



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 149 OF 2013

ABRAHAM NYAMBANE ASIAGO.....CLAIMANT

VS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 31st January and filed in Court on 4th February 2013, the Claimant brought this action against the Respondent Bank seeking relief for unlawful termination of employment. The Respondent filed a Memorandum of Defence on 11th March 2013 to which the Claimant filed a Reply on 2nd April 2013. The Respondent then filed an amended Memorandum of Defence on 18th July 2013.

2. This matter first came before me under certificate of urgency and upon hearing the Claimant's application I granted interim orders barring the Respondent from interfering with the Claimant's housing loan terms pending full determination of this case. Pursuant to my orders, the Respondent amended its defence to include a claim for accrued interest at commercial rates on account of the Claimant's housing loan facility.

The Claimant's Claim

3. The Claimant joined the Respondent's employment in May 2007, initially as a temporary commission staff. From 1st January 2010, he was employed as a Customer Advisor. Being a member of the Banking Insurance & Finance Union (BIFU), the Claimant's employment was governed by a Collective Bargaining Agreement (CBA) dated 3rd October 2012 negotiated between BIFU and the Kenya Bankers Association.

4. On 8th May 2012, the Claimant was issued with a suspension letter dated 30th April 2012 on allegations of external borrowing from a customer; one Peter Waweru Ng'ang'a and forgery of another customer's signature; one Catherine Mbaisi. A disciplinary meeting was held on 14th June 2012 and on 25th June 2012, the Claimant's employment was terminated.

5. The Claimant appealed against the termination by letter dated 26th June 2012 and an appeal hearing was held on 16th August 2012 during which two additional complaints were raised against the Claimant. On 12th October 2012, the Respondent notified the Claimant that his termination had been upheld.

6. The Claimant claims that the termination of his employment was substantively and procedurally unfair. He seeks the following remedies:

- a. A declaration that the termination of his employment was unlawful, null and void
- b. Reinstatement or re-engagement
- c. Withheld salary from 1st May 2012 to 25th June 2012.....Kshs. 92,635
- d. Reasonable notice of 12 months.....1,231,620
- e. Maximum compensation for unlawful termination.....1,231,620
- f. Maximum compensation for loss of employment

before retirement age.....34,361,740

- g. Certificate of service
- h. Costs and interest

The Respondent's Defence

7. In its amended Memorandum of Defence dated 17th July 2013, the Respondent states that the Claimant was employed on 9th May 2007 as a temporary commission staff at a monthly retainer of Kshs. 20,000. As at the time his employment was terminated, he was employed as a Customer Advisor-Consumer at level B2 with a basic salary of Kshs. 92,635.

8. By letter dated 6th April 2009, the Claimant was invited to a disciplinary hearing where he was required to explain his persistent indebtedness evidenced by nonpayment of his credit card and overdrawing of his account contrary to the Respondent's policy and code of conduct. The Claimant told the disciplinary panel that he had lost his credit card sometime in June 2008, an occurrence he had reported to the Credit Card Centre. It would appear however that the card continued being in use with new expenses amounting to Kshs. 220,000 being incurred.

9. The Respondent's efforts towards resolution of this matter did not bear fruit and the Claimant continued overdrawing his account in spite of having been warned about his overdrawn account and accumulation of credit card debt. In March 2009, a cheque issued by the Claimant was dishonoured.

10. Usage of the Claimant's credit card continued until November 2008 and no stop order was received at the Card Centre. It later emerged that the credit card was in the hands of one James Odima who was said to be the Claimant's cousin. The Respondent took the view that the Claimant was in collusion with his cousin with regard to the continued use of the credit card. The Claimant was issued with a written warning on 7th May 2009.

11. On 30th April 2012, the Claimant was notified of his suspension arising from complaints received on performance of his duties and monetary transactions with the Respondent's customers contrary to the Bank Code of Conduct. Specifically, Peter Ng'ang'a Waweru was said to have written to the Respondent's Branch Manager in Ngong complaining that the Claimant had defaulted in re-paying a soft loan of Kshs. 300,000.

