



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

*(Before Hon. Lady Justice Maureen Onyango)*

**CAUSE NO. 1331 OF 2014**

**JOSEPH NAFTALY MACHARIA KARUMBA.....CLAIMANT**

**VERSUS**

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

**CONSOLIDATED WITH**

**CAUSE NO. 1330 OF 2014**

**SYLVESTER AKOLO MUTULI.....CLAIMANT**

**VERSUS**

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

**CONSOLIDATED WITH**

**CAUSE NO. 682 'B' OF 2014**

**JIMMY MATHEW LABI.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

The Claimants, Joseph Naftaly Macharia Karumba, Sylvester Akoli Mutuli and Jimmy Mathew Labi filed their individual Claims dated 11<sup>th</sup> August 2014, 7<sup>th</sup> August 2014 and 12<sup>th</sup> March 2014 respectively against the Respondent, National Bank of Kenya Limited. They aver that their services were unfairly terminated on 26<sup>th</sup> September 2013 on the grounds of negligence and loss of confidence on account of an incident that posed a potential loss of Kshs.330 million due to a system breach in the Respondent's Bank Fusion Universal Banking (BFUB) System.

Joseph avers that on 6<sup>th</sup> May 2008, he was appointed a member of the Clerical Staff of the Respondent and posted to Mombasa, Portway House Branch. He was on probation for 6 months before his appointment was confirmed. His basic salary on employment was Kshs.33,416/= with a House Allowance of Kshs.3,700/=. It was increased over time to Kshs.80,991/= as at the time of termination. That he got transferred vide a letter dated 7<sup>th</sup> August 2009 to the Respondent's Head Office ICT Division where he was stationed for 4 years. After the said potential loss, he was transferred to the Harambee Avenue Branch via a letter dated 24<sup>th</sup> June 2013. That he wrote to the Chairperson of the Respondent's Staff Welfare Committee on 5<sup>th</sup> April 2014 requesting an assessment of his termination but the same was ignored. He annexes Appendixes 1 – 10 in support of his claim.

Sylvester was employed by the Respondent as a Bank Officer on 13<sup>th</sup> March 2002, on 6 months' probation before his employment was

confirmed. That he worked for over 11 years at the Respondent's Head Office ICT Division until 24<sup>th</sup> June 2013 when he was transferred to the Credit Division. That his consolidated salary on employment was Kshs.101,357/= and as he rose through the ranks, it was increased over time to Kshs.392,915/= as at the time of termination. He also annexes **Appendixes 1 – 8** to support his claim.

Joseph and Sylvester aver that they were skilful, efficient and reliable as proved by appraisals conducted by their Head of Department where their services were ranked excellent and satisfactory and that this is why they were with the Respondent for 5 and 11 years respectively. That the Head of ICT and Operations, Thomas Gachie had in a letter dated 26<sup>th</sup> March 2013 demanded that they explain their purported failure to respond to calls to trace and track a breach in the BFUB system and/or failed or ignored to set up a safe infrastructure which was not vulnerable to abuse and infiltration. That despite the short notice, they duly responded to the said letters and continued working in a strained relationship with him because he severally threatened them with a sack before subsequently transferring them. That before being transferred, they were directed to report at the meeting room on the sixth floor every day for disciplinary action which they adhered to for 3 months without working or any action being meted upon them. That upon being transferred, they worked under difficult circumstances until they were both unlawfully terminated.

Joseph and Sylvester both list the particulars of breach of law and Respondent's HR Policy Manual. They state that they were dismissed: before being presented with charges to respond to; without defending themselves; without the Respondent disclosing the results of the investigations regarding the potential loss; without a formal complaint or record of dissatisfaction; and without the Respondent convening a disciplinary committee. That the Respondent breached **Sections 41, 43 and 45 of the Employment Act** together with the Respondent's **Human Resource Policy** and the **CBA**.

They aver that the reasons for their termination had no basis because Mr. Charles Owala did not at all call them on 16<sup>th</sup> March 2013 as regards the potential loss and that they responded to calls from him on 17<sup>th</sup> March 2013 when they were reached. That they both gave out the password for the Virtual Private Network (VPN) concentrator and that the VPN could only keep logs of history for a short period dependent on the activity at the bank as old data was deleted automatically. That this was within the knowledge of the Respondent's security team and not them. Further, that the VPN could only be accessed by users authorized by the Respondent's security team who knew the weakness of the VPN concentrator. That a new system was to be installed but procurement was frozen.

