



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1450 OF 2013**

**ESTHER WAMBUI NDUWA.....CLAIMANT**

**VS**

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

**AWARD**

**Introduction**

1. This action was brought by the Claimant, Esther Wambui Ndua against her former employer, National Bank of Kenya. By her Memorandum of Claim dated 6th September 2013 and filed in Court on even date, the Claimant seeks relief for unlawful and unfair termination of employment.
2. The Respondent's defence is contained in a reply dated 26th September and filed in Court on 30th September 2013. At the hearing, the Claimant testified on her own behalf and the Respondent called its Security Manager, Maurice Muchira Paskwale and Employee Relations Officer, Jacob Makanga.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as a clerical staff effective 5th June 2006 at a monthly salary of Kshs.29,035.00 plus a house allowance of Kshs.2,32.00. At the time of leaving employment the Claimant earned a monthly salary of Kshs.70,005.00. At the material time, she was deployed at the customer service desk at Kenyatta University Agency where she received customer queries, handled complaints and verified signatures not captured in the system.
4. The Claimant testified that on 13th April 2011, a customer by the name Luka Kimani Macharia went to the Bank wishing to withdraw Kshs.400,000.00 from his personal account. Having failed to see the customer's signature in the system, the cashier referred the customer to the Claimant.
5. The Claimant told the Court that she verified the customer's details from his national identity card and called for a specimen card from Ruiru Branch where the account was domiciled. She then verified the signature and forwarded the transaction to the Agency Manager for authorisation. On 15th April 2011, the customer came back this time wishing to withdraw Kshs.1 Million and the Claimant followed the same procedure she had followed on 13<sup>th</sup> April, 2011.
6. In September 2011, while working at Kiambu Branch, the Claimant was confronted with the debits in the aforesaid transactions by the Bank's investigators. The Claimant could not remember the customer and following her written statement, she was suspended on half pay by letter dated 27th September 2011. In the course of her suspension, the Claimant wrote a second statement. By letter dated 24th April 2012, the Claimant's employment was terminated.

7. The Claimant contends that the termination of her employment was unfair and without lawful cause. Apart from meetings with the Bank investigators, the Claimant states that she was not called to any disciplinary hearing.

8. She claims the following:

- a. Kshs.90,422.00 being leave pay for 31 days
- b. Kshs.35,002.50 being leave allowance
- c. Kshs.840,060.00 being damages for unfair termination of employment
- d. Costs and interest

### **The Respondent's Case**

9. In its reply filed on 30th September 2013, the Respondent admits having employed the Claimant but disputes the claim for unlawful and unfair termination. According to the Respondent, the Claimant was dismissed for dishonesty, fraud and corrupt dealings contrary to her employment contract. Despite being given an opportunity to explain the circumstances leading to the fraudulent dealings in which she processed personal loans while working at Kenyatta University Agency, the Claimant failed to exonerate herself.

10. Prior to her dismissal, the Claimant was suspended pending investigations, in accordance with the Respondent Bank's policy and the applicable Collective Bargaining Agreement. The Respondent states that following due diligence and proper investigations, the Claimant was implicated in the fraudulent dealings.

11. The Respondent further contends that the Claimant's termination was done procedurally within the contract of employment and the law. In this regard, the Claimant was accorded the opportunity to defend herself but she failed to give an account of the fraudulent verification of a customer's debit on 13th and 15th April 2011.

12. On 10th May 2012, the Claimant was cleared by the Bank and paid Kshs. 343,841.50 in satisfaction of her final dues. She was also issued with a certificate of service.

### **Findings and Determination**

13. The following are the issues pending determination before the Court:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in reaching the decision to terminate the Claimant the Respondent observed fair procedure;
- c) Whether the Claimant is entitled to the remedies sought.

