



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

**AT KERICHO**

**CAUSE NO. 167 OF 2016**

***(Before D. K. N. Marete)***

**MERINDA LYNDIAH AJIAMBO.....CLAIMANT**

**VERSUS**

**SMEP MICROFINANCE BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of Statement of Claim dated 5th December, 201. The issues in dispute are herein cited as;

- 1. Unfair and unlawful termination.*
- 2. Unfair and unlawful suspension from duty.*
- 3. Unlawful withholding of salary.*
- 4. Unfair labour practices.*
- 5. Summary dismissal while criminal proceedings are pending.*
- 6. Reinstatement to employment*
- 7. Compensation/Damages for breach of rights.*

The respondent in a Memorandum in Reply dated 22nd May, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she was employed by the respondent on 9th September, 2010 as a Credit Officer Trainee at a gross salary of Kshs.40,000.00. She was elevated to a Business Development Officer and deployed to work at the Kisumu branch of the respondent.

The claimant's further case is that she dutifully and diligently discharged her duties to the respondent until 23rd September, 2016 when she was suspended from duty and her salary withheld. She avers that this was unfair and unlawful for reasons that;

- a) The claimant was not informed by the respondent of the allegations for which it was considering*

*placing her on suspension and accorded her an opportunity to be heard.*

*b) The suspension was without pay hence irregular and/ or pay was withheld unlawfully.*

*c) No Prima-facie basis existed to warrant the suspension as an internal audit report was compiled on 30<sup>th</sup> September, 2016 while suspension was effected on 23<sup>rd</sup> September, 2016 prior thereto.*

*d) The claimant was denied any other benefits that she was entitled to under the employment contract such as house allowance, travelling allowance and medical attention.*

*e) No objectively justifiable reason to deny the claimant access to the work place existed.*

*f) The claimant was never involved in the audit process and investigations at the work place.*

The claimant's other case is that while she was in suspension the respondent made a report to the police leading to her arrest on 15th October, 2016 and subsequent incarcerated at Kisumu Police Station. She was thereafter arraigned before the Chief Magistrate at Kisumu in Kisumu CM Cr. Case No.494 of 2016 in which she was charged with forgery contrary to section 245 of the penal code, making a document without authority contrary to section 349 of the penal code and stealing by servant contrary to section 281 of the penal code, chapter 63 of the Laws of Kenya. She was released on bond and trial schedule for 7th December, 2016.

The claimant's further case is that during the pendency of the criminal case, the respondent summarily dismissed her from employment. It is her averment that this was unfair and unlawful for the following reasons;

*a) The claimant was not given advance notice of the allegations of misconduct that the respondent was contemplating to summarily terminate the employment.*

*b) The respondent did not invite the claimant to reply to specific allegations for misconduct.*

*c) The claimant was not accorded an opportunity to be heard in the presence of a fellow employer of her choice or a trade union representative.*

*d) The claimant was not notified in advance of the witness if any that would attend before the disciplinary panel and given their statement(s) in advance to prepare for cross-examination.*

*e) The dismissal letter fails to give specific details of the disciplinary process(es) and instead imputes knowledge on the claimant.*

*f) The dismissal letter confirmed that the claimant was suspended without being invited to show cause.*

*g) The respondent proceeded with the disciplinary process while it had put into motion the criminal process against the claimant which was pending.*

*h) The dismissal letter dismisses the claimant from 'the Bank' instead of from Employment.*

*i) The dismissal letter alludes to cause 11.4 of the HR policy of which the claimant was ever given advance notice of the same and a copy of the same supplied to the claimant in advance.*

*j) The dismissal letters does not contain date(s) of the alleged misconduct found to have been established.*

*k) The dismissal from employment is **sus-judice** as the same issues are pending before the criminal court for determination which proceedings were commenced at the respondent's motion.*

- l) *The termination fails to comply with section 78 of the **Employment Act**, 2007.*
- m) *The respondent failed to adhere to the disciplinary policy.*
- n) *The respondent failed to maintain and inform the claimant of the staff disciplinary policy and practices despite having employed more than 50 employees.*
- o) *The respondent is seeking to withhold terminal dues by purporting to recover unauthenticated losses.*
- p) *The matters leading to dismissal of the claimant are belated as the information about any such loss does not appear in the respondent's audited accounts which were duly prepared, approved and submitted to the Central Bank of Kenya in accordance with section 26 of the **Micro-Finance Act**, 2006.*
- q) *The dismissal is irregular, unfair and unlawful as the Central Bank of Kenya has never required the respondent to correct or amend the audited accounts to incorporate any alleged losses in accordance with section 32 of the Microfinance Act, 2006.*
- r) *The exhibited and published accounts of the respondent over the period in question published pursuant to section 31 of the **Microfinance Act**, 2006 do not contain information of the alleged losses.*
- s) *The internal audit report has not been prepared by a qualified Internal Auditor as provided for in section 28 of the **Microfinance Act**, 2006.*
- t) *No report has been compiled by the External Auditor appointed under section 29(8) (b) of the **Microfinance Act**, 2006 and a report made to the Central Bank of Kenya.*
- u) *The claimant had not been given any certificate of service as required by section 51 of the **Employment Act**, 2007.*