12. Another customer, Catherine Mbaisi had complained that the Claimant had gone against her instructions not to process a loan she had applied for due to adjustment of interest rate from 17% to 20%. The client declined to take the loan and the transaction had to be reversed.

13. While still on suspension, the Claimant was invited to a capability hearing on 17th May 2012 following a rating of D in his performance appraisal for period ending 31st December 2011. At the capability hearing the Claimant blamed his immediate line manager for the poor performance. On 25th June 2012, the Claimant was issued with a written warning on his poor performance.

14. The Claimant denied having any link with Peter Ng'ang'a Waweru until he was confronted with a printout from Safaricom showing Mpesa transactions between himself and the said Peter Ng'ang'a

Waweru. The Claimant explained these transactions as payment for services rendered.

15. The Claimant was invited to a disciplinary hearing on 5th June 2012 at which he was accompanied by a union representative. Owing to inconsistencies in his statements, the Claimant's explanations were unacceptable to the disciplinary panel who recommended termination of his employment. The Claimant's employment was therefore terminated by letter dated 25th June 2012.

16. On 16th August 2012, the Claimant was heard on appeal. At the appeal hearing, the disciplinary panel considered the apparent recanting of the testimony of Peter Ng'ang'a Waweru on the debt owed to him by the Claimant. The disciplinary panel however rejected the new testimony by Peter Ng'ang'a Waweru. Further, new evidence on fraudulent transactions effected by the Claimant emerged. The disciplinary panel recommended that the Claimant's termination be upheld.

Findings and Determination

17. The issues for determination in this case are as follows:

- a. Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b. Whether in effecting the termination the Respondent observed due procedure;
- c. Whether the Claimant is entitled to the remedies sought.

Reason for Termination

18. On 30th April 2012, the Claimant was issued with a suspension letter stating as follows:

"In accordance with the disciplinary procedure, I write to confirm the decision to suspend you from today's date pending the current investigation concerning the below issues:

- a. *External borrowing from a customer,*
- b. *Alleged forgery of a customer's signature on a loan application.*

You are therefore hereby suspended from employment under clause A 5 c)i) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical and Subordinate staff for a period of thirty (30) days with effect from today's date.

During the period of suspension, you will receive salary at half basic pay. You are also entitled to your normal contractual benefits. You are also required to report to the branch once a week on Tuesdays to sign the attendance register.

The Bank reserves the right to change or add to these allegations as appropriate in the light of the investigation. Your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct. The Bank will keep the matter under review and will aim to make the period of suspension no longer than necessary. The Bank will write to you periodically to keep you updated about the progress of the investigation.

You will continue to be employed by the Bank throughout your suspension and you remain bound by your terms and conditions of employment. You are required to co-operate in the investigation and may be required to attend the workplace for investigative interviews or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend the workplace unless authorized by Charles Mburu to do so. You must not communicate to any employees, contractors or customers unless authorized by Charles Mburu. However, you are required to be available to answer any work related queries.

At the conclusion of the investigation, the Bank will write to inform you whether it intends to hold

a disciplinary hearing. If it considers that there are grounds for disciplinary action it will inform you of those grounds in writing and you will have the opportunity to state your case at a disciplinary meeting, in accordance with the Disciplinary Procedure.

If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible. If you require access to the premises or computer network for this purpose please let me know as we may agree to arrange this under supervision.

Yours sincerely,

(signed)

Charles Mburu

Branch Manager – Ngong Branch”

19. Further to the suspension, the Claimant was invited to a disciplinary hearing on 14th June 2012. In answer to the first charge of forging a customer's signature on a loan application form, the Claimant told the disciplinary panel that the customer, Catherine Mbaisi had actually signed the loan application form only to change her mind after the loan had been processed. The Claimant explained that a meeting on this matter had been held with the customer, the Branch Manager and himself and according to him the matter was closed.

20. With regard to the second charge of borrowing from a customer, Peter Ng'ang'a Waweru, the Claimant told the disciplinary panel that the only financial transaction he had had with the said Peter Ng'ang'a Waweru related to building poles supplied to the Claimant by Waweru.

