



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

**AT NAIROBI**

**CAUSE NO. 362 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOHN MATHENGE MACHARIA.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. The claim herein was instituted through a statement of claim dated 10<sup>th</sup> June 2019
2. The Claimant avers that he was employed by the Respondent as a Relationship Manager on 1<sup>st</sup> August 2015
3. The Claimant avers that during the tenancy of his employment he was servicing a house loan of Kshs.7,136,962.42 and a secured personal loan of Kshs.239,568.42 all being paid at staff interest rate.
4. The Claimant further avers that he attended disciplinary hearing and was later dismissed summarily on the 18<sup>th</sup> March 2019.
5. The Claimant avers that the Respondent demanded immediate repayment of the loan since the employment relationship had ceased.
6. The Claimant states that he has challenged the process leading to his dismissal and prays that he continues to service the loans at staff rate
7. The Claimant in his statement of claim states that as a result of the unfair dismissal he has suffered immense loss and damages and seeks the following reliefs –

*i) A declaration that the Claimants termination was unlawful and unfair*

*ii) The Respondent be restrained from demanding immediate payment of the house loan and secured personal loan on the basis of matters arising out of employment relationship between the Claimant and the Respondent or cessation thereof particularly at clause 9.14, 9.15 of the charge unless the Claimant is convicted of a criminal offence and no appeal from the conviction has been filed*

*iii) A declaration that the Respondent is not entitled to require payment of the loans arising out of employment, cessation or related thereto.*

*iv) That the Claimant be allowed to continue serving the house loan he had with the Respondent's staff rate.*

*v) The Claimant be allowed to continue servicing the secured personal loan he had with the Respondent at the staff rate.*

*vi) The Respondent be restrained from demanding that the Claimants pays interest on the house loan and secured personal loan at commercial rates or prevailing market rate.*

*vii) Salary of one month in lieu of notice Kshs.96,703*

viii) Twelve (12) months' salary being damages for unlawful and unfair dismissal (96,703 x 12) Kshs.1,160,436

ix) Severance pay at the rate of Kshs.48,351.50 for every completed year being Kshs.241,757.50

x) Cost of the suit

xi) Interest on (vii), (ix) and (x)

xii) Certificate of service

xiii) Any other relief as this court may deem fit to grant

7. Together with the Memorandum of Claim, the Claimant filed a notice of motion under certificate of urgency seeking the following orders:-

(a) **THAT** this application be certified urgent service of the same be dispensed with and the application be heard ex-parte in the first instant

(b) **THAT** the Respondent be restrained from demanding immediate payment of the house loan and secured personal loan on the basis of matters arising out of employment relationship between the Claimant and the Respondent or cessation thereof pending the hearing and determination of this application

(c) **THAT** the Respondent be restrained from demanding immediate payment of the house loan and secured personal on the basis of matters arising out of the employment relationship between the Claimant and the Respondent or cessation thereof pending hearing and determination of the cause filed herein.

(d) **THAT** Respondent be restrained from demanding that the Claimant pays interest on the house loan and secured personal loan at commercial rate pending the hearing and determination of this application

(e) **THAT** Respondent be restrained from demanding that the Claimant pays interest on the house loan and secured personal loan at commercial rate pending the hearing and determination of the cause filed herein

(f) **THAT** the Claimant/Applicant be and is hereby allowed continue servicing the House Loan and secured personal loan at staff rates pending the hearing and determination of the cause filed herein

(g) **This** court be pleased to make any other such orders as it may deem just.

(h) The cost of this Application be in the cause.

8. The application is supported by the affidavit of **JOHN MATHENGE MACHARIA**, the Claimant and the grounds on the face thereof which are a reiteration of the facts pleaded in the Statement of claim.

### **Respondent's Case**

9. In response to the statement of claim the Respondent filed a reply to the statement of claim. The Respondent contends that the Claimant was employed in a position that required utmost good faith and responsibility as an employee and that it terminated his employment on account of loss of confidence arising from his conduct, gross violation of the Banks code of conduct and acting contrary to the terms of contract of service.

10. The Respondent contends that on 20<sup>th</sup> December 2018 there was an attempted cyber-crime against the Respondent and upon investigation of the incident, criminal charges were preferred against the Claimant for conspiracy to commit a felony and electronic fraud vide **Kiambu CMCC No. 11 of 2019**.

