



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 674 OF 2012**

**JOHN NGATIA NDUNG'U.....CLAIMANT**

**VS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. John Ngatia Ndung'u, the Claimant herein was a long serving employee of the Respondent Bank having joined its employment on 10th September 1984 in the position of Clerical Officer and rising through the ranks to the position of Branch Operations Manager as at the time of termination of his employment on 6th September 2011.
2. By a Memorandum of Claim dated 20th April and filed in Court on 23rd April 2012, the Claimant sued the Respondent Bank for unlawful, unfair and wrongful termination of employment. The Respondent filed a Memorandum of Defence on 8th November 2012 to which the Claimant filed a Reply on 24th June 2013.
3. The matter was heard between 11th July and 13th November 2013 with Mr. Onyony instructed by Onyony and Company Advocates appearing for the Claimant and Mr. Njiru instructed by the Federation of Kenya Employers appearing for the Respondent. The Claimant testified on his own behalf and the Bank called its Regional Business Manager, Jamal Nassor.

**The Claimant's Case**

4. The Claimant commenced his employment with the Respondent on 10th September 1984 in the position of Clerical Officer at KCB Voi Branch. He rose through the ranks and worked in a number of branches culminating with his appointment as Operations Manager at KCB Kiserian Branch. On 26th January 2011 the Claimant was suspended pending investigations on allegations of some irregularities committed by him. His employment was later terminated on 6th September 2011.
5. The Claimant claims that the outcome of the investigations by the Respondent Bank was not revealed to him and that at the time his employment was terminated, the reasons for the termination were not made clear to him. The Claimant further contends that he was not accorded a fair hearing.
6. At the time his employment was terminated, the Claimant was servicing loans with the Respondent Bank and having run into arrears, the Bank attached part of his pension. The Claimant

further pleaded that due to the trauma caused by the termination of his employment, he had developed high blood pressure and a pre-existing condition of diabetes from which he suffered had become worse.

7. The Claimant therefore claims the following:
  - a. A declaration that the termination of his employment was unfair, wrongful and unlawful;
  - b. Loss of income from termination to date of retirement...Kshs. 18,314,640
  - c. Service pay for 28 years.....4,748,240
  - d. 12 months' pay in compensation for unfair termination.....2,034,960
  - e. Incorporeal loss (expectation of stable employment).....1,000,000
  - f. Loss of earning capacity.....1,000,000
  - g. Costs and interest
  - h. Any other relief the Court may deem fair and just to grant

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

8. In its Memorandum of Defence filed on 8th November 2012, the Respondent admitted the Claimant's employment history. The Claimant's allegations of unlawful and unfair termination of employment were however denied.

9. According to the Respondent, upon prompting by its customer by the name Harrison Kiburu Irungu, the Respondent's Branch Manager at Embu checked the customer's account number 1107224209 and noted a number of over the counter withdrawals from the customer's account amounting to Kshs. 2.8 Million which appeared inconsistent with the normal activity of the account. The customer disowned the withdrawals which had taken place at the Respondent's Kiserian Branch between 4th and 8th January 2011. It turned out that the transactions were fraudulent.

10. On 17th January 2011, the Branch Manager, Kiserian wrote to the Claimant seeking an explanation on the fraudulent transactions in account number 1107224209. The Branch Manager sought to know from the Claimant why a fraudster had been paid yet the signature on the vouchers differed from the specimen signature held in the system; how the fraudster was paid yet there was a photograph of the account holder in the system and whether the fraudster was interviewed before being paid.

11. The Branch Manager further sought to know why a payment of Kshs. 200,000 was made on 4th January 2011 on the strength of a voucher dated 4th March 2011. Finally, the Claimant was asked to show cause why severe disciplinary action should not be taken against him for negligence of duty.

12. The Claimant submitted his response on 18th January 2011 stating that he had exercised due diligence while handling the transactions in question since he had used the documents presented to him and the photograph image in the system.

13. On 20th January 2011, the Respondent's Branch Manager at Embu noted from a branch report that an amount of Kshs. 1.8 Million had been withdrawn from account number 1103966936 held by Francis M. Njiru which transaction was suspected to be fraudulent.