They continue to aver that they have suffered immensely and are unable to get employment because of the manner in which their termination letters are framed which is that they deliberately breached their duties; they are incompetent ICT specialists unable to adhere or ensure adherence to the policies set by the ICT department; they have questionable qualifications and knowledge of the VPN concentrator system; they were not keen to detail; and that they are guilty of professional negligence. They claim damages for defamation by the Respondent concerning their trade and profession as ICT specialists. That the said defamatory letters exposed them to disrepute and contempt in the eyes of their colleagues and prospective employers. Joseph and Sylvester each pray for judgment against the Respondent for:-

- i. A declaration and/or finding that the Respondent's termination was unprocedural, wrongful, illegal and amounted to unfair termination.*
- ii. A declaration that the Claimant's fundamental rights to fair administrative action, access to information and right to fair hearing was violated, transgressed on and trampled upon by the Respondent, an order for compensation for general damages for breach of Article 47 of the Constitution of Kenya.*
- iii. A declaration that the Claimant's fundamental rights to fair labour practice were violated and an order for compensation for general damages for breach of Article 41(1) of the Constitution of Kenya.*
- iv. An order for compensation to the Claimant to the maximum of 12 months' salary on the gross salary at the time of dismissal as stipulated under Section 49 of the Employment Act, for unfair termination and loss of employment.*
- v. An order for compensation to the Claimant for salary, allowances and benefits from 1<sup>st</sup> October 2013 to the date of Judgment.*
- vi. An order for compensation to the Claimant for salary, allowances and benefits for at least 5 years from the date of Judgment or a period the Court deems fit to meet the ends of justice.*
- vii. General Damages for slander.*
- viii. Exemplary and/or aggravated Damages.*
- ix. An order for payment of costs for this claim.*
- x. Interest on IV, V and VI at court rates from the date of filing claim until payment in full.*
- xi. The Court do make such and further orders that it deems fit to meet the ends of justice.*

Jimmy avers that he was employed by the Respondent as a Bank Officer in August 1999 and loyally served it until 23<sup>rd</sup> February 2013 when the Respondent's General Manager (Human Resources) transferred him from his position as Manager ICT Department to the Business Continuity Centre (BCC)/Disaster Recovery Centre with immediate effect. That he was not told the reasons for his transfer or given any notice for the same and that when he reported to his new station, no tasks or duties were assigned to him. His access to all systems was deactivated. This caused him mental trauma and frustration until he was further transferred in June. That when he sought an explanation on 26<sup>th</sup> February 2013 through his email to the Respondent's General Manager-ICT Department. He did not receive any response. That it is on

19<sup>th</sup> March 2013 when he was informed to report to the HR Department for redeployment or hand in his resignation letter. That on 27<sup>th</sup> March 2013, he received an undated show cause letter for alleged unjustified/unnecessary procurement of goods and services in the organization which he duly responded to before receiving another letter on 24<sup>th</sup> June 2013 transferring him to the Legal and Remedial Division but without access to the computer systems. That in August 2013, he was asked by the Respondent's security manager to respond to the attempted theft said to have occurred in March 2013, which he was not aware of as he was not working in the ICT Department at that time. His employment was terminated by letter dated 25<sup>th</sup> September 2013. He relies on documents marked *JL1 – JL9*.

That after termination he made a formal demand to the Respondent on 31<sup>st</sup> October 2013 for his immediate and unconditional reinstatement but the same was not responded to.

He avers that the Respondent has failed to substantiate the allegations on his undated show cause letter to date. That his rights under the law were seriously violated entitling him to an order of reinstatement and in the alternative, an order for payment of damages including aggravated damages. That the Respondent has further discriminated him by refusing to offer him the severance package offered to other employees of the Respondent. He lists the particulars of loss and damage as follows:

- (i) Damages for wrongful termination of contract at 12 months' salary of Kshs.474,930 per month being Kshs.5,699,160.00*
- (ii) Severance pay of one month for every completed year of service (1999 to 2013=14 years) being Kshs.6,649,020.00*
- (iii) Medical allowance at Kshs.150,000.00*

Jimmy prays for judgment against the Respondent as follows:

