



**IN THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 1765 OF 2016**

**JACOB KELLY OMONDI ONYANGO.....CLAIMANT**

**-VERSUS-**

**THE NATIONAL BANK OF KENYA.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent as Head of Credit Analysis and Monitoring on 21.5.2013 and rose the ranks to become the Head of Credit Origination. His salary was also increased from Kshs. 350000 to Kshs. 545,186 due to his stellar performance.

2. On 12.5.2016, 2 days after the last salary increment due to outstanding performance, he received a show cause letter accusing him of misconduct in handing of a temporary overdraft facilities amounting to Kshs. 157,000,000 for TSS Group on diverse dates in 2015. He responded within one day as required but thereafter he was dismissed from service. Being dissatisfied, he brought this suit through the law firm of Prof. Tom Ojienda and Associates on 31.8.2016 under Certificate of Urgency. The suit seeks the following reliefs:

- (a) Declaration that the respondent unfairly, wrongfully and unlawfully summarily dismissed the claimant from employment;
- (b) An order directing the respondent to reinstate the claimant to his former position as the Head of Origination Monitoring and Controls in the Head Office of the Bank;
- (c) In the alternative, twelve months' salary as compensation for wrongful and unfair dismissal amounting to Kshs. 6,542,232;
- (d) General damages;
- (e) Costs of the suit;
- (f) Interest on the amount awarded above;
- (g) Mandatory injunction restraining the respondent from purporting to adjust the claimant's mortgage interest rate from 4.5% to the current market rates as opposed to 10% that is offered to ex-staff members of the Bank.

3. The Respondent entered appearance and filed defence through the law firm of KTK Advocates on 31.10.2016. The Respondent averred that the Claimant was lawfully dismissed in accordance with section 44 of the Employment Act for gross misconduct, namely, reckless lending contrary to its code of conduct, acceptable banking practice and prudential guideline. It further averred that the Claimant was accorded a fair hearing and even an opportunity to appeal his dismissal but he never appealed. Therefore it prayed for the suit to be dismissed with costs.

4. The suit went to full hearing, both parties gave evidence and thereafter filed written submissions.

**Claimant's Evidence**

5. The Claimant testified as CW1 and basically adopted his written statement dated 29.8.2016. He stated that he joined the Respondent on 21.8.2013 as Head of Credit Analysis and Monitoring. He enjoyed cordial relationship with his employer and fellow employees. His performance was outstanding and as a result of which he was given several promotions and salary increments within the three years of his service to the bank.

6. On 1.4.2014 he was given the first promotion accompanied by a salary increment from Kshs. 35000 to Kshs. 490,000. By letter dated 10.4.2015 he received an exceptional rating of 5 and his salary was increased to Kshs. 526,750. On 10.5.2016, he was given a good rating of 3 and his salary was increased to Kshs. 545,186. He contended that the foregoing performance at the age of 34 years meant that sky was the limit in his banking career.

7. However, things turned drastically on 17.5.2016, days after the last increase of his salary for outstanding performance, when he received a show cause letter dated 12.5.2016. He had only one day to respond and in his view it spewed nothing but malice. The letter accused him of lending malpractices as follows:-

(a) On diverse dates in 2015, he originated temporary overdraft amounting to Kshs. 157,000,000 for TSS Ceramics Limited despite knowing that the company was in financial stress and not servicing their loan facilities with the bank.

(b) Without authority, he diverted Kshs. 20,00,000 from the above overdraft facility to Ocean Group Traders ( a member of KAAB Group) which action was a breach of the approved credit terms and amounted to fraud;

(c) Although Kshs. 50000000 of the above funds was to be paid by the bank directly to the suppliers as per approval, this did not happen and the funds could not be accounted for;

(d) The above facility had an approved tenure of 90 days which he failed to implement;

(e) As a result of the said malpractices, the customer had defaulted in its loan obligations and the Claimant had made no effort to aid in the recovery of the same.

8. The Claimant stated that despite the short notice he responded to each and every accusation levelled against him by his letter dated 18.5.2016 with respect to the first accusation of origination of the temporary overdraft, he responded that he was not involved in the approval of the said overdraft and went ahead to provide the names of the officers who were involved in the deal.

9. As regards the diversion of Kshs. 20,000,000 from the said overdraft he responded that the diversion to pay Ocean Group Traders was a pre-approved condition which was beyond his authority and as such he did not participate in the process except by writing an email to the RM reminding him of the approval conditions which action was in the best interest of the bank. He denied the alleged fraud on his part.