### **Reason for the Termination**

14. Section 45 of the Employment Act, 2007 requires an employer to prove valid reasons for terminating the employment of an employee. The termination of the Claimant's employment was initiated by a suspension letter dated 27th September 2011 which stated as follows:

*"This is to advise that following the discovery of **fraudulent transactions involving Unsecured Personal Loans at Ruiru Branch** (emphasis added) in which you have been implicated, it has been decided to suspend you from duty with immediate effect to facilitate thorough investigations to establish your role in the matter.*

*Your suspension is in accordance with clause A 5c (i) of the Collective Bargaining Agreement*

covering Section Heads, Clerical, Technical and Subordinate Staff and is effective from the date of this letter. Immediately upon receipt of this letter you should formally hand over all your current responsibilities including bank keys, books, documents etc in your possession to another suitable person in the Branch as you will be advised by your Manager.

During the period of your suspension you will be entitled to your normal terms of service except your basic salary, which will be at the rate of half your normal salary. Whilst on suspension you will not be required to carry out your normal duties but you will be expected to report to your Manager at 9.00 a.m daily in order to furnish any information considered relevant to the on-going investigations.

Once the on-going investigations are completed and a decision made on the matter you will be suitably advised.

Please sign and return the duplicate of this letter as an acknowledgement of receipt.

Yours faithfully

**J.O. RABURU**

**GENERAL MANAGER**

**HUMAN RESOURCES**

15. The Claimant's employment was subsequently terminated by the following letter dated 24th April 2012:

“Dear Madam,

**RE: TERMINATION OF EMPLOYMENT**

This letter serves to confirm the Bank's decision to terminate your employment on account of **loss of confidence arising from amongst other things your verifying of signature on a customer's debits on 13th and 15th April 2011 while working at Kenyatta University Agency** (emphasis added). The signature for this particular account had not been captured in the system by Ruiru Branch which is where the account was domiciled, the full particulars whereof are well known to you.

Your termination which is effective from the date of this letter is in accordance with Clause A5 (d) of the Collective Agreement covering Section Heads, Clerical, Technical and Subordinate staff. You will be paid one month's salary in lieu of your contractual notice entitlement. Any items constituting Bank property such as official documents, books, keys, staff identity card etc must be returned to your Branch Manager.

Arrangements will be made to compute and pay you your terminal dues if any less any monies owed to the Bank.

Kindly acknowledge receipt of this letter by signing and returning the copy thereof to this office through your Branch Manager.

Yours faithfully,

**JARED RABURU**

**GENERAL MANAGER**

## **HUMAN RESOURCES**

16. From the suspension letter, it would appear that the complaint against the Claimant had to do with her role in some fraudulent transactions involving unsecured personal loans at Ruiru Branch. The subsequent termination letter made reference to the Bank's loss of confidence arising from the Claimant's action of verifying a signature on a customer's debits on 13th and 15th April, 2011 at Kenyatta University Agency, as the motivator for the Claimant's termination.

17. An undated investigation report signed by D.Z Ogana returned the following verdict against the Claimant:

*“There is evidence and witnesses that a clerk who by then was at Kenyatta University Agency **Esther Ndua** was involved in these frauds. She is the one who gave the loan application forms to **DSR Joseph Kahuriu** to take to Ruiru Branch. She passed the signatures for payments without specimen card as the signature was not captured. She told the Operations Manager at the Agency **Mr. Githae** and the Officer **Mrs. Wainaina** that she knew the customer very well.”*

18. In her testimony, the Claimant narrated the steps she took in verifying the customer's signature on 13th and 15th April 2011. On both occasions, she verified the customer's details from his national identity card and asked for a specimen card from Ruiru Branch where the account was domiciled. She then forwarded the transaction to the Agency Manager for authorisation.

19. Apart from her word, there was no further evidence that the Claimant actually called for and received the customer's specimen card from Ruiru Branch. This is significant because the investigation report indicated that the Claimant passed the debits for payment without a specimen card. It was also said that the Claimant told her bosses that the customer was well known to her.