- a) A declaration that the Respondent's termination of the Claimant's contract of employment was unfair and unlawful.*
- b) An order for immediate reinstatement.*
- c) Damages in the total amount of Kshs. 12,498,180*
- d) Certificate of Service*
- e) Costs of the suit*
- f) Interest*
- g) Any other or further relief that the Court may deem fit to grant*

The Respondent filed two Memorandums of Reply both dated 18<sup>th</sup> May 2015: one is in response to the claims of Joseph and Sylvester and the other a Statement of Defence dated 28<sup>th</sup> May 2014 in respect of the claim by Jimmy. The Respondent admits having employed the Claimants under the terms and conditions laid down in the CBA and staff policies and procedures. It avers that it complied with proper and fair procedure for disciplinary action before terminating the Claimants' employment and acted in accordance with its HR Policy Manual, CBA and the Employment Act.

### **Facts of the Case**

It is an undisputed fact that there was a systems breach in the Bank on 16<sup>th</sup> and 17<sup>th</sup> of March 2013 where a fraudulent batch gateway of Kshs.330,020,000/= was processed in the BFUB system but which was averted. The respondent avers that two accounts domiciled at the Respondent's Nakuru and Kisii branches were credited with the amount in question and a branch staff forestalled withdrawal of the same after noting the anomalies in the transaction. That its security team investigated and found out initially that a staff at the ICT department had fraudulently debited various government related accounts and credited to two accounts held by the Respondent.

Joseph and Sylvester being administrators of the VPN system were blamed for the breach as outlined in the letters issued to them which required them to explain themselves on the said potential loss. After their responses they were removed and sent to sit in the Boardroom for about three months following which they were deployed to different departments. On 6<sup>th</sup> September 2013 they were summoned for a meeting and thereafter were issued with letters of termination.

It is the Respondents case that the responses by the Claimants were not satisfactory, that Joseph and Sylvester failed to ensure audit trails of access logs were maintained in the VPN systems as required; they failed to issue the password upon request by Mr. Charles Owala during investigation of the system breach with each of them stating that they needed permission from the other; that thereafter they issued a wrong password to Mr. Charles Owala; failed to report to the management the shortcomings of the VPN system as required; failed to hand over to the infrastructure unit at ICT systems that failed to record access logs. It is further averred that Sylvester failed to alert the respondent on the vulnerability of the VPN system.

The respondent denied that the termination letters were of the claimants published and defamatory stating that the wording in their ordinary meaning meant the Claimants were negligent and thus unsuitable to hold their positions. That it provided fair and valid reasons for terminating their employment.

With regard to Jimmy, the Respondent avers that his transfer including restriction of access to systems was necessitated by the need to investigate the department for exposing it to potential loss. That it was therefore not obliged to give him prior information or explanation as the same would have compromised the investigations. It denies that it demanded he resigns. That while it clearly outlined the allegations he was required to answer to in his show cause letter, Jimmy never complained about the timeframe given for him to respond. That he was given a hearing by the disciplinary committee which recommended termination of his services.

The Respondent filed two Witness Statements both dated 15<sup>th</sup> October 2018 by its Head of Security Investigations, Willy Tanui and the HR Manager, Stephine Opiyo. Willy Tanui states in his statement that the Claimants' actions and inactions amounted to gross misconduct both in law and as per the Respondent's HR Manual, ICT policy and ICT Security policy and warranted disciplinary action. He states that Jimmy was suspected to be engaged in procedurally improper procurement systems which he admitted to be part of his responsibilities as Infrastructure Manager. That being responsible for the day to day operations of the ICT department he was also liable to be queried on the anomalies. That even though he was given an opportunity to justify his inactions over his duties and responsibilities, his response was unconvincing and unsatisfactory.

### **Evidence**

CW1, Jimmy testified that he was the IT manager of infrastructure and did not have any disciplinary issues or warnings. CW2, Sylvester adopted his witness statement dated 7<sup>th</sup> August 2014 as his evidence in chief together with his bundle of documents running from page 1 to 73. CW3, Joseph adopted his witness statement dated 11<sup>th</sup> August 2014 as his evidence in chief.