11. The Respondent states that the Claimant was suspended from work on the 17<sup>th</sup> January 2019, he was issued with a notice to show cause which he responded to and a disciplinary hearing was conducted on the 7<sup>th</sup> March 2019, the committee reached a finding against the Claimant and it summarily dismissed the Claimant vide a notice dated 18<sup>th</sup> March 2019.

12. The Respondent states that during the course of the Claimants employment the Respondent granted him two credit facilities at the staff preferential interest rate under Clause 1.18.7 of its Bank Staff Facilities Policy which provides that

*“A staff terminated or dismissed shall be ineligible for any consideration. A notice of 90 days on the charge of interest/profit rate to commercial rate will be issued to the staff at the point of exit.”*

13. The Respondent states that the Claimant was duly notified that his outstanding loans would accrue the prevailing commercial interest rates upon expiry of the 90 days as the Claimant was summarily dismissed for gross misconduct.

14. The Respondent submits that the claim is misconceived, misplaced and an abuse of the court process and unmerited in the circumstance as the Claimant was lawfully terminated.

### **Evidence**

15. At the hearing the Claimant gave oral evidence and relied on his witness statement and list of documents dated and filed on 10<sup>th</sup> June 2019.

16. The Respondent on the other hand called three witnesses namely Stephen O. Obong'o the head of employee relations at the Respondent's bank who relied on his witness statement dated 16<sup>th</sup> October 2019, Willy Kiprok Kirui who is the head of Security at the Respondents bank who relied on his statement dated 19<sup>th</sup> February 2019 and Michael Mwita the Manager Credit Remedial Collection and Recoveries at the Respondent who also relied on his witness statement dated 16<sup>th</sup> October 2019.

17. On 2<sup>nd</sup> February 2021 both parties having closed their cases the Court gave directions that parties file written submissions.

### **Claimant's Submissions**

18. The Claimant submitted that for termination to be fair there must be both substantive justification and procedural fairness and relied on the case of **Naumy Jemutai Kirui v Unilever Tea Kenya Limited [2020] eKLR** which analyzed the issue of fairness in the termination of employment. The Court stated:

*"For termination of employment to be fair there must be both substantive justification and procedural fairness. In the case of **Walter Ogal Anure versus Teachers Service Commission** the court held that substantial justice refers to establishment of a valid reason for termination of employment while procedural fairness refers to the procedure adopted by the employer in effecting the termination. Section 41 of the Employment Act, 2007 (the Act) requires the employer to give a hearing to the Claimant before termination or summary dismissal while Section 45 requires proof of valid reason and fair procedure. In this case, the Court held that;*

*... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.*

19. The Claimant testified that he was arrested on 15<sup>th</sup> January 2019 and arraigned in court and was charged with an offence to commit a felony. That on 17<sup>th</sup> January 2019 the Claimant was issued with a letter of suspension.

20. On 21<sup>st</sup> January, 2019 the Claimant was issued with a letter of suspension; on 28<sup>th</sup> February 2019 while at the Respondents Kitengela branch he was issued with a letter dated 27<sup>th</sup> February 2019 requiring him to attend disciplinary hearing to be held on 7<sup>th</sup> March 2019. The letter referred to a notice to show cause dated 26<sup>th</sup> February 2017 which ought to have been responded to by 28<sup>th</sup> February 2019 which was the date the letter was handed to him.

21. The Claimant submits that the entire disciplinary process was flawed as a disciplinary date had already been set even before he could respond to the show cause letter.

22. The Claimant submits that the disciplinary process lacked procedural fairness as it was a mere formality. He relied on the case of **Jackson Leparmarai v L.A.B International Kenya Limited [2019] eKLR** where the court stated as follows:

*"Although this particular letter required the Claimant to respond within 2 days, it also served as an invitation to a disciplinary hearing on 5<sup>th</sup> May 2017 which would curiously coincide with the deadline for the Claimant's written response. Moreover, by inviting the Claimant to show cause and to attend a disciplinary hearing by the same letter of 5<sup>th</sup> May 2017, the Respondent showed its hand too early. This led the Court to reach the finding that the decision to terminate the Claimant's employment was a fait accompli and the disciplinary process was mechanical, if only to tick the boxes required by law."*

23. The Claimant submits the letter of dismissal was dated 18<sup>th</sup> March 2019 and was to take effect from the same date but was given to him on 20<sup>th</sup> March 2019. That the letter gave him 7 days to appeal. That since there was a weekend 3 days had already lapsed, therefore he was unable to appeal.