20. I agree with the holding of the Court in ***Moses Chavangi Vs Barclays Bank of Kenya Ltd (Cause No. 694 of 2010)*** and ***Banking Insurance & Finance Union Vs Post Bank Ltd [2013] eKLR*** that the relationship between bankers and their employers must be premised on utmost prudence, trust and good faith because banks are held to the same standards by their customers.

21. Looking at the Claimant's case in totality it seems to me that she ought to have exercised more care in handling the transactions in issue especially in view of the amounts involved, the rather short time lapse between the first and the second transactions and the fact that the withdrawals were made from an Agency and not a fully fledged branch. The Court therefore finds that the Respondent had a valid reason for terminating the Claimant's employment.

### **Termination Procedure**

22. I will now examine the procedure adopted by the Respondent prior to the termination of the Claimant's employment. According to letter dated 27th September 2011, the Claimant was suspended under Clause A 5c (i) of the Collective Bargaining Agreement, which provides as follows:

*“Where the employer requires to carry out investigations in acts of gross misconduct and/or serious neglect as detailed in paragraph A5(a) above, an employee may be suspended for a period not exceeding thirty (30) days during which period the employee shall be entitled to be paid at the rate of half his basic salary. The suspension may be extended at the discretion of the employer.”*

23. From the record, the Claimant remained on suspension for a period of seven (7) months up to the date her employment was terminated on 24th April 2012. In ***Rashid Jeneby v Prime Bank Limited [2015] eKLR*** this Court held that a prolonged suspension that goes without explanation acquires the character of a disciplinary action meted against an employee without due process.

24. The Court did not find any evidence that the Claimant's suspension was ever extended and in the absence of any explanation as to why she was kept on suspension for so long, I find that her suspension

was unlawful and unfair. In my view, this marred any disciplinary process she could have been subjected to.

25. Section 41 of the Employment Act, 2007 establishes the following procedure for handling cases of misconduct, poor performance or physical incapacity:

- a. That the employer explains to the employee in a language the employee understands the reasons why termination is being considered;
- b. That the employer allows 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 hears and considers any explanations by the employee or their representative.

26. The Respondent's defence is that the Claimant was heard in the course of investigations. In my view this line of argument mixes two distinct processes. While at the investigation stage, the employer seeks to establish allegations or suspicions touching on one or more employees, the disciplinary process which is triggered by a show cause notice is specific in terms of the target employee and the charges the employee faces.

27. Employers must therefore be careful to notify the employee the point at which investigation terminates and a disciplinary process kicks in. It is the right of every employee facing disciplinary action to be notified in clear and express terms that what they are engaged in is a disciplinary process with all its ramifications.

28. At any rate, a discussion with an investigating team or the recording of a statement does not qualify as a disciplinary process as defined by Section 41 of the Employment Act, 2007. The Court therefore finds that the Respondent failed to accord the Claimant an opportunity to be heard as required by law and the termination was therefore procedurally unfair.

### **Remedies**

29. In the course of the trial, the Claimant told the Court that she had received payment on account of leave pay and leave allowance. These claims were therefore abandoned, leaving the single claim for damages for unfair termination still standing.

30. Section 49(4) of the Employment Act, 2007 sets out factors for consideration in granting remedies for wrongful dismissal and unfair termination of employment. The Claimant in this case claims compensation at 12 months' salary. I have considered the finding that there was a valid reason for the termination together with the Claimant's length of service. I have also taken into the Respondent's conduct in keeping the Claimant on unlawful suspension and failing to grant her an opportunity to be heard. Overall, I find compensation at six (6) months' salary appropriate.

31. I therefore make an award in favour of the Claimant in the sum of Kshs.420,030.00 being six (6) months' salary in compensation for unfair termination of employment. I further award the Claimant the costs of this case.

32. The award amount is subject to statutory deductions and shall attract interest at court rates from the date of the award until payment in full.

33. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Makori for the Claimant

Mrs. Wachira for the Respondent