RW1, WILLY KIPTOO TANUI testified that he conducted the investigations on the potential fraud. He testified that there was an earlier breach in the ICT department in February which he was not investigating but was fully aware of. That it is not true Jimmy was denied work at BCC stating that he undertook debt recovery. That he was invited to a formal disciplinary hearing where Jimmy was offered an opportunity to defend himself against the allegations brought against him and that he was terminated on account of breach of the ICT infrastructure among other reasons. RW2, STEPHINE OPIYO OBONGO adopted his witness statements in all the claims

### **Claimants' Submissions**

The Claimants submit that the termination of their employment was unfair because it did not meet the threshold of procedural fairness as per Section 41 of the Employment Act and substantive fairness as stipulated in Sections 43 and 45 of the Act. That Clause 7.1.3 of the Respondent's HR Policy also states that no employee shall be condemned unheard with the hearing being by way of oral supplication or written explanation. That even though they attended the meeting of 6<sup>th</sup> September 2013, the same was not a disciplinary meeting as they were only interrogated by a panel comprising of representatives from the HR and Security and Audit departments. That they did not present their defence. That the Respondent did not produce any letter demonstrating the reasons for the said meeting or the minutes thereof. It is their submission that they did not have representatives of their own or attendance by a Union official. That RW1 confirmed the investigation results were not communicated to them and that the said meeting was one of the many interrogations they attended while investigations were on-going. They rely on the case of Peterson Ndung'u & 5 Others –V- Kenya Power and Lighting Company Ltd [2014] eKLR where Rika J. found that:

“...It is to be drawn from this that the Respondent, in spite of its very meticulous collection of evidence preceding its final decision, did not hear the Claimants. The involvement of the Claimants with the investigations, their answer to the letter to show cause, would not amount to a hearing under section 41 of the Employment Act. The process was lacking in fundamental procedural protections, and therefore unfair within the meaning of Section 41 and 45 of the Act.”

It is submitted that Section 47(5) of the Employment Act dictates that the Claimants prove their termination was unfair but places the burden of justifying the grounds for termination of employment upon the Respondent. That they have demonstrated from their evidence adduced in court that they were unfairly terminated while the respondent's witnesses just gave hearsay evidence and did not justify why they were terminated. That Sylvester Mutuli had raised a similar issue on 21<sup>st</sup> February 2013 with Mr. Charles Owala as confirmed by RW1 in court but the same was not rectified. That it is the ICT security team that was involved in the issuance of access to the VPN system and not the infrastructure team.

The Claimants pray that their prayers in the claim be granted. citing the case of Fredrick Odongo Owegi –v- CFC Life Assurance Limited [2014] eKLR.

### **Respondent's Submissions**

The Respondent submits that Joseph and Sylvester cannot dismiss the meeting held on 6<sup>th</sup> September 2013 as not constituting a disciplinary hearing and insists that it met the threshold of procedural fairness set by Section 41 and in the case of Anthony Mkala Chitavi –v- Malindi Water and Sewerage Co. Ltd [2013] eKLR. That it also complied with substantive justice on the establishment of a valid reason for terminating the Claimants' employment which is stipulated under Section 43 of the Act. That the Claimants were summarily dismissed under Section 44(4)(c) and (g) of the Employment Act. That in Sophia Wambui Muthoni –v- Muramati Sacco Society Ltd [2014] eKLR, the court in dismissing a claim for unfair termination of the negligent employee who based her entire claim on minor procedural flaws, considered that she wilfully neglected to perform her work or carelessly and improperly performed her work.

With respect to Jimmy the Respondent submits that under Clause 2 of the Contract of Employment dated 20<sup>th</sup> July 1999, it was entitled to move him to any branch while Clause 3 stipulates that its management may alter his functions and duties at discretion. That it is also noteworthy that while at his new workstation, Jimmy continued receiving a managerial level salary despite undertaking administrative duties and that his termination letter clearly stated the reasons for termination as required in labour law. That his claim is founded on his own incompetence, impropriety and/or illegality and cannot be sustained and it relies on the case of Ahmednasir Abdulahi –v- National Bank of

Kenya [2006] eKLR.

It submits that Joseph and Sylvester are not entitled to any of the reliefs sought in their claims in particular prayers I, II, III, IV, VII and VIII. That Jimmy does not deserve the reliefs he seeks in his claim and that reinstatement is impractical within the context of Section 49(4) of the Employment Act and unmerited because Jimmy contributed to his termination by failing to perform his supervisory duties and engaging in malpractice that led to loss of confidence in him. That Jimmy is not entitled to severance pay which flows from a redundancy under Section 40 of the Act as there is no factual and legal basis for the same. That the claim for medical allowance has merely been pleaded but no evidence has been adduced to support the claim.