She prays as follows;

- a) *A declaration that her suspension from employment was unfair, unlawful and a nullity and the same be set aside/lifted as it also amounts to an unfair labour practice.*
- b) *Payments of the September, 2016 monthly salary of Kshs.40,000 and withheld salary for the months of October, 2016 and November, 2016 @Kshs.40,000 totaling Kshs.120,000.*
- c) *Payments of damages for the breach of the constitutional right to fair labour practices under article 41 of the Constitution of Kenya, 2010 by the unlawful suspension and dismissal.*
- d) *Reinstatement to employment without loss of salary, benefits or seniority.*
- e) *Payment of salaries from the dated of dismissal to reinstatement @ Kshs.40,000 monthly or such increased rate.*
- f) *In the alternative but without prejudice to the foregoing 12 months salary as damages @ Kshs.40,000 thus Kshs.480,000.*
- g) *3 months salary in lieu of notice at Kshs.40,000 @ thus Kshs.120,000.*
- h) *Costs and interests.*

The respondents opens her case by a denial of paragraph 5 of the Statement of Claim and avers that the

claimant's service was not dutiful or diligent in that she regularly absented herself from work without prior authorization and was involved in fraudulent activities leading to a loss of Kshs.2,390,513.00 out of which the claimant benefited from Kshs.1,940,885.00.

The respondent's further case is an admission of paragraph 6 of the claim with a rider that the claimant was suspended upon discovery of the fraud above referred and further that the suspension was pursuant to the provisions of the service contract. Her salary was withheld as a lien in accordance with section 19 (b) and (d) of the Employment Act, 2007.

Her other case – in reference to paragraph 7 of the claim is that the suspension was fair and lawful for the following reasons;

- a) The claimant was suspended upon discovery of fraud that led to the loss of Kshs.2,390,513 by the respondent out of which the claimant personally benefited from Kshs.1,940,885.*
- b) Pursuant to Clause 11.1 of the service contract between the claimant and respondent the respondent reserved the right to suspend the claimant upon inquiry to alleged offences committed by the claimant.*
- c) Investigations carried out by the audit department confirmed the claimant had defrauded the bank of the amount specified in (a) above.*
- d) Upon a report being made to the police and more specifically to the anti-banking fraud unit, the police performed independent investigations and made a decision to charge the claimant in Kisumu Criminal Case No.494 of 2016 R.V Merinda Lyndah Ajiambo.*
- e) That pursuant to Section 19(b) and (d) of the Employment Act 2007, the respondent withheld the claimant's monetary entitlements to cover itself from the loss caused by the claimant.*
- f) The claimant was invited to participate in the audit and investigation process but declined the invitation citing a variety of reasons. Annexed hereto and marked appendix 3 are email correspondences between the claimant and the respondent's officials.*

In reference and denial of the claimant's assertion that her dismissal was unfair and unlawful, the respondent recites a case fair and lawful dismissal for the following reason;

- a) An internal audit had ascertained that the claimant was involved in fraudulent activities that led to the loss of Kshs.2,390,513 out of which the claimant personally benefited from Kshs.1,940,885.*
- b) The fraudulent activities by the claimant had led to the disintegration of the bank's Kisumu Branch best performing business groups.*
- c) The claimant had been invited severally to respond to the findings by the audit team to which she declined the invitations.*
- d) The claimant had been informed of her rights including a right to be accompanied by a fellow colleague to the disciplinary hearings but still decline to participate in the same. See appendix 1.*
- e) The claimant was issued with a show cause letter dated 4<sup>th</sup> November, 2016 which she ignored. Annexed and marked appendix 4 is a copy of the same.*
- f) The police through the anti-banking fraud agency carried out their independent investigations and proceeded to charge the claimant in court.*
- g) The claimant had breached Clause 11.4 of the service contract between herself and the respondent and as per the contract was liable for summary dismissal. Annexed and marked*

*appendix 5 is a copy of the same.*

*h) The claimant had conducted herself in a manner incompatible with an Employer Employee relationship.*

The respondent in the penultimate submits a case of lawful termination and prays that the claim be dismissed for the following reasons;

*a) The dismissal of the claimant was fair and lawful within the meaning of Section 41 of the Employment Act, 2007.*