21. According to the Claimant, the disciplinary charges leveled against him were prompted by a fraud case within the Branch which the Claimant had uncovered and escalated by-passing his Branch Manager. The Claimant told the disciplinary panel that following the fraud report, he received threats from the persons involved.

22. The Claimant's termination letter which was unsigned states as follows:

“Following the investigations and disciplinary hearing you attended on 14th June 2012 regarding external borrowing from a customer and the alleged forgery of a customer's signature on a loan application, I am satisfied that you are in contravention of the Bank's Compliance Code of Conduct clause 2.2.1 on Treating Customers Fairly and clause 2.1.7 on Reputational Risk, as well as clause 11 of the terms and conditions of your employment.

In view of this, the bank is not prepared to have you continue in its service and with effect from June 25th 2012, your services are terminated in accordance with the provision of Clause A 5(d) of the Collective Bargaining Agreement covering Section Heads, Clerical, Technical and Subordinate staff, by the payment of one month's salary in lieu of notice.

If you feel this decision is unfair you can appeal against it by writing to the HR Director Lyn Mengich stating clearly the reason for the appeal within 10 working days of receiving this letter.

Please sign and return a copy of this letter to me as acknowledgement of receipt.

Yours sincerely,

(unsigned)

Charles Mburu

Branch Manager–Ngong Branch”

23. In his appeal to the Human Resource Director, the Claimant stated that the first charge of forgery of a customer's signature on a loan application form had not been proved since the customer herself had taken the loan form to her employer for signature. With regard to the second charge of external borrowing from a customer, the Claimant pointed out that the said customer, Peter Ng'ang'a Waweru had disowned the complaint.

24. At the appeal hearing held on 16th August 2012, the Claimant restated his defence to the two charges of forging a customer's signature and external borrowing from a customer. In addition, the Claimant was confronted with two additional charges. On the first charge regarding a complaint by a Charles Njoroge, the Claimant told the appeal panel that his brother had impersonated him in his dealings with the said Charles Njoroge. With regard to a Kshs. 345,000 debt owed by the Claimant to a Mr. Obure, the Claimant explained that this was a debt owed on account of construction costs of the Claimant's house.

25. The Claimant's appeal failed and on 12th October 2012, the Respondent wrote to the Claimant as follows:

“ We write further to the meeting on 16th August 2012 at which the decision to terminate you was discussed.

The findings are as follows:

Your conduct was in contravention of the Bank's Compliance Code of Conduct and the terms and conditions of your employment.

Consequently the decision is to uphold the termination.

The decision in this matter is final.

Yours sincerely,

(signed)

Chris Huka,

Ag. Employee Relations Manager”

26. Section 43(1) of the Employment Act, 2007 provides as follows:

(1) In any claim arising out of termination of a contract, the employer shall be required 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.

27. In *Jessy Olukutukei Vs Feed The Children Kenya & Another [2014] eKLR*, this Court held that the burden placed on an employer under Section 43 of the Employment Act, 2007 is to demonstrate a valid reason that would cause a reasonable employer to terminate the employment of an employee. The burden of proof in such a case is always on a balance of probability and not beyond reasonable doubt.

There lies the major difference between internal disciplinary proceedings and a criminal trial.

28. I have examined the Claimant's case against this standard. With regard to the first charge of forging a customer's signature, the Court observed that neither the investigation team nor the disciplinary panel made any conclusive findings against the Claimant. This charge was therefore not proved and could not have been a basis for termination of the Claimant's employment.

29. I will now consider the second charge of external borrowing from a customer. In the course of investigations on this charge, the Claimant denied having any financial dealings with the complainant customer, Peter Ng'ang'a Waweru. However, when confronted with evidence of Mpesa transactions between himself and the customer, he stated that the customer had done some paid work for him. At the disciplinary hearing, the Claimant stated that the customer had delivered building posts to his construction site.

30. In light of these contradictions, the Court rejects the Claimant's account of his dealings with Peter Ng'ang'a Waweru and adopts the Respondent's evidence that he in fact engaged in unauthorized financial dealings with a customer of the Bank.