That the Claimants' claim for compensation for periods where they rendered no service to it amounts to commercial exploitation as was similarly observed by the court in *Abraham Gumba –v- Kenya Medical Supplies Authority* [2014] eKLR. That it is trite law that compensation or damages are not aimed at facilitating unjust enrichment of the party claiming unfair termination and that in the event this court is inclined to award any damages, it should be guided by Section 49(1) as read together with Section 50 of the Employment Act. That in urging this court to grant minimum compensation, it relies on *John Muia Mbute and Another –v- Rakim Rajan t/a Smokey's Bar & Restaurant* [2016] eKLR where Mbaru J. awarded 3 months' salary in compensation for unfair termination. That this court has the discretion to award costs as per Rule 28 (1) (e) of the ELRC (Procedure) Rules which discretion should be exercised judiciously and that since the Claimants have failed to prove their claims, they should bear the costs.

### **Determination**

The first issue for determination is whether the Claimants were wrongfully, unfairly and unlawfully terminated from their employment by the Respondent. The second issue for determination is whether Claimants are entitled to the reliefs sought in their Claims.

While Section 44 provides for summary dismissal for gross misconduct, Section 41 provides that before an employee is summarily dismissed under section 44(4), the employer must comply with the stipulated procedure thereof.

It is not contested that the Claimants were never issued with notices summoning them for disciplinary hearing in the manner provided in section 41 of the Act. All that the Respondent relied upon to terminate the Claimants' services were reports from the Manager, Security and Investigations which recommended serious disciplinary action against the Claimants and a summary from Head of Human Resources recommending the termination of their employment. These followed a recommendation by Dismas Omondi, HRBO-Corporate and Support Functions, Shirley Ncharo-Manager, Employee Relations, Willy Tanui-Officer Security and Johnson Amulumba-Manager IS Audit. All that the Claimants were subjected to was an interrogation, which came more than six months after the incident that triggered the termination of their employment.

On the validity of reason for the termination the Claimants each denied the accusations against them and were not given an opportunity to be heard. In any event there could be no proof of valid reason without a hearing as envisaged under Section 41 of the Act.

In *Donald Odeke –v- Fidelity Security Ltd, Cause No.1998 of 2011*, the court observed that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair.

It is on these grounds that I find the termination of employment of the Claimants unfair both substantively and procedurally.

The three Claimants are all entitled to compensation having concluded that they were unfairly terminated and considering they each worked for the Respondent for quite a long time. Joseph and Sylvester have however not demonstrated how their fundamental rights under the constitution were violated to warrant a declaratory order and/or compensation for the same as per their prayers. I also agree with the Respondent that Joseph and Sylvester cannot claim for compensation for periods when they did not render any service to it as was observed by the court in the Abraham case above. As for the claim of defamation, Rika J in the case of *Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute* [2016] eKLR observed at paragraph 82 that:

“In *Naqvi Syed Omar v. Paramount Bank Limited & the Attorney- General* [2015] e-KLR, it was the view of the Court that where an Employee's attractiveness to potential Employers is damaged or diminished as a result of the actions of the Employer in the process leading to termination of employment, the Court may grant damages to compensate the lost employability. The manner of dismissal and negative publicity attendant to the process of dismissal has the potential to damage or lower the Employee's stock in the labour market...”

The claimants did not adduce any evidence in support of the prayer for defamation and thus have not proved the same.

The Claimants cannot be reinstated as in my opinion they did not demonstrate exceptional circumstances to warrant reinstatement. Further, having been out of employment since 2013, the period of three years within which the court may order reinstatement has since long lapsed.

Taking into account all the circumstances of their cases and the manner in which the termination occurred, the anguish they suffered between March and September when they were subjected to hostile treatment by the respondent, further taking into account their length of service I award the claimants compensation as tabulated below –

### **Joseph Naftaly Macharia Karumbe**

I award him 10 months' gross salary as compensation in the sum of **Kshs.800,000/=**.

**Sylvester Akolo Mutuli**

I award him 12 months' gross salary as compensation in the sum of **Kshs.4,714,980/=**.

**Jimmy Mathew Labi**

I award him 12 months' gross salary as compensation in the sum of **Kshs.5,699,160/=**.

All the claimants are entitled to certificate of service. The Claimants did not prove any of the other prayers in their respective claims which are accordingly dismissed.

The respondent shall pay the claimants' costs of the suit. The decretal sum shall attract interest from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**