*b) The dismissal of the claimant was pursuant to Section 44(g) of the Employment Act, 2007.*

*c) The respondent has discharged the burden placed upon it pursuant to Section 43 (1) of the Employment Act, 2007.*

*d) The claimant committed an offence contrary to Section 44 (g) of the Act and was liable for dismissal for gross misconduct.*

*e) The respondent is a financial institution entrusted with funds from members of the public and therefore the public interest matter in this case weight heavily in favour of the respondent.*

*f) The termination was a fair and lawful termination within the meaning of the provisions of the Employment Act, 2007.*

The matter came to court variously until 1st December, 2017 when it was partially heard *inter partes*. Thereafter, the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

- 1) Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
- 2) Is the claimant entitled to the relief sought?
- 3) Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submissions dated 7th December, 2017 reiterates her case of unfair and unlawful termination as hitherto pleaded.

The claimant in support of her case submitted a breach of her rights as follows;

*a) She had been suspended through a phone call and her letter dropped at the Kisumu Branch of the respondent instead of sending it through the postal address she has had in the service contract.*

*b) Even before and after her arrest, the employer did not bother to give me the audit findings.*

*c) She was mistreated and detained in police custody with her ailing baby at the instance of the respondent on allegations she had not been told about since no audit report was given to her.*

*d) After being released on bond, she went to pick the suspension letter which still it had not copy of audit findings attached to it.*

*e) There was also a variation of the amounts that she was charged with on the charge sheet as against the amount on the suspension letter and the show cause letter which was sent in accompaniment with the suspension letter purporting to state that the audit was concluded and that*

the findings justified what was on the suspension letter.

f) *The said Mr. Kiptisya being unqualified cannot carry out an audit that can lead to the termination of the contract of an employee that has been validly entered into.*

g) *No statement from an External auditor has been submitted to the court verify the respondent's allegations of stealing.*

h) *The Central Bank of Kenya which is the licencing authority and regulator for the respondent has not submitted any report or adverse comments against the claimant linking her to any loss of money.*

i) *The respondent if at all it was true she forged and stole money has not given any evidence of having submitted a report to the Central bank of Kenya.*

j) *No officer linked to the Anti-Banking Fraud unit of the Police has presented a statement to this court to confirm that they investigated and found the claimant culpable of forgery and stealing from the respondent.*

k) *No handwriting expert report on forgery has been presented before the court to confirm the claimant forged any signature or any document submitted with the true specimens of the bank customers.*

l) *Forgery and theft are matters of fraud and the standard of proof is very high and an allegation devoid of the benefit of concrete evidence cannot suffice to justify an unfair and unlawful termination.*

Her further case and submission is as follows;

a) *She was unlawfully and unfairly terminated from work.*

b) *She was unlawfully and unfairly suspended from duty.*

c) *Her salary was unlawfully withheld as the contract and the law did not provide for the same.*

d) *She was summarily dismissed from work without due process being followed.*

e) *Mr. Kiptisya Kipsongol has since confirmed that he is not qualified Accountant and an Auditor under the law and reference can be made to his statement in court.*

The claimant in further support of her case sought to rely on the authority of **Fredrick Saundu Amolo suing through the Executive Secretary KUPPET Kajiado County Branch –V- Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR** in which Mbaru, J. observed as follows;

*“Therefore, before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3 dimension criteria. First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima-facie case, Secondly, there is some objectively justifiable reason to deny the employee access to the work place based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict”.*

Again, the claimant relied on the authority of **Muller & Others vs. Chairman of the Minister's Council: House of Representatives & Others (1991) 12 KJ 71 (c) at 766** where it was held that an employee has a right to a hearing before suspension as follows;

*“ The question, as we see it is whether the person involved is entitled to be heard not on the ultimate question of whether the charge is or is not made out but on the question under consideration at that time, namely, whether or not he should be suspended as an interim step ...plainly, the decision which adversely affects (his) rights and legitimate expectations. It is likely to have profound emotional social and financial effects on him. He was entitled to be heard on the question whether he should be suspended without salary during interim period. It may well be that there is little that the appellant could have said or done that was likely to influence the decision on that question. It may well be the decision would have been the same if he had been given the opportunity of being heard. The fact remains, however that he was given no opportunity whatsoever of being heard on the question whether he should be suspended without salary.”*

The claimant in further support of her case of unfair and unlawful termination of her employment employed the authority of **Machanga Mwachanya vs Operation 680 Limited [2013] eKLR**, where Radido, J. summarized the principles in section 41 of the Employment Act, 2007 as follows;

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation.*
- c) That the employer has heard and considered any explanations by the employee or their representative;*
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

