



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC NO. 480 OF 2016**

**DAVID MWANGI KAGUO.....CLAIMANT**

**VERSUS**

**EQUITY BANK KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent for unfair termination, payment for salary arrears, House allowance, underpayment and outstanding leave pay.

2. It is stated that, the claimant was employed by the respondent on or around 1<sup>st</sup> February, 2006 and has risen up the ranks to the position of Relations Manager as at 18<sup>th</sup> March, 2014 and was based in Kabarnet branch throughout his employment. He stated that sometimes in October, 2015 the Branch Manager, One Joel Sawe was transferred from the branch and he was directed to take up the role of the Branch manager, since he was the senior most left in the branch, till a substantive Branch manager is sourced.

3. He stated that sometimes on 22<sup>nd</sup> March, 2016 he was summoned by the General Manager Operations one Mr. Miringu to the head office in Nairobi on 23<sup>rd</sup> March, 2016. These summons was also communicated to him by the Mr. Joram Ng'an'ga the General Manager, Rift valley Region. That he heeded the summons and went to Nairobi where he was interrogated for 2 hours by the security department, regarding alleged irregular loans advanced at the Branch.

4. He stated that after the Interrogations, he received a letter from the Human resource suspending him to pave way for investigations on the irregular loans advanced. Subsequently, on 16<sup>th</sup> September, 2016 about 6 months later, while still on suspension, he was served with a show cause letter why disciplinary action should not be taken against him which he responded to wit;

- i. He indicated that the loan approval was sanctioned by the credit committees and Branch credit manager and not himself
- ii. That the loans in question are maintained by the relevant credit officers and approved by the credit manager in line with the banks policies and procedures.
- iii. The loan in question were advanced regularly to the customers' accounts as per the advice from the credit committee, primarily for business growth.
- iv. The loan facility approvals were done independently and that he did not approve any facility that he has an interest at any instance.

5. He stated that his role in the process of granting of loans to customers is to countersign the letters of offer and disburse the funds to the said customers' accounts. therefore, he contends that if there was any irregularity in the approval of the said loan the first persons who ought to have been held accountable are the credit officers who were never subjected to any disciplinary process.

6. The claimant states that on 3<sup>rd</sup> October, 2016 he was invited for disciplinary hearing scheduled for 5<sup>th</sup> October, 2016 which he attended, however during hearing he was not shown the details of the alleged irregular loans advances and there was no person representing the credit department. He stated that at the end of the meeting he countersigned the minutes which documents were never served upon him including an audio recording of the disciplinary hearing.

7. That on 18<sup>th</sup> October, 2016, he received a letter of summary dismissal which was based on purported approval of overdraft to unqualified customers with an outstanding balance of Kshs. 1,073,244.27 which the claimant was required to pay as part of his clearing process. he stated that the initial figure in the show cause letter was of Kshs. 2,926,556.41 which clearly indicated that customers were duly servicing their loans.

8. That he has been unable to clear with the respondent for the reason that the clearance was pegged on the clearance of the alleged irregular overdrafts and that at the time of termination he was earning basic salary of Kshs. 86,000/-.

9. Aggrieved by the termination of his employment, he appealed the dismissal by his letter of Appeal dated 27<sup>th</sup> October, 2016 which the Respondent declined by a letter of 1<sup>st</sup> November, 2016.

10. Dissatisfied with the reasons of the termination, the claimant filed this Claim praying for judgment against the respondent for;

**a) A declaration that the Claimant termination was unfair.**

**b) Salary for the months of March, April, May, June, July, August, September and October 2016 amounting to Kshs. 688,000/-.**

**c) 12 months' salary being damages for unfair termination Kshs. 1,032,000/-.**

**d) House allowance at the rate of 15% of basic salary for the period of employment (Kshs. 12,900 x 130 months) = Kshs. 1,677,000/-.**

**e) Outstanding leave days (19 for 2015 and 13 for 2016= 32 days- Kshs. 86,000/24 x32 = Kshs. 114,656.00.**

**f) Certificate of service.**

**g) Costs of this Suit.**

11. The respondent entered Appearance on 23<sup>rd</sup> December 2016 and filed a statement of response on 18<sup>th</sup> January, 2017 denying all the allegations contained therein and put the claimant into strict proof thereof.

12. The respondent averred that the claimant acted as the branch manager between October 2015 and 23<sup>rd</sup> March, 2015 when he was suspended for misconduct of approving and issuing irregular loans. It is contended that when the claimant was placed in the acting position of the Branch manager he arrogated himself duties and approved various overdrafts and irregular loans without following the set down credit appraisal process which exposed the respondent to potential financial losses.

13. It is stated that the disciplinary procedure was conducted regularly as required and the amount of Kshs. 1,073,244.27 which was found to have been irregularly issued was surcharged on the claimant as he was the one who approved the same and did so without following bank credit protocols of obtaining the relevant securities for the said monies.