14. On 21st January 2011, the Claimant was notified that three withdrawals from this account were suspected to be fraudulent and was asked to explain why a fraudster had been paid in spite of differences in signatures and the presence of a photograph of the account holder in the system. The Claimant was also asked to explain whether the fraudster had been interviewed and was further required to show cause why severe disciplinary action should not be taken against him for negligence of duty.

15. The Claimant submitted his response on this account on 21st January 2011 indicating that he had followed due diligence in handling the transactions in question as he had relied on documents presented to him together with the photograph image in the system.
16. On 21st January 2011, the Respondent's Branch Manager at Kiserian wrote to the Retail Manager Operations, Nairobi Region regarding fraudulent withdrawals from account number 1103966936. The Branch Manager pointed out a number of anomalies on this account namely; that the data in the account had not been updated, the customer's telephone number had not been captured, the passport photograph held was an old black and white image, an alteration on the amounts on the vouchers were not authenticated and the signatures were apparently assimilated with practice.
17. It was the Respondent's assertion that both the paying teller and the Claimant failed to observe due diligence when making the payments and the Claimant ought to have called Embu Branch where the account was domiciled in view of the fact that the data in the system was not up to date.
18. On 24th January 2011, the Respondent received a preliminary forensic report on fraudulent transactions aggregating to Kshs. 9.2 Million affecting account number 1107224209 held by Harrison Irungu Kiburu and account number 1103966936 held by Francis M. Njiru both domiciled at Embu Branch.
19. With regard to account number 1107224209 held by Harrison Irungu Kiburu, it was found that there had been 3 over the counter withdrawals at the Kiserian Branch on 4th, 6th and 8th January 2011. The account holder disowned all the 3 transactions stating that he had in fact never been to Kiserian Branch. The preliminary forensic report recommended that the Claimant be suspended pending further investigations.
20. On 24th January 2011, the Respondent's Regional Business Manager forwarded a report to the Senior Manager, Employee Relations on fraudulent cash withdrawals from account number 1103966936 held by Francis M. Njiru. The report indicated that a fraudster had presented himself at Kiserian Branch with a fake Identity Card and managed to fraudulently withdraw cash amounting to Kshs. 3,800,000.
21. It was the Respondent's case that there were operational lapses on the part of the paying teller and the Claimant leading to fraud. According to the Respondent, before withdrawal from a non domiciled branch is authorised the paying teller and the authorising officer are expected to ascertain beyond reasonable doubt that the transaction is genuine.
22. In the instances in issue signatures on the vouchers were differing with the specimen signature held in the system and a fraudster had been paid in spite of the existence of a photograph of the account holder in the system. Moreover, there was no evidence of the fraudster having been interviewed and no call back was made to the domicile branch to confirm the authenticity of the transactions.
23. The verdict by the Respondent was that the teller and the Claimant were grossly negligent since they failed to properly identify the customer despite having a photograph in the system and no call back was made to the domicile branch in spite of the amounts involved being high.
24. On 26th January 2011, the Claimant was suspended on half salary pending further investigations. On 9th August 2011, the Respondent received a forensic investigations report. The report stated that the transactions in accounts number 1107224209 and 1103966936 were inconsistent with the general nature and level of account activity, which was considerably low especially on the debit side. The conclusion was that the transactions handled at Kiserian Branch on 30th December 2010 and 5th January 2011 were clearly out of pattern and should have raised a red flag leading to further verification.

25. The forensic investigators also drew the conclusion that the paying teller and the Claimant were negligent in handling the 3 over the counter withdrawals of Kshs. 800,000 on 30th December 2010 and Kshs. 800,000 on 8th January 2011 from account number 1107224209 and Kshs. 3 Million on 5th January 2011 from account number 1103966936.

26. According to the Respondent, the photograph images linked to Embu Branch where the accounts were domiciled were old black and white photographs that bore little resemblance with the physical appearance of the two customers as at the time of the transactions. It was the Respondent's position therefore that the age of the photographs ought to have alarmed the Claimant to act with greater caution.