24. The Claimant submits that Sections 43 and 45 of the Employment Act make provision on substantive fairness. Section 43(1) requires that in any claim arising out of the termination of a contract the employer shall be required to prove the reasons for termination and where the employer fails to do so the termination shall be deemed to have been unfair.

25. The Claimant submits that the Respondent claims that he introduced a foreign device into the bank's network thus exposing the Respondent to cybercrime. He states that there is a CCTV footage to that effect. He submits that a copy of the footage was never supplied to him. That he was only shown part of it during the disciplinary hearing. The Claimant submits that the Respondent failed to give evidence on the validity of the summary dismissal. The Claimant relies in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** where the Court of Appeal stated:

*"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the*

reasons for termination/dismissal (Section 43); prove the reasons are valid and fair (Section 45); prove that the grounds are justified (Section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination."

26. The Claimant submits that failure by the Respondent to submit the CCTV footage and call witnesses to be cross examined on the same entitles the court to make an adverse inference to the effect that should the same have been produced it would not have supported its case. The Claimant relies in the case of **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2021]** which the Learned Judge rightly stated that:-

*"Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party."*

27. The Claimant also submits that from the wording of the show cause letter the Respondent was not intending to get the Claimant's version but the Respondent had already made up its mind as he was required to respond to issues he had no knowledge about while the Respondent failed to provide him with the materials necessary for him to defend himself.

28. The Claimant submits that the Respondent failed to prove reasons for the summary dismissal therefore the same was unfair and unlawful. He urges the court to declare as such.

29. The Claimant submits that he took two credit facilities whose interest was charged at staff rate. The Claimant submits the Respondent cannot rely on the clause allowing it to vary interest rates on the basis of dismissal of the Claimant from employment since the termination was unlawful and unfair thus the Respondent should not be allowed to benefit from its own wrongdoing. The Claimant relies in the case of **Gladys Muthoni Mwangi & 20 Others v Barclays Bank of Kenya Limited & Another [2016] eKLR** where the court stated

*.... The Petitioners shall continue repaying any loans and or facilities advanced to them while in the employment of the Respondents at the same terms, rates, interests as at the time of termination unless they wish to repay such in advance. The Respondents shall not apply any unfavorable terms against the Petitioners on any facility due from them outside the terms already in existence."*

30. The Claimant further urges the Court to declare the termination unlawful and unfair. The Claimant further states that he was not given notice of dismissal therefore he prays to be awarded Kshs.90,377 being one month's salary in lieu of notice. He further prays for 12 months' salary amounting to Kshs.1,160,436 being damages for unlawful termination and severance pay at the rate of fifteen days' pay for every year worked amounting to Kshs.241,757.50

### **Respondent's Submissions**

31. The Respondent submits that the termination of the Claimant's employment was regular, lawful and in strict compliance with Section 41, 43 and 45 of the Employment and Clause 12 and 13 of the contract of employment. It maintains that there was sufficient and adequate grounds to terminate the Claimant's employment, that the Claimant was afforded fair and unlimited chances to defend himself and the rules of procedure were strictly followed.

32. The Respondent states that in compliance with the substantive justification as set out in Section 43 of the Employment Act the reasons for termination were laid out in the dismissal letter dated 18<sup>th</sup> March 2019.

33. The Respondent submits that the investigation report was supplied to the Claimant and he was accorded a chance to respond to it. That the investigation report involves five other employees therefore making it private and confidential.

34. The Respondent submits that prior to the termination the Claimant had received a total of 4 warning letters and had been subjected to two disciplinary hearings on misconduct and had been suspended from duty and reinstated on 9<sup>th</sup> March 2017.