14. It was stated that it is the bank's policy that its employees were only allowed to clear after settling any claim with it which the claimant is yet to clear. Further that the claimant is not entitled to reliefs sought as the termination was occasioned by breach of contract in negligently performing his duties exposing the bank to financial losses.

15. The Respondent states that the termination of the claimant was legal and without any breach of any laws and urged this Court to find in its favour and dismiss the claim herein.

#### **Claimant's case**

16. The claimant, **David Mwangi Kaguo, CW-1** gave sworn testimony and requested to adopt his witness statement dated 3<sup>rd</sup> October, 2017 which the court granted and also sought to produce the list of documents dated 5<sup>th</sup> December, 2016 which was equally granted. The witness statement adopted basically reiterates the averments of the Claimant's claim.

17. The claimant also called a second witness, **Daniel Kamau Ndungu, CW-2**, the credit manager of Equity bank who sought to also adopt his statement of 3<sup>rd</sup> October, 2017 who exonerated the claimant from any responsibility with regard to the alleged irregular loan and overdraft irregularly advanced to the Respondent clients. He stated that the claimant was at no point in charge of approval of loan but was only tasked with disbursement of already approved loan.

18. The respondent despite being served with hearing Notice on 26<sup>th</sup> January, 2021 did not appear in Court to defend this Suit therefore the case was closed and the matter proceeded for submissions with the claimant filing his submissions on 27<sup>th</sup> January, 2021.

#### **Claimant's Submissions.**

19. The claimant maintains that he was unfairly terminated from employment as he was subjected to a disciplinary hearing but was not furnished with sufficient information with precision that would enable him respond appropriately and submitted that the accusation in the cause letter were general in nature. He cited the case of **Naumy Chemutai Kirui –v- Uniliver Tea Kenya Limited [2020] eKLR** where the Court held that for termination to be fair there must be both substantive justification and procedural fairness.

20. The court of Appeal in **Mobile link Limited –v- Tabitha Masege [2020] eKLR** insisted on the need to give the person charged sufficient notice and hearing and be furnished with the document the disciplinary committee intend to rely on to enable the charged person prepare his

response.

21. He thus argued that the procedure followed was not in line with the law and urged this Court to find as such.

22. He submitted further that the alleged losses claimed by the Respondent were termed as 'potential' which the respondent had not suffered at all as was demonstrated in their response that the money advanced was Kshs 2Million and the customers had repaid leaving a balance of 1 Million which the customers were still servicing as such there is no loss suffered by the Respondent at all to necessitate his dismissal. Accordingly, he argued that he was unfairly terminated from employment and urged this Court to find in his favour and grant him the maximum compensation of 12 months' salary.

23. On the prayer for House allowance, he submitted that he was never paid any house allowance for the entire period working for the Respondent contrary to the express provisions of section 31 of the Employment Act and reinforced his argument by citing the case of **Grain pro Kenya Inc Limited –v- Andrew Waithak Kiragu [2019] eklr**. Where the court awarded the claimant house allowance at the rate of 15% for the entire period he worked for the Respondent.

24. On the prayer for leave, it was submitted that the said leave was not contested by the Respondent since they did not bring any evidence to challenge the same as such the leave not utilized be paid for by the Respondent.

25. He submitted that when the respondent suspended him he was not paid his terminal dues and cited the case of **Peter Mbuha Gitau –v- Kenya Revenue Authority [2019] eklr**.

26. He concluded by submitting that he has proved his case on a balance of Probability and therefore is entitled to costs of this Suit as well and urged this Court to allow the claim as prayed.

27. I have examined the evidence and submissions of the claimant herein. This case proceeded exparte after the respondents failed to attend court for hearing despite service.

28. The claimant denied committing any misconduct and also called a witness who exonerated him from any wrong doing averring that the claimant was not at any point in charge of approval of loans but was only tasked with disbursement of already approved loans.

29. This evidence produced by the claimant remained uncontroverted. There was no evidence to the contrary pointing to any wrong doing on the part of the claimant.

30. This being the case, I find for the claimant as follows;-

1. A declaration that the claimant's termination was unfair and unjustified for want of valid reasons.

2. Unpaid salary for the month of April to October, 2016 amounting to kshs.86,000 x 7 = 602,000/=

3. Payment of outstanding leave days of 19 days =  $19/30 \times 86,000 = 54,467/=$

4. 10 months salary as compensation for unlawful & unfair termination =  $86,000 \times 10 = 860,000/=$

**TOTAL = 1,517,467/=**

Less Statutory deductions

5. The claimant be issued with a certificate of service.

6. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

**DATED AND DELIVERED IN OPEN COURT THIS 13<sup>TH</sup> DAY OF JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Githinji for claimant – present

No appearance for respondent

Court Assistants – Fred and Wanyoike