



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRCC/36/2020**

**CITATION: KIPCHIRCHIR NORMAN KEMBOI VS NATIONAL BANK OF KENYA LIMITED**

**JUDGMENT**

**ON 2021-09-24 BEFORE HON. JUSTICE J. N. ABUODHA**

1. By a memorandum of claim filed on 25th August, 2020 the Claimant alleged that he joined the respondent in July, 2014 and was attached to its Islamic Banking Division. Subsequently on 7th July, 2015 the Claimant was appointed by the respondent on a three-year contract running from 15th July, 2015 to 14th July, 2018. He was appointed as a clearing and settlement Analyst at a monthly salary of Kshs. 40,000/=.
2. On 10th March, 2016 the Claimant was appointed on permanent and pensionable terms and entered management grade 9 at a monthly salary of Kshs. 87,321/=.
3. On 1st September, 2018, the Claimant proceeded on his annual leave but was according to him arrested for unknown reasons at the instigation of the respondent. He was placed in custody at Eldoret Police Station.
4. While in custody he was interrogated by the police of his whereabouts since he commenced leave and his cell phone confiscated.
5. The Claimant was subsequently taken to Nairobi where he was issued with a suspension letter dated 3rd September, 2018 and later on 12th September, 2018 he was issued with a notification for disciplinary hearing scheduled for 19th September, 2018.
6. The suspension letter made reference to a fraudulent transaction arising from modification of Bank Salaries Revenue Collection account in favour of Mr. Peterson Nyakundi and others where the Bank lost the sum of Kshs. 7,322,802. The investigations further alleged that the Claimant received an amount of Kshs. 50,000/= from the said Peterson Nyakundi through his personal account.
7. The Claimant further pleaded that he attended the disciplinary hearing on 12th September, 2018 **terminated on the basis of that his professionalism as a Bank employee had been brought to doubt and his integrity was questionable rendering his continued employment impracticable.**
8. The Claimant appealed against the termination by a letter dated 5th October, 2018 and was by letter dated 11th October, 2018 invited for the hearing of the appeal on 17th October, 2018. He attended and by a letter dated 30th October, 2018 informed that his appeal had no merit and the decision to terminate him stood.
9. According to the Claimant the suspension and eventual termination from employment was unfair and lawful for reasons among others that he was never issued with notice to Show Cause why he should not be suspended from employment and that was mention of ongoing investigations was made and whose integrity could have been compromised by his presence at work as he was already on leave. The Claimant further averred that he was never invited to Show Cause why his employment should not be terminated over misconduct and further that no justifiable reason existed to terminated his employment contract as based on the termination letter it was indicated that the respondent would have suffered a potential loss of Kshs. 7 million which was contrary to the earlier letter of 12th September, 2018 which had indicated that the respondent had actually lost Kshs. 7,322,892/=.
10. The respondent in its response to the claim pleaded among others that it admitted paragraphs 1,2,3,4 and 5 of the statement of claim.
11. The respondent further stated that immediately prior to the commencement of the dispute which resulted and the suits, the Claimant was a Data Euphie Analyst and his responsibilities included ensuring accurate transfer of data captured from customers applications to core banking systems. Further to ensure issues and risks encountered on the job are promptly escalated to the supervisor to facilitate regular updates on the unit issue and risk registers and also ensure zero revenue leakage while processing data.

12. On 29th August, 2018 the transaction monitoring department flagged an account belonging to Peterson Nyakundi for having received several suspect credits amounting to Kshs. 4,739,033 from ten companies between 13th April, 2018 to 30th August, 2018. This necessitated the commencement of investigations on the account and the account holder.

13. On the issue of suspension, the respondent denied the allegations on paragraph 9 of the statement of claim and averred that the Claimant was suspended because he was adversely mentioned in the preliminary investigations reports over the fraudulent transactions with particulars reference to the fact that the Claimant's account was credited with Kshs. 60,000/= through a mobile number 0711771625 belonging to one Peterson Nyakundi whose account was under investigations. The respondent denied knowledge of allegations that the Claimant was arrested and his phone taken away from him.

14. The respondent further pleaded that following the conclusion of the investigations, by a letter dated 12th September, 2018 the Claimant was issued with a notice for disciplinary hearing to be held on 19th September, 2018 and at the hearing the respondent established that the Claimant was working in cahoots with one Ezra Andabwa, a former employee of the respondent facing conspiracy to defraud charges.

15. The respondent averred that the disciplinary hearing was conducted in a lawful manner and rules of natural justice were observed and by a letter dated 25th September, 2018 the respondent terminated the Claimant's employment and was informed of his right of appeal within 7 days. The Claimant albeit outside time, appealed and was invited for an appeal hearing on 12th October, 2018 which took place as scheduled and 30th October, 2018 the Claimant was notified that his appeal was unsuccessful and that the decision to terminate his service stood.

16. In a claim for termination of employment the burden of proof of reasons for termination rests on the employer while the burden of proof that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee (section 47(5) Employment Act).

17. The Claimant herein alleges he was unfairly terminated for the reason that he was never issued with a Show Cause letter prior to suspension and that no mention was made of ongoing investigations whose integrity he could have compromised by his presence at work as he was already on leave. He further alleged that he was never invited to Show Cause why his employment should not be terminated.

18. The suspension letter dated 3rd September, 2018 informed the Claimant that following a preliminary report with ongoing investigations regarding fraudulent activities at Salaries and Payments Section, it was noted that his personal account received the sum of Kshs. 60,000/= from a suspect, Mr. Peterson Nyakundi. The Court noted that the suspension letter never called upon the Claimant to explain himself regarding the allegations against him this might be presumably because the investigations were still going on.

19. The Claimant was by a letter dated 12th September, 2018 invited for disciplinary hearing. The letter of invitation stated the charges against the Claimant which were the same as those stated in the suspension letter. The Claimant was further informed of his right to be accompanied to the disciplinary meeting by a colleague.

20. Upon the conclusion of the disciplinary hearing the Claimant's service was terminated and advised of his right of appeal which he exercised but the appeal was disallowed.

21. From the foregoing the Court is not persuaded that the Claimant was not aware of the charges against him and further that he was not heard in his defense to allegations against him.

22. Regarding complaint that the Claimant was not issued with a Show Cause letter before suspension and that he was not aware of any investigations whose integrity he could interfere with, the Court takes the view that there is no obligation on an employer to issue an employee with a Show Cause letter before suspension. A suspension is preliminary stage in any allegation against an employee. The evidence available at this stage may be cogent enough to justify suspension but not conclusive enough to call upon an employee to Show Cause.

23. The Court further observes that it would defeat the purpose of an investigation if an employee suspected of involvement in an activity such as fraud, were alerted at the preliminary stages. Most of these investigations are in their nature discrete and snap.

24. As observed earlier the burden of proof that an unfair termination or wrongful dismissal has taken place is cast upon an employee while the burden of proof of reasons for termination is on the **employer**.

25. In this particular case the Court is persuaded that there existed valid reasons for terminating the Claimant's service and the respondent has successfully discharged the burden while the Claimant on the other hand has miserably failed to show in what way or manner his termination from employment was unfair or wrongful.

26. The claim is therefore found without merit and hereby dismissed with costs.

27. It is so ordered.

**GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2021-12-01 12:21:17**

**SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)**

**THE JUDICIARY OF KENYA.**

**ELDORET ELRC**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**DATE: 2021-12-01 12:21:17**