as per the requirements of Section 45(2)(c) of the Employment Act. The Respondent submitted that it further complied with the requirements of Section 41 of the Employment Act in notifying the Claimants in a language they understood the reasons why the Respondent was contemplating terminating their employment, their entitlement to be represented during the disciplinary hearing and giving the Claimants a chance to be heard. The Respondent submitted that Courts have time and again emphasized on the sensitive nature of an employment relationship between banks and their employees which is based on trust and utmost good faith. That where there is breach of trust by bank employees as was the case herein, the employer has every right to terminate the employment relationship. The Respondent relies on the Court of Appeal case of **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K) [2017] eKLR** in support of this submission. It further cited the case of **Daniel Omache Qgato v Barclays Bank of Kenya Ltd** (unreported), where Rika J. held that trust and confidence are the core values in the banking industry and are the cornerstone of the relationship between Banks and their Employees. The Respondent submitted that the Claimants continue to enjoy repayment of outstanding loans at staff rates following an order of this Honourable Court to that effect and prays that this suit which lacks merit should be dismissed with costs to the Respondent. It further submitted that the interest rates applicable on the Claimants outstanding loans should revert to commercial rates from the date he was terminated until payment in full.

10. The Claimants were terminated for failing to stop the illegal payment out of a deceased client's account. The cheque that they cleared for payment are stated to have been issued after the demise of the banks customer. The Claimants are alleged to have failed to effect call backs. The Claimants were in positions of trust and as they were bound to ascertain the veracity of a cheque before payment there was failure on their part that entitled the Respondent to terminate their services. They were given a hearing and even had their appeals considered and nothing in the proceedings even remotely suggests that they were not accorded the safeguards under Section 41 of the Employment Act. As there was cause to terminate in terms of Section 43, the dismissal was fair and for a valid reason in terms of Section 45 of the Employment Act. The suits by the Claimants are devoid of merit and are accordingly dismissed. The Respondent is however not entitled to charge commercial rates of interest for the period preceding judgment and can only do so post judgment since the Claimants had a valid Court order deferring charging of commercial rates of interest. Each party will however bear their own costs for the suits filed.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2021**

**NZIOKI WA MAKAU**

**JUDGE**