31. Banks operate in an environment in which utmost trust and good faith are crucial. Their employees must therefore be held to these very virtues. As held in *Moses Chavangi Vs Barclays Bank of Kenya Ltd (Cause No. 694 of 2010)* and *Banking Insurance & Finance Union Vs Post Bank Ltd [2013] e KLR*, the relationship between bankers and their employers is premised on a high degree of honesty and integrity and where these are put into question, then the employment relationship becomes untenable. This is as it should be since banks are held to the same values by their customers who hold the lifeline in banking business. This Court must uphold these principles.

32. That said and in view of my conclusion that the Claimant equivocated on his relationship with Peter Ng'ang'a Waweru who was the Respondent's customer, the Court finds that the Respondent had a valid reason for terminating the Claimant's employment.

Termination Procedure

33. I will now explore the procedure adopted by the Respondent in terminating the Claimant's employment. In spite of the nature of an offence facing an employee, the law requires the employer to follow due procedure before taking any disciplinary action against the employee. This is more crucial where the ultimate disciplinary action leading to loss of employment is in view.

34. Section 41 of the Employment Act, 2007 sets out the mandatory procedure 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.

35. I have examined the disciplinary procedure adopted by the Respondent in light of the law as well as the applicable CBA and the Claimant's terms and conditions of employment. From the record, it appears that the Claimant was taken through the motions of Section 41 of the Employment Act, 2007. However, the termination letter issued to him was unsigned.

36. Charles Mburu who was the Claimant's line manager and would ordinarily sign and issue the termination letter told the Court that the unsigned termination letter did not originate from him. The Respondent's Employee Relations Manager, Odhiambo Ooko also testified that it was unusual for an employee to be issued with an unsigned termination letter. He admitted in cross examination that an unsigned letter was not valid.

37. Clause A5 (d) of the Collective Bargaining Agreement provides for a written termination notice of one month. In similar fashion, Clause 10 of the terms and conditions of service issued to the Claimant by the Respondent Bank requires service of termination notice on the affected employee by an authorized officer of the Bank.

38. The Court was unable to understand why the Respondent, a well resourced Bank of many years standing with networks across the globe would issue an unsigned termination letter to an employee. To my mind, issuing an unsigned letter amounts to verbal termination of employment contrary to the law and any known human resource practice.

39. Even worse, the Respondent contravened its own internal terms and conditions of service as well as the applicable CBA. For this reason, I find the termination of the Claimant's employment unfair for want of due procedure.

Remedies

40. The Claimant seeks reinstatement or re-engagement without loss of benefits. This is a premiere remedy uniquely available in this Court to be granted in very exceptional circumstances. In *Dr. Joseph Maingi Maitha Vs the Permanent Secretary Medical Services & Another [2015] eKLR* this Court held that reinstatement or re-engagement is not available to an employee with a negative employment record. Having examined the Claimant's employment record and in view of my finding that the Respondent in fact had a valid reason for the termination, I decline to order reinstatement or re-engagement.

42. I however award the Claimant the equivalent of six (6) months' salary in compensation for unfair termination. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the disciplinary process. I further award the Claimant one (1) month's salary in lieu of notice as well as salary withheld during the suspension period. I find no legal basis for the additional claim for compensation for loss of employment before retirement which is hereby dismissed.

43. Ultimately I make an award in favour of the Claimant as follows:

a) 6 months' salary in compensation for unfair termination (102,635x6).....	615,810
b) 1 month's salary in lieu of notice.....	102,635
c) Withheld salary during suspension (1 month and 25 days)	<u>84,918</u>
Total.....	<u>803,363</u>

44. I further direct the Respondent to issue the Claimant with a certificate of Service and to pay the costs of this case.

45. The award amount will attract interest at court rates from the date of the award until payment in full.

46. In view of the finding that the termination of the Claimant's employment was unfair the Respondent's claim for accrued interest at commercial rates on account of the Claimant's housing loan facility fails and is dismissed.

47. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF
APRIL 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Ongicho for the Claimant

Mr. Molenje for the Respondent