To buttress the above, the claimant also sought to rely on the authority of **James Ondima Kabesa v Trojan International Limited [2017] eKLR** in which Onyango, J. observed as follows;

*“Under Section 41 of the Employment Act an employer is required to inform the employee in the presence of a fellow employee or a shop floor union representative of his choice, the reasons for which the employer contemplates to terminate the services of the employee. The employer is then supposed to hear the employee’s representations and the representations of the person who has accompanied the employee to the disciplinary hearing.*

*The employer is also expected to observe the rules of natural justice of giving the employee notice of the impending hearing and the grounds for the disciplinary hearing to enable the employee prepare to defend himself.*

*In the present case there is no formal notification to the employee of the disciplinary hearing, no mention of whether the employee was informed of his right to be accompanied by a fellow employee to the hearing and no mention in minutes of a disciplinary hearing. Further the letter of termination does not make any reference to a disciplinary hearing on 10th June 2015. The minutes are also not signed by the claimant.*

*From the foregoing it is evident that there was no disciplinary hearing as envisaged in section 41 of the Employment Act”.*

This is all in support of a case of unfair, unprocedural and unlawful termination of employment of the claimant by the respondent.

The respondent in her submissions dated 7th December, 2017 reiterates her case. She submits as follows;

*6.0 It is therefore clear that despite being issued with notice and invitation to the disciplinary hearing and failing to attend all the claimant is barred from relying on the ground that the*

*Respondent failed to accord her a hearing or to be accompanied by an employee of her choice or a shop steward as these are issues that would have been addresses at the said disciplinary hearings.*

*6.1 The Respondent left with no recourse finally terminated the claimant with effect from 10<sup>th</sup> November 2016.*

Further,

*It is the respondent's submission that the dismissal of the claimant herein was a lawful and fair termination of employment pursuant to section 44 sub section 3 and 4 (a) and (g) as the claimant not only absented herself from her work place without proper approval but also committed a criminal offence against and to the substantial detriment of the respondent and its property.*

*It is the Respondent's submission that even when required to answer queries as to the audit the Claimant continually absented herself from the work place without leave and in addition single handedly committed massive fraud as against the Respondent leaving the respondent with no other cause of action but to summarily dismiss the claimant.*

The respondent as an illustration of the futility of the claimant's case and submission of lack of procedural fairness further seeks to rely on the authority of **J. Jackson Butiya vs Easter Produce Kenya Limited, Industrial Court Case No.335 of 2011** where it was observed as follows;

*"An employee who squanders the internal grievance handling mechanism provided by an employer cannot come to this court and say I refused to talk with those people and therefore I was not heard, order them to pay me". It is not for the court to supervise the internal grievance handling process between employer and employees. The role of the court is to ensure such process is undertaken within the law similarly the claimant having squandered five disciplinary hearing chances is stopped from claiming in this honourable court lack of a fair hearing prior to dismissal and further it is worthy to consider that she was informed of a right for a final appeal to the Chief Executive Officer even after dismissal which she declined to pursue. See document 5 in the Respondent list of documents, email correspondence.*

The respondent in the penultimate polishes her case and submissions thus;

*The Respondent further submits that the claimant herein has been charged in a court of Law by the police in **CRIMINAL CASE NO. 494 OF 2016 – KISUMU** on three different counts which are;*

- 1) Forgery contrary to section 245 of the Penal Code.*
- 2) Making a document without authority contrary to section 349 of the Penal Code.*
- 3) Stealing by servant contrary to section 281 of the Penal Code.*

*The police who instituted independent investigations charged the claimant with the above three counts thereby validating the audit and investigations carried out by the respondents.*

The determination of this issue borders around a determination on the issue of substantive and procedural fairness as expressed under section 41 (1) and (2) of the Employment Act, 2007. This is contested by the parties. It is however discernable from the respective cases of the parties that the claimant was afforded an opportunity to be heard through disciplinary proceedings in which she was informed and invited. Prior to the disciplinary proceedings, the claimant had been issued with a suspension and show cause letter all of which she disputes and maligns as being unprocedural.

The respondent submits a case of absconding duty by the claimant. This was the causative of the letter of suspension. The suspension was contemporaneous with an audit at the work place in which the claimant was found culpable of massive fraud and therefore the additional edict of her disciplinary cause. The

claimant does not rebut this but only brings out technical issues to downplay the efficacy and validity of the disciplinary process. This is not acceptable. I find in favour of the disciplinary process and uphold the respondent's case. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a case for lawful termination of employment, the claimant is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Kigamwa instructed by Wambua Kigamwa & Company Advocates for the claimant.
2. Mr. Kimathi instructed by Gitonga Kamiti, Kairaria & Company Advocates for the respondent.