10. With respect to Kshs. 50, 000,000 which could not be accounted for, he responded that the money was to be paid against proforma invoices and the Credit Documentation Team sought separate approval from the COO to disburse the funds by paying suppliers directly as per the list of names which he provided to the employer.

11. Regarding the alleged failure to implement the 90 days approved terms for the said overdraft, he responded that primary role of Account Management belonged to the Relations Manager and Business Heads while his role and that of his team (Origination Team) was to remind the Relations Manager of the obligation via email and calls and copy to Business Heads. He contended that he performed the said role of reminding the people in charge as per emails he attached to his response to the show cause letter, as evidence.

12. He contended that he responded to the accusations, generally that his role was basically to support businesses which were justified but he had no authority to approve a transaction, disburse facilities or divert funds as those functions had various approval stages with different independent teams responsible for management.

13. He further testified that after rendering the said response to the show cause letter he noted a dramatic negative change in working environment and concluded that his goose had been cooked and therefore tendered a resignation vide the letter dated 26.5.2016 to the HR Manager Mr. Dismas Omondi and immediately took a paternity leave. However, the resignation was ignored and by the letter dated 22.6.2016, he was summarily dismissed for gross misconduct and loss of confidence arising from alleged non-adherence to the bank's policies and procedures as well as the prudential guidelines in origination and disbursement of temporary overdraft facilities amounting to Kshs. 110,000,000; and alleged careless and improper performance of his role as the Head Origination Monitoring and Controls.

14. He contended that the dismissal was wrongful, unlawful, malicious and premeditated because it was done with a 20 days' notice and without valid reason; that the amount cited in the dismissal letter was less than the one cited in the show cause letter and he was not afforded an opportunity of being heard on the matter before the dismissal.

15. He maintained that he was innocent of the alleged misconduct and contended that he was being sued as a sacrificial lamb when in actual fact he was an outstanding performer as evidenced by the regular appraisals, promotions and salary increments within the short period of his service to the bank. He maintained that the dismissal was unfair because it was maliciously premeditated by the management, since because no money was lost.

16. Finally he contended that the allegations against him were not substantiated and the Forensic Audit Report cited in the Separation Notice did not adversely mention him. Consequently he prayed for the reliefs sought in his claim.

### **Defence evidence**

17. The Respondent's Employee Relations Manager Mr. Stephine Opiyo Obong'o testified as RW1 and like the Claimant he also adopted his written statement as his evidence in chief. He confirmed that the Claimant was employed by the Respondent as Head of Credit Analysis and Monitoring on 20.6.2013 reporting directly to the General Manager Business Banking.

18. He explained the Claimant's job description as including Monitoring and Control of excess(including dropped limits) to minimize losses; responsible for adherence to credit policy and underwriting standards; and personally recommending approval of credit applications with values beyond Kshs. 20,000,000.

19. He further explained that on diverse dates in 2015, the Claimant, in violation of Bank Policy, originated overdraft facilities to the sum of Kshs. 110,000,00 to TSS Group, despite being aware that the said company was in financial stress, and not servicing existing loan facilities with the bank; that without authority, he diverted Kshs. 20,000,000 from the said overdraft facility to Ocean Group Traders ( a member of KAAB Group) which action was in breach of approved credit terms and amounted to fraud; that Kshs. 50,000,000 of the above funds meant to be paid directly to suppliers as per the approval was never so paid and it could not be accounted for as the customers disputed receipts of the money; and that despite the said overdraft facility being approved for 90 days, the Claimant failed to implement the same, and rendering it as a non-performing after the lapse of the approved term.

20. He further stated that as a result of the said infractions, the Claimant was served with a show cause letter dated 12.5.2016 to give explanation why disciplinary action should not be taken against him and he submitted his response dated 18.5.2016. He contended that on 2.6.2016, the claimant was invited to a disciplinary hearing where the above infractions were discussed.

21. He further stated that after the hearing, the disciplinary committee evaluated the evidence and found that the Claimant had blatantly contravened bank policy, and acted in gross negligence of his role and responsibilities at the bank. He contended that it was Claimant's contractual obligation to ensure key credit control measures are in place and promptly address lapses in the credit process; and to do credit analysis and reporting for all business segments and to Senior Management.

22. RW1 further stated that the disciplinary committee found the Claimant's conduct of facilitating lending to a customer in distress placed the bank in a precarious position with respect to recovery and litigation. According to RW1 the Claimant's actions were in contravention of the acceptable banking practice, against Bank's Credit Policy and the Central Bank Prudential Guidelines.

