



**REPUBLIC OF KENYA**

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

**CAUSE NO.1106 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> May, 2020)**

**EUSTACE MUCHIGIRI NJUGUNA.....CLAIMANT**

**VERSUS**

**CONSOLIDATED BANK**

**OF KENYA LIMITED .....RESPONDENT**

**JUDGMENT**

1. The Claimant filed an Amended Memorandum of Claim on 9/1/2019. He avers that was employed by the Respondent on 20/5/2019 as a Credit Analyst and rose through the ranks to Credit Officer. He avers that he worked dutifully until 20/6/2014 when the Respondent summarily dismissed him.

2. He avers that the Respondent summarily dismissed him for failing to protect the interest of the Bank by allowing funds to be transferred from the USD accounts of Masafi Fruits & Vegetables Limited to that of Willy Musinga Mutiso and disregarding the bank's credit policy and procedure by authorising without approval from the Ag. Head of Credit.

3. He avers that he was invited to a disciplinary hearing scheduled for 23/5/2014. He avers that the composition of the disciplinary committee was conflicted because the Chairman Mr. Joshua Kaiga was the patron of Umoja branch and knew the directors of Masafi Fruits & Vegetables Limited.

4. He further avers that the disciplinary committee did not present him with a fair opportunity to present his defence. He stated that Human Resource Manager acted ultra vires for reason that pursuant to clause 10.4 of the Respondent's Human Resource Policies and Manual Revised January 2009, only the Chief Executive Officer (CEO) was mandated to warn, suspend or terminate him.

5. He contends that his dismissal was unlawful, malicious and in total disregard to the rules of natural justice as it was not based on a fair reason as mandated by the Employment Act. He seeks the following prayers:-

***a. A declaration that the Claimant's dismissal from employment was null and void for breach of Clause 10.4 of the Respondent's Human Resources and Procedures Manual Revised January 2009.***

***b. An order reinstating the Claimant to his position without any loss of benefits.***

***c. In the alternative, an order compelling the Respondent to pay to the Claimant full salary WEF 20<sup>th</sup> June 2014 to the date of judgment herein at the rate of Kshs. 129,839 per month.***

***d. Three months' salary in lieu of notice*** ***Kshs. 464,565.00***

***e. 12 months' salary as compensation for  
unfair/unlawful termination*** ***Kshs. 1,558,068***

***f. Interest on (c), (d) and (e) at Court rates from time of filing suit till payment in full.***

***g. Costs of the suit.***

6. The Respondent filed an Amended response to the Memorandum of Claim on 12/2/2019. It avers that the Claimant was employed on 20/5/2009 and was promoted to the rank of Credit Manager vide a memo dated 31/6/2009.

7. It avers that following investigations into some irregularities in the management of accounts at Harambee Avenue Branch it established that most of the transactions resulted into unauthorised overdrawn positions in customers' accounts without the authority of the Head of Credit in violation of the Claimant's job description and its credit policy.

8. It avers that the Claimant was issued with a show cause letter dated 21/5/2014 on the irregularities in certain accounts. It avers that the Claimant responded to the show cause letter on 22/5/2014 but his response was not satisfactory leading to disciplinary hearing on 23/5/2014.

9. It avers that the Claimant did not raise any Preliminary Objection at the disciplinary hearing. It further avers that dismissal was on lawful grounds in accordance with Section 44, 45 and 49 of the Employment Act. It is its case that the fact that the letter was signed by the Head of Human Resource does not negate the fact that procedure of dismissal was lawful. It further avers that he was paid terminal dues.

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

10. The Claimant, CW1, testified that he was served with a show cause letter on 21/3/2014 and before he could respond, the following day, he received an email inviting him to a disciplinary committee hearing on 23/5/2014. He testified that he responded to the allegations in the show cause letter and forwarded it to the Human Resource.

11. He testified that his response was that accounts had not been overdrawn and that he would not have authorised funds transfer as it was an operations function. He testified that being in credit function he could only see a customer's account but could not authorise transfer.

12. He testified that his dismissal letter was by an unauthorised officer, Ms. Jacinta Rwaka who was the head of Human Resource yet Clause 10.4 of the Respondent's Human Resource Policy was clear on who could issue him with a show cause letter and termination letter.

13. He testified that the disciplinary committee findings were that the staff involved being Peter Kimutai Bii and Michael Mukuya be issued with warning letters. He stated that the CEO in the findings recommended for his resignation.

14. He testified that the disciplinary Committee was biased as Joshua Kagia who was the patron of the Umoja Branch where the accounts were domiciled. He further testified that Joshua had interacted with the accounts hence his bias.

15. In cross-examination, he testified that he needed approval from the Credit Manager to approve certain transactions. He testified that in his response to the show cause letter, he did not indicate that he had sought approval from the Credit Manager. He testified that he shared his response with Peter Kimutai who copy pasted his response.

16. He testified that he was informed of his right to a hearing. He stated that he was not present at the time of transfer of funds from Masafi Fruits & Vegetables Ltd as it was not a credit function. He testified that he never admitted authorising the transactions including those from an account of one Mwikali.

17. He testified that he never raised any objection to the composition of the disciplinary hearing and did not know if the members were of a standing committee. He avers that Page 23 of his documents shows that he disregarded bank credit policy and authorised transfer without approval from head of credit.

18. He testified that he did not know if Jacinta had received instructions from the CEO to sign his termination letter. He testified that he was paid his terminal dues as per the dismissal letter.

19. In re-examination, he testified that nothing was brought to his attention to show that he authorised the transactions. He further testified that he had not seen any document from the CEO delegating authority to Jacinta.

#### **Respondent's case**

20. Mukoba the Respondent's Human Resource Manager testified as Rw1. She testified that the disciplinary committee comprises Heads of Legal, Human Resource, Finance, Retail & SME and Treasury. She testified that Joshua Kaiga is a member of the committee as he is the Head of Treasury.