27. The forensic report also took issue with the Claimant's failure to initiate a call back to the domicile branch to verify the identity of the payees. The final conclusion was that failure by staff to complete proper Know Your Customer (KYC) procedures both at the account opening and transaction level contributed to the fraud.

28. On 17th August 2011, the Respondent's Human Resource Department prepared a Fraud Charge Sheet detailing the charges against the Claimant and his responses thereto. According to the charge sheet, the specific violations committed by the Claimant were failure to verify the signatures on the vouchers against those in the system and to observe due diligence as advised through various circulars and emails regarding over the counter withdrawals of large amounts by customers from non domicile branches.

29. On 6th September 2011, the Claimant's employment was terminated for committing acts of gross negligence. With regard to the Claimant's performance history, the Respondent submitted a letter dated 22nd April 2002 reprimanding the Claimant for authorising a fraudulent cheque deposit of Kshs. 356,201. Further, on 7th August 2009, the Claimant was severely reprimanded for approving loan facilities to his spouse against laid down rules and procedures.

## **Findings and Determination**

30. The twin issues for determination before the Court is whether the Respondent had a valid reason for terminating the Claimant's employment and whether the procedure adopted by the Respondent to effect the termination was lawful.

31. Section 43 of the Employment Act, 2007 provides that:

***(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.***

32. Section 45 (2) of the Act goes on to provide that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***i) related to the employees conduct, capacity or compatibility; or***

**ii) based on the operational requirements of the employer and that**

**(c) That the employment was terminated in accordance with fair procedure.**

33. The Claimant was suspended by letter dated 26th January 2011 which stated *inter alia*:

***“We advise that it has been decided that you be suspended from employment with effect from today's date, pending further investigations into irregularities you appear to have committed, details of which you are aware.”*** [Emphasis added]

34. Then a fraud charge sheet dated 17th August 2011 which the Claimant denied receiving accused the Claimant of:

- ***Failure to verify the signature on the vouchers against that in the system***
- ***Failure to observe due diligence as advised through various circulars and e-mails regarding over the counter withdrawals of large transactions to customers from other branches***

35. Finally, the letter of termination dated 6th September 2011 stated in part:

***“It has been established that you committed acts of gross negligence, details of which are well within your knowledge. As a consequence, you have been terminated for loss of confidence from employment with effect from today's date.”*** [Emphasis added]

36. What is common between the suspension letter and the termination letter is that the details of the charges against the Claimant were somehow within the Claimant's knowledge. In my view, an employee facing disciplinary action is entitled to a clear statement of the exact offences for which the employer is considering disciplinary action. Use of phrases such as ‘*irregularities, gross negligence and loss of confidence*’ without further elaboration gives the impression that the employer is on a fishing expedition to find some fault against an employee and validate a *fait accompli*.

37. The Claimant told the Court that in discharging his mandate with regard to the transactions in question, he had exercised due diligence by checking the dates, amounts involved, Identity Card numbers and the image of the customers as captured in the system. He also left the back office to the front office to interview the customers who turned out to be fraudsters but there was no place in the documents used to record the interviews.

38. According to the Claimant, there was no requirement to record customer interviews. Nassor on the other hand testified that the Claimant was supposed to record the customer interview at the back of the voucher and indicate on the voucher that he had made a call back.

40. It was the Claimant's testimony that at KCB Kiserian Branch, it was common for customers to withdraw large sums of money. Nassor testified that it was not possible to put a figure on what constitutes a large transaction but there were limits for different cadres of staff. As Branch Operations Manager, the Claimant had no limits.

41. There was divergence on the procedure to be followed in making payments from non domiciled accounts. According to the Claimant, a call back to the domicile branch was only necessary if some detail in the account presented suspicion in the mind of the paying or authorising officer.

42. For the Respondent, Nassor testified that the procedures to be followed are documented in operational manuals, circulars and e-mails and once a matter was referred to the Branch Operations Manager, he was expected to go through the KYC procedures. According to Nassor, the standard procedure in making payment from non domiciled accounts was as follows: confirm availability of funds; check the specimen signature; interview the customer; look at the photograph

in the system and make a call back to the domicile branch.