23. As a result of the foregoing matters, the Respondent lost confidence in the Claimant and dismissed him on 22.6.2016 and paid him his terminal dues after completing exist clearance process. Therefore he contended that the dismissal was fair and regular and the Claimant is not entitled to the damages sought because money was lost in an unexplained and irregular transaction cited above.

24. On cross-examination he confirmed that the dismissal letter on page 111 of the defence bundle set out the grounds for the dismissal. He further confirmed that the application for the temporary overdraft of Kshs. 110,000,000 is the one on page 88 of the defence bundle and it bears the signatures of the approving officials including Fraruk Hiran, Boniface Biko, and George Jaba.

25. He further admitted that page 91 of the Claimant's supplementary documents is a letter of offer of the Temporary Overdraft of Kshs. 110,000,000 issued to TSS Group, signed by Mr. R. Mdzomba SDU Analyst and C. Kinuthia the Acting Manager Security and the conditions of the facility are set out in the offer letter.

26. RW1 admitted that based on the records, the Claimant played no role in the said facility from the offer letter to the approval for disbursements. He further confirmed that paragraph 2.0 of the Credit Risk Management Policy Document (page 47 of the defence bundle), is on credit initiation and it provides that the person with the last word in approval of credits is the Credit Director.

27. He further admitted that paragraph 12 of the said Credit Policy provides that the Relations Manager is the person with the duty of ensuring that approval is given by the relevant manager. He also admitted that he was not sure whether credit originator had a role in Temporary Excesses and whether the Claimant had a role in the said Temporary Excesses.

28. On re-examination he confirmed that the Claimant was Head of Credit but as at the time of dismissal he was the Head of Origination, Monitoring and Controls. He pointed that the disciplinary proceedings are on page 106-110 of the defence bundle. Finally he reiterated that TSS never paid the facilities advanced.

### **Submissions**

29. The Claimant submitted that his dismissal was wrongful, unlawful and malicious because first, he was not accorded a hearing on the grounds cited in the dismissal letter and as such section 41 of the Employment Act was not complied with. He relied on **Kenfreight (EA) Limited v. Benson K. Nguti [2016]eKLR** where the Court of Appeal held that no decision to dismiss an employee for reasons of the worker's conduct or performance can be taken without providing him with an opportunity to defend himself of the allegations.

30. Secondly, he submitted that the Respondent did not establish by evidence that he had by conduct, fundamentally breached his obligation arising under the contract of service as required under section 44(3) of the Employment Act. In his view he has demonstrated by evidence that he did not bear any responsibility on the transaction for which he was summarily dismissed for, namely, non-adherence to the banks policies and procedure as well as the Prudential Guidelines in the origination and disbursement of temporary overdraft facilities amounting to Kshs. 110,000,000 for TSS Group. Consequently, he submitted that the Respondent has not proved any of fundamental breach of his obligation under his contract or that he had negligently, willingly carelessly and knowingly performed his work in a manner that was detrimental to his employer.

31. For emphasis he relied on **Nicholas Otinya Muruka v. Equity Bank Limited [2013]eKLR** and **John Rioba Maugo v Riley Falcon Security Services Limited[2016]eKLR** where the test of fair termination of employment contract by the employer was discussed.

32. Finally the Claimant urged for the reliefs sought under section 49 of the Act plus general damages for mental anguish and damage to profession reputation and/or loss of income. He relied on **The Standard Group Limited v Jenny Luesby[2018]eKLR** where the Court of Appeal awarded nominal damages and held that under section 12 of the ELRC Act and Article 162 (2) of the Constitution the court is not

bared from awarding general damages so long as the employee can plead and prove breach of a constitutional right within the context of the employees contract of employment or demonstrate that he is entitled to damages in circumstances contemplated under the ELRC Act, over and above those awardable for unlawful termination.

33. On the other hand, the Respondent submitted that it has met the statutory requirement set under section 43, 44 (c) and 47(c) of the Employment Act for fair termination and contended that it is the Claimant who has failed to discharge the burden of proof of unfair termination. It further submitted that the Claimant was accorded a hearing before the dismissal but he was found guilty of the offence of non-adherence with bank policies and procedures as well as prudential guidelines in the origination and disbursement of temporary overdraft facilities amounting to Kshs. 110,000,000 for TSS Group; and further guilty of careless and improper performance of the Claimants role as Head of Origination, Monitoring and Controls.

34. Finally the Respondent submitted that it provided the Claimant with the opportunity to appeal against the dismissal within 7 days from 22.6.2016 but he never appealed.