21. She stated that the termination letter was signed by the Head of Human Resource after the report on dismissal was approved by the Chief Executive Officer (CEO). He testified that others staff were approved for dismissal including Jeremiah. She testified that the Claimant in his response to the show cause letter did not deny he overdrew the account. She stated that they debited the account before credit was received and that this was against the Bank's policy.

22. In cross-examination, she testified that she sat in the disciplinary committee but there was no evidence of this. She testified that the allegations of what the Claimant said during the hearing were correct because she attended the disciplinary meetings.

23. She testified that investigations report was not given to the claimant before the hearing as it was highly confidential. She further testified that neither the report nor the vouchers signed by the Claimant in relation to each of the transaction was produced in Court.

24. She testified that the recommendation on the warning to Peter Bii was based on 3 transactions. She testified that the Claimant's actions

related to 6 transactions which touched on other employees. She testified that Joshua was not concerned with transfers as he only deals with forex.

25. She testified that pursuant to Clause 10.4 of the Human Resources Policies and Procedures Manual, warning letters and termination letters were to be signed by the CEO. She testified that the Claimant was in management but the head of Human Resource signed his termination letter. She testified that when the committee sat the CEO decided that the Claimant should immediately hand in his resignation letter.

26. In re-examination, she testified that the Claimant was aware of all allegations against him.

27. Elizabeth Koech the Respondent's Credit manager testified as Rw2. She testified that on 10/4/2014 Masafi Ltd received USD 111,330 and the Claimant and Peter Bii authorised the transfer of money to an account of Willy Musinga and 3 Million to another account. She testified that KShs. 5,328,500 was withdrawn in cash. She testified that from the show cause letter and the claimant's response he did not contest that he authorised transfer of funds as alleged. She stated that the Head of Credit is the one who had power to approve such transactions.

28. In cross-examination, she testified that she did not sit in the disciplinary committee. She testified that she gave a detailed statement of all transactions made by the Claimant which she obtained from the system.

29. She testified that page 43 of the Report of the disciplinary hearing indicated that Jeremiah authorised the 11,231,388 but that was an error. She testified that her statement is not erroneous. She testified that the Committee at pg. 41 of the Report made a finding that the transaction was authorised by Jeremiah and that Michael signed as a second signatory. She testified that this would not have formed the basis of the Claimant's dismissal.

30. She testified that the transaction by the Claimant was accompanied by a paper trail, which was not produced in Court.

31. I have examined the evidence of the Parties on record. From the Claimant's summary dismissal letter dated 20<sup>th</sup> June 2014, the Claimant was dismissed for the reasons that he failed to protect the interests of the bank by allowing funds to be transferred irregularly from the USD account of Masafi Fruits and Vegetables Limited to that of Willy Musinga Mutiso and other accounts thus evading to regularize the overdrawn position.

32. The Claimant was also accused of blatantly disregarding the Bank's Credit Policy and Procedures by authorizing without approval from the Acting Head of Credit various transfers as listed in the dismissal letter. He was therefore accused of exposing the bank to possible financial losses.

33. The Claimant was served with a show cause letter prior to the dismissal dated 21/5/2014 setting out various issues which the Claimant was expected to respond to by 4pm on 22<sup>nd</sup> May 2014. The Claimant responded to the show cause letter vide his response dated 22.5.2014 denying allegations levelled against him.

34. On 22<sup>nd</sup> May 2014 at 3.45 pm he was sent an email inviting him to attend a disciplinary hearing on 23/5/2014 at 11.30 am.

35. The disciplinary hearing proceeded on 23.5.2014 as per Minutes attached by the Respondent which show the members present in the meeting were 4 with one (1) apology.

36. From the Minutes there is no indication that the Claimant raised objection on the Membership of the Committee. The Claimant has submitted that the hearing process was flawed because his dismissal letter was authored by an unauthorised officer being the Human Resource Director instead of the Chief Executive Officer as per Clause 10.4 of the Respondent's Human Resource Manual Policy.

37. Clause 10.4 of the Respondent's Human Resource Manual states as follows:-

***“Where the breach is of such a nature as to warrant a final warning, suspension, termination or dismissal, recommendations will be made to the Chief Executive for approval on guidance before action is taken.***

***Warning letters will be issued by respective Heads of Departments but copied to Human Resource Department. Termination and dismissal letters will be signed by the Chief Executive for officers, while the Head of Human Resource will sign such letters for unionisable employees “.***

38. Indeed this position of the Manual was flouted by the Respondent as the show cause letter to the Claimant and even the dismissal letter was authored by the Head of Human Resource.

39. The Claimant also averred that his dismissal was unfair as it was not based on any valid reasons. From the Minutes of the disciplinary hearing attached to the proceedings, the actions or inactions complained against the Claimant are not clear. The Minutes were done in prose form and it is not clear whether the complaints raised against the Claimant were put to him and what his responses were.

40. At page 4 to 5 of the minutes, the issue of the overdrawn account of Masafi Fruits & Vegetables was put to him but his response is not recorded.

41. It is not clear whether the Respondent established that they had valid reasons for the dismissal of the Claimant from the Minutes

displayed in Court. And this coupled with the failure to follow their Human Resource Manual Procedure. I find the dismissal of the Claimant was unfair.

42. In terms of remedies, I award him 6 months' salary as compensation for the unfair termination =  $6 \times 129,837 = 779,022/=$ .

43. I also award him 1 month salary in lieu of notice =  $129,837/=$ .

**TOTAL = 908,859/=**

***Less statutory deductions***

44. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in Chambers via zoom this **21<sup>st</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kigata for Respondent – Present

Claimant – Absent