35. The Respondent states that the termination was fair and reasonable and relied in the Court of appeal decision in **Civil Appeal No. 3 of 2014 CFC Stanbic Bank Limited v Danson Mwa Kuwona** the Court held as follows;

*"In determining whether the reasons for the termination by the appellant were valid, it is imperative to consider the terms of the Respondent's contract of employment and his duties/responsibilities as an Accountant Analyst in the appellant bank.*

*We also cannot help but note that the Respondent in his appeal against his dismissal admitted that he was not diligent in the above mentioned transactions. We are of the considered view that the reasons for the Respondent's dismissal were valid and fair."*

36. The Respondent submits that it followed the right procedure issued the Claimant with letters dated 27<sup>th</sup> and 28<sup>th</sup> February 2019 which indicated the disciplinary hearing was to be held on 7<sup>th</sup> March 2019 and ample time was granted to the Claimant to prepare for the hearing. The disciplinary proceedings were produced in court and the charges and the responses were clearly set out. The Respondent states that in terminating the Claimant the procedure was proper, regular and fair. It relied on the decision in **Thomas Sila Nzivo v Bamburi Cement Limited** where the Court held as follows on fair procedure;

*"In terms of procedural fairness, the Claimant can have no justification in alleging the Respondent fell short of the minimum statutory standards. The procedure was in full conformity to Section 41 of the Employment Act 2007.*

*The Respondent investigated the incident; communicated the charges to the Claimant gave him the opportunity to prepare and answer to these charges; he was advised of his right to be accompanied by a colleague; he exercised that right; he was heard, a decision was made; he was advised of his right of appeal; he appealed and appeared before the appellate panel and was heard; and finally a reasoned decision was communicated to him.”*

37. The Respondent submits that having lawfully terminated the Claimant’s employment and the Claimant having admitted to receipt of the 90 days’ notice to charge commercial interest, it was justified to convert the loan facilities to commercial status.

38. The Respondent further submits that the Claimant is not entitled to the reliefs sought as he was lawfully terminated and relies on the **Thomas Sila Nzivo case** where the Court held as follows;

*“The summary dismissal of the Claimant was fair in substance and on procedure. He does not merit compensation for unfair termination. The prayers for the various declarations in the Claim are baseless and rejected. The prayer for reinstatement in view of the finding on the fairness of termination is rejected.”*

39. The Respondent submits that severance pay is only payable in cases of redundancy under Section 40 of the Employment Act and not in cases of termination. As such the same prayer for the same is misconceived, untenable and unavailable.

40. The Respondent prays that the court finds the Claimant has failed to prove his claim and dismisses the same with costs.

#### **Determination**

41. I have carefully considered the pleadings and the submissions by the parties. The issues for determination are

- a) Whether the termination was lawful
- b) Whether the Claimant should service the outstanding credit facilities at staff preferential rate or at commercial rate
- c) Whether the Claimant is entitled to the reliefs sought

#### **Whether the termination was lawful**

42. Section 43 of the Employment Act, 2007 provides that:

#### **43. Proof of reason for termination**

**1) In any claim arising out of termination of a contract the employer shall require to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

45. Section 45(2) of the employment Act provides that;

**(2) A termination of employment by an employer is unfair if the employer fails to prove-**

- a) **That the reason for the termination is valid;**
- b) **that the reason for termination is fair reason-**
  - (i) **related to the employee’s conduct, capacity**
  - or compatibility; or**
  - (ii) **based on the operational requirements of the employer and**
- c) **That the employment was terminated in accordance with fair procedure**

46. The Claimant was summarily dismissed by the Respondent vide a letter dated 18<sup>th</sup> March 2019 on the grounds of misconduct. The letter of dismissal sets out the grounds of dismissal as follows –

#### **RE: SUMMARY DISMISSAL LETTER**

*We refer to your suspension letter dated 17<sup>th</sup> January 2019, the investigations report, our show cause letter elated 26<sup>th</sup> February*

2019, your response elated 28<sup>th</sup> February 2019 and the Disciplinary Hearing you attended on Thursday, 7<sup>th</sup> March 2019 at National Bank Building 6<sup>th</sup> Floor -Conference Room, Human Resource Division regarding your suspected involvement in security breach on the Bank systems which led to attempted cyber-attacks on the Bank Network exposing' the Bank to a potential loss of Kshs. 135Mn. The Bank has established the following;

1. You introduced an unauthorized machine into the Bank network exposing the Bank to a cyber-attack.
2. You exposed the Bank to a potential loss of Kshs.135 Million through an attempted fraud with an actual loss of approximately Kshs.5 Million
3. You failed to provide reasonable explanation on your conduct on the matters raised for your explanation.