35. To support its submission, the Respondent relied on **Kenya Revenue Authority v. Renwel Waitthaka Gitahi & 2 Others [2019]eKLR** among others.

36. As regards the reliefs sought, the Respondent relied on **Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014]eKLR** where the Court of Appeal held that in reinstatements the court ought to be guided by the factors set out in section 49(4) of the Employment Act which include practicability of the relief and exceptional circumstances being demonstrated.

37. The Respondent opposed the claim for general damages and review of mortgage interest contending that the Claimant did not plead the same in the main body of his pleadings and as such in, its view, there is no nexus between the pleadings and the prayer for general damages. Further, it contended that the Claimant did not produce the mortgage documents in court and as such the court cannot interfere with a contract it has not seen. Finally, it urged the court to find that it has amply met the procedural requirements and provided valid reasons for the dismissal of the Claimant and proceed to dismiss the suit.

#### **Issues for determination**

38. There is no dispute that the Claimant was employed by the Respondent from 21.5.2013 upto 22.6.2016 when he was summarily dismissed for gross misconduct and loss of confidence. Section 45 of the Employment Act requires the employer to prove that the termination of employees contract of service was grounded on valid and fair reason and that a fair procedure was followed and in default the termination is unfair. Consequently, the issues for determination are:

- (a) Whether the reason for dismissing the Claimant was valid and fair.
- (b) Whether a fair procedure was followed
- (c) Whether the Claimant is entitled to the reliefs sought.

#### **The reason(s) for dismissal**

39. The reasons for dismissing the Claimant cited in the dismissal letter dated 22.6.2016 were:

- (a) Non-adherence to the Bank's policies and procedures as well as Prudential Guidelines in the origination and disbursement of temporary overdraft facilities amounting to Kshs. 110,000,000 for TSS Group, and thereby placed the bank in a precarious position with regard to recovery and litigation.
- (b) Careless and improper performance of his role as Head, Origination Monitoring and Controls which was his duty to have performed properly in accordance with his job description.

40. The Claimant denied the validity of the said reasons for dismissal and relied on documentary evidence to show that the process of approving and disbursing temporary overdraft facilities was not within his role under his contract or the credit policy. The said documents showed that the said roles belonged to the RM and the Credit Department and the CEO. Further, he relied on documentary evidence to show that he was not among the persons who approved the application for the said temporary overdraft facilities and the disbursements.

41. He contended that although he had mandate to recommend the approval of Business Credit Application of amounts greater than Kshs. 20,000,000, the credit application in issue herein was not a Business credit application but a Temporary Excesses (overdraft) under paragraph 12.0 of the credit policy of which he had no mandate to recommend approval. Consequently he contended that he had neither recommended, supported nor approved the said excess disbursements to TSS Group, but his superiors as shown in the approval documents.

42. He further contended that when he was copied the correspondence enquiring about the disbursement of the credit funds, he registered a complaint, via email dated 23.10.2015 that the instructions for compliance and disbursement was incomplete since it was not accompanied by proforma invoice which was a condition of approval. However Mr. George Jaba instructed Caroline Kiruba, to proceed with the disbursement of Kshs. 110,000,000 despite the reservation registered by the Claimant and Caroline Kiruba.

43. During cross examination RW1 admitted that the Claimant never played any role in the said temporary overdraft facility from the offer letter to the approval of disbursements. RW1 further admitted that he was not sure whether credit originator has any role in temporary excesses or whether the Claimant played any role in the said temporary excesses.

44. Under Section 43(1) and 45 (2) of the Employment Act, the employer has the burden of proving that the reason for dismissing an employee was valid and fair in relation to the employee's conduct, capacity and compatibility or in relation to the employers operational requirements. In the present case, the Respondent has not done so on a preponderance of evidence. RW1 admitted under oath that the Claimant did not play any role in the approvals and disbursement of the said Temporary Excesses of Kshs. 110,000,000 for the TSS Group.

45. The said admission is corroborated by the application forms, offer letter and instructions form for the disbursements which were all signed by managers who were all superior to Claimant. I have also verified from paragraph 12.0 of the Credit Risk Management Policy that Temporary Excesses are additional short-term facilities given on the strength of securities already approved during the Business Credit Applications (BCA) approval and as such there is no role for the Credit Origination Division where the claimant worked, in the approval of the temporary excesses.