43. The Claimant told the Court that there was no requirement for a coloured photograph and the age of the photograph was not indicated in the system. Nassor agreed that there was nothing wrong with using a black and white photograph in the system and according to him the only thing the Claimant failed to do was to initiate a call back to KCB Embu which was the domicile branch of the accounts handled by the Claimant.

44. Although reference was made to some KYC procedures documented in the form of operational manuals, memos, circulars and e-mails, none of these were produced and the Court could not therefore confirm the official position on the steps to be taken by staff handling accounts held in other branches. Nassor admitted in cross examination that there was no standard rule for call back with regard to all non domiciled accounts. He however pointed out in re-examination that the cases at hand raised enough queries to prompt a call back.

45. The conclusion of the forensic investigation was as follows:

***“The fraudulent withdrawals succeeded due to detailed information, which the fraudsters appeared to have and effective drilling by the internal collaborators thus making their scheme flawless.***

***Further, failure by staff to complete proper KYC both at account opening and transaction level as envisaged in both the CBK Prudential Guidelines and Operations Manual clearly contributed to the fraud.”***

46. My reading of this conclusion is that the frauds in issue were well planned and executed. It seems to me that the failures that facilitated the frauds were systemic in nature and although the Claimant owed a duty of care to his employer, he was caught in the cross hairs of a chain fraud involving a number of branches and staff. According to the Claimant, the fraudsters were paid in 5 other branches namely; Kikuyu, Sarit Centre, Village Market, Prestige Plaza and Embu all within a span of 2 months. Embu Branch, where the accounts were domiciled was responsible for keying in the customer details into the system.

47. In the course of the hearing it emerged that some of the staff caught up in the fraud are still working at the Bank. According to the forensic report, the Claimant was to be severely reprimanded and Nassor could not explain why he was terminated instead.

48. From the evidence on record, the Claimant's conduct and integrity were not called to question and save for a reprimand and a severe reprimand issued on 22nd April 2002 and 7th August 2009 respectively, which had since lapsed the Claimant appears to have had a clean employment record with the Respondent.

49. There was therefore no reason why the management of the Bank chose to depart from the recommendation in the forensic investigations report that the Claimant be issued with a severe reprimand and instead terminated his employment altogether. Overall, I find that the Respondent failed to establish a valid reason for the termination of the Claimant's employment.

50. I will now examine the procedure adopted by the Respondent in effecting the termination. In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR***, Radido J summarised the legal fairness requirements set out 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.

51. The Respondent made no reference to any internal disciplinary rules and the Court will therefore consider the Claimant's case within the four corners of Section 41. The Claimant was suspended on 26th January 2011 pending investigations and he told the Court that he did not get to know the outcome of the investigations until 14 months after the termination of his employment when the Respondent filed its Memorandum of Defence. Altogether, the Claimant was on suspension for a period of 9 months and there was no explanation as to why he was kept on suspension for so long.

52. The Claimant testified that he was not heard either before the suspension or the termination; neither was he called in the course of the investigations conducted by the Respondent. The Claimant further told the Court that he was not served with the fraud charge sheet. In the absence of any contrary evidence by the Respondent, the Court adopted the Claimants account in this regard. At any rate, Nassor told the Court that he was not aware whether the Claimant was ever heard. The Court therefore finds that the Respondent flouted the law in effecting the termination of the Claimant's employment.

53. Overall, I find the termination of the Claimant's employment unfair for want of substantive and procedural justification and award him 12 months' pay in compensation. An order for loss of income from termination to date of retirement amounts to an order for specific performance which is available in exceptional circumstances not established in this case. This claim therefore fails and is dismissed. The Claimant was a member of the Respondent's Staff Pension Fund and is therefore not entitled to service pay. The claims for incorporeal loss and loss of earning capacity were not proved and are therefore dismissed.

54. Ultimately I make an award in favour of the Claimant for the sum of Kshs. 2,034,960 being the equivalent of 12 months' pay in compensation for unfair termination of employment. The Award amount will attract interest at court rates from the date of the Award until payment in full. I further award the Claimant the costs of this case.

55. This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF FEBRUARY 2014**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*