..”

47. The Claimant posits that the termination of his employment was unfair because he was dismissed on the basis of a finding in the investigation report to the effect that CCTV footage captured him disconnecting a laptop, yet he had by then not been shown either the investigation report or the CCTV footage.

48. Further, that the sequence of events up to the disciplinary hearing was not fair; that he received suspension letter dated 17<sup>th</sup> January 2019 on 21<sup>st</sup> January 2019; the suspension was extended by letter 10<sup>th</sup> February 2019 which he received on 15<sup>th</sup> February 2010; that the notice of disciplinary hearing dated 27<sup>th</sup> February 2019 was received by him on 28<sup>th</sup> February 2019 and informed him that disciplinary hearing would be on 7<sup>th</sup> March 2019.

49. That he was also issued with a show cause letter on the same day as the notice of disciplinary hearing.

50. It is further the Claimant's position that the date of the disciplinary hearing was fixed before the Respondent received his response to the notice to show cause, which required his response by 28<sup>th</sup> February 2019.

51. The Claimant further argues that the people who prepared the disciplinary report did not appear at the disciplinary hearing.

52. The investigation report however states that the Claimant was shown the CCTV footage disconnecting the laptop which was subsequently found to be the root of the cyber-attack on the bank system. The Claimant was shown the clip at the disciplinary hearing.

53. The Respondent further explained that all correspondence to the Claimant was through his Supervisor at Kitengela and since he was on suspension there was bound to be some delay before letters from the Head Office reached him, as was the case with the notice to show cause and letter informing him of disciplinary hearing.

54. It is also apparent from the evidence that at the time of disciplinary hearing, the Claimant had been arraigned in Court and charged with offences of stealing Kshs.6,982,623 from the Respondent, conspiracy to commit a felony namely stealing from the Respondent Kshs.135,402,700 and fraudulently and with intent to steal, altering date in a computer system of the Respondent's data base by altering 49 clients accounts and causing a loss of Kshs.6,982,623. The Claimant's Counsel had been supplied with the CCTV footage for purposes of the criminal case.

55. Based on the circumstances of this case where there were investigations and the Claimant had been charged with the criminal offences arising from the same events as those in the disciplinary hearing, I find that this case is distinguishable from the case of **Jackson Leparmarai v LAB International Kenya Limited (supra)**. In this case, the Claimant was already aware of the reasons for which he was to be taken through the disciplinary hearing. He responded to the show cause letter which reached him on the same date as the invitation for disciplinary hearing and raised no complaint over the same at the disciplinary hearing. He also signed the minutes of the disciplinary hearing without reservation.

56. I find that the Respondent had valid reason to take the Claimant through the disciplinary process, and to terminate his employment.

57. I further find that the Respondent complied with its own disciplinary process and the requirements of the law. The Respondent was entitled to summarily dismiss the Claimant for loss of confidence arising from the Claimant's actions which violated the Respondent's code of conduct and staff policy. The Respondent being a financial institution, the level of integrity required of its employees was higher than in ordinary employment relationships and the bank was entitled to dismiss an employee for loss of confidence and the circumstances of this case.

#### **Whether the Claimant is entitled to continue serving his loan facilities at preferential rate**

58. During the hearing the Claimant stated that he was aware that upon losing his employment the staff preferential rates of interest would cease and he would be required to pay commercial interest rates. He further admitted that he received a notice of 90 days as per Clause 1.18.7 of Staff Facilities Policy at page 19 of the Respondent's bundle of documents notifying him of the intention to convert the interest rates on his loans.

59. Based on the circumstances under which the Claimant's employment was terminated, I do not find the case of **Gladys Muthoni Mwangi & 20 Others v Barclays Bank of Kenya Limited & Another** which the Claimant relied on applicable to the instant case.

60. I find the Respondent is entitled to charge commercial rates of interest from the facilities advanced to the Claimant during employment in accordance with the Bank's polices as the termination of the Claimant's employment was valid.

61. For the same reasons, the Claimant is not entitled to any of the prayers sought in prayer (i) to (viii) of the claim save for a certificate of service if the same has not yet been issued to him. He is further not entitled to prayer (ix) which is only payable upon redundancy.

**62. The suit is accordingly dismissed. There shall be no orders for costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF OCTOBER 2021**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**