46. Paragraph 12.0 provides that:

***“The responsible RM must ensure that prior credit approval from the appropriate authority is obtained for any excess. . . approval for excesses are temporary and transactional and therefore do not require new documentation apart from what is already mandated in the BCA and what is required from the transaction itself. . .”***

47. In addition, I have verified from the documentary evidence adduced that at the time when the temporary excess of Ksh. 110,000,00 was approved the same was sufficiently secured and within the credit limit for the TSS Group of Kshs. 735,000,000 secured against LR No. Mombasa/Block XXVV658, Vista Heights Kizingo Estate valued at Kshs. 808,000,000 among others. Consequently having considered the evidence adduced, I find and hold that the Respondent has failed to establish that the reasons cited for the dismissal of the Claimants were valid and fair as required by the law to justify the action taken. There was also no basis for the alleged loss of confidence in the Claimant.

48. I am also satisfied by the emails written by the Claimant to Mr. Edwin Kipchumba on 29.1.2016 and Peter Sabile on the same date, that the Claimant did not fail to perform his work under the contract of service as alleged. I have noted from the minutes of disciplinary hearing that the Claimant did contact the customer directly but learned that the MD was already in contact with the customer.

#### **Procedure followed**

49. The Claimant contended that he was never accorded any hearing on the new allegation concerning a temporary overdraft of Kshs. 110,000,000 after he responded to the show cause letter that accused him of negligence and fraud in handling of Kshs. 157,000,000. However the Respondent maintained that the Claimant was accorded opportunity to explain himself vide a show case letter and later he was called to defend himself orally before a disciplinary committee. I have seen the show cause letter, his response and the minutes of the disciplinary hearing held on 6.6.2016. Although the figure was initially cited as 157,000,000, I see no prejudice to the claimant in the reduction to Kshs.110, 000,000, because the transaction in issue was the same. Consequently, I am satisfied that the Claimant was given fair hearing.

50. Section 41 of the Employment Act provides that:

***“41(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 shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provisions 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.”***

51. Having found that the Claimant was afforded opportunity to present his defence before the dismissal, both orally and in writing, I proceed to hold that his dismissal was in accordance with a fair procedure as required under section 45(2)(c) of the Employment Act.

#### **Reliefs**

52. Despite the foregoing finding that a fair procedure was followed before the dismissal of the claimant, my earlier finding of fact was that the Respondent has failed to prove that the reasons for dismissing the Claimant were valid and fair. Consequently, I make a declaration that the dismissal was unfair, wrongful and unlawful within the meaning of section 45 of the said Act.

53. The Claimant prayed for reinstatement or in alternative compensation by an award of twelve months' salary for the unfair termination. By dint of section 12(3) (vii) of the ELRC Act, the remedy of reinstatement is overtaken by events because under the said statutory provision it cannot be ordered if 3 years have lapsed after the separation.

54. It follows that an award of damages is the only reasonable remedy in the circumstances. The Claimant worked for 3 years for the Respondent with an outstanding performance and no record of misconduct as admitted by the RW1. His star shone throughout the said period of his service leading to promotion that came in quick succession plus salary increments from Kshs. 350,000 to Kshs. 545,186 per month. It is clear from the evidence and admission by the RW1 that the Claimant played no role in the approval and disbursement of the temporary overdraft. The Claimant contended that he has not secured alternative employment and his financial position has been pathetic considering the loan obligations to the Respondent. Having considered the foregoing matters, and the possibility of the claimant not getting another job in the sensitive banking sector, I award the Claimant the maximum 12 months' gross salary as compensation for the unfair termination equalling to Kshs. 6,542,232.

55. The Claim for General damages is however not well founded. The Claimant did not plead the basis for the said prayer but only listed it in the last paragraph of the statement of claim. He relied on the Court of Appeal decision in **The Standard Group Limited case** where the court awarded nominal damages.

56. However in the present case, I would state that the Claimant's pleadings did not invite the Respondent to respond to that claim for nominal damages. It would therefore prejudice the right to fair trial to grant the said prayer.

57. Finally, the prayer for injunction to grant permanent injunction to restrain the Respondent from converting the mortgage interest from staff to commercial rates is declined because it was not prosecuted and no evidence or submissions were presented in favour of that prayer.

### **Conclusion and disposition**

58. I have found that the dismissal of the Claimant was not justified by a valid and fair reason and it was therefore unfair, wrongful and unlawful. I have also found that reinstatement cannot be ordered three (3) years after separation and as such the Claimant is only entitled to compensatory damages for the unfair dismissal. Consequently, I enter judgment for the Claimant in the sum of Kshs. 6,542,232 less statutory deductions. The Claimant will have costs plus interest at court rates from the date hereof.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021.**

**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**