



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 1944 OF 2012**

**BETWEEN**

**BANKING, INSURANCE AND FINANCE UNION [KENYA]..... CLAIMANT**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED..... RESPONDENT**

*Rika J*

*CCs. Leah Muthaka and Edward Kidemi*

*Mr. Tom Odera, National Organizing Secretary of the Claimant Union, appearing for the Claimant*

*Ms. Marete & Mr. Kibira instructed by Muteithia Kibira Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION OF EMPLOYMENT**

**AWARD**

1. The Banking, Insurance and Finance Union [BIFU] Kenya, filed the Statement of Claim on 14<sup>th</sup> September 2012. The Claim is brought on behalf of the Claimant's Member Mr. George Agutu Ningu [Grievant], who is a former Employee of the Respondent Bank. He was employed on 1<sup>st</sup> September 2005 as a Graduate Clerk. He rose through the ranks to become a Section Head in the ICT department, effective from 2<sup>nd</sup> February 2010, based at the Respondent's Head Office in Nairobi. On 7<sup>th</sup> June 2010, the Grievant was charged with the offence of preparing to commit a felony vide Nairobi Chief Magistrate's Criminal Case Number 1060 of 2010. The Respondent was the complainant. The Grievant was summarily dismissed by the Respondent on the 7<sup>th</sup> June 2010.

2. The Grievant faults the decision to summarily dismiss him. He explained that he was acquitted in Criminal Case Number 1060 of 2010, on 27<sup>th</sup> January 2012. He was not issued with a letter to show cause why disciplinary action should not issue, and was not heard before dismissal. The Claimant asked the Respondent to reinstate the Grievant after his acquittal. The Respondent refused to do so and the dispute was reported to the Minister for Labour, under Section 62 of the Labour Relations Act 2007. The Minister appointed a Conciliator, who after hearing the Parties, recommended the Grievant be paid 5 months' salary in compensation for unfair termination. It was the position of the Conciliator that the Respondent did not carry out the termination process in accordance with the Parties' Collective Bargaining Agreement and the Employment Act 2007.

3. The recommendation was not acceptable to the Parties, with the Claimant insisting on reinstatement of the Grievant, arguing as in the present case, that the Grievant was acquitted of the criminal charges, and merited reinstatement. The inability of the Parties to compromise resulted in this litigation in which the Claimant prays for:-

- a. The Grievant be reinstated without loss of benefits and seniority in service.
- b. All salaries and allowances which the Grievant lost as a result of the uncalled for dismissal should be paid to him in full, from the date of dismissal until reinstatement.
- c. The Grievant be compensated for loss of employment, unfair confinement, unfair prosecution, humiliation and embarrassment in front of the public and his family members.
- d. Any other appropriate relief.
- e. Costs of the Claim.

4. The Grievant testified on 24<sup>th</sup> April 2013 and 25<sup>th</sup> June 2013. The Respondent gave evidence through a Security Guard Supervisor Mr. George Barongo on 25<sup>th</sup> June 2013; Bank Security In-Charge Mr. Jimmy Mutuku who testified on the 11<sup>th</sup> February 2014; and the Human Resource Manager Ms. Rose Mukoba, who closed the hearing on 12<sup>th</sup> March 2014. The dispute was last mentioned on 5<sup>th</sup> May 2014 when Parties confirmed the filing of their Final Arguments and were advised the Award would be read on notice.

5. The Grievant testified his duties included the maintenance of computers, supporting the users and customers, as well as visiting Bank Branches. He was recognized and rewarded by the Bank for his performance. He did not have any disciplinary warnings in his file.

6. He reported for duty on 5<sup>th</sup> June 2010 as required by the Respondent. He went up to his 6<sup>th</sup> floor office, realized he had forgotten his keys and was assisted by the Caretaker Peter Ndichu, who retained spare keys, to access his office. It was after this that the Bank Security Officer Jimmy Mwithi, accompanied by 2 Police Officers, approached the Grievant and arrested him.

7. He was locked in another room, searched by the Officers and his mobile phone, cash of Kshs.500, his Bank Account PIN number and Staff Identity Card, taken. He testified he was, in the company of a stranger, taken to the Bank Fraud Offices where he was questioned the whole day. He was kept in custody at Kileleshwa Police Station in Nairobi on Saturday and Sunday, and arraigned in Court on the following Monday. He was charged with the Offence of preparation to commit a felony.

8. He was charged alongside Mr. Kennedy Oyamo who used to work for the Bank's Operations department. The 2 were acquitted for want of evidence. It was not true that he had communicated with Oyamo, and brought him to the Bank with the intention of committing fraud. He was not issued with any letter to show cause why disciplinary action should not issue, and the letter attached to the Response purporting to be such a letter, was unknown to the Grievant. The Human Resource Office which purported to write this letter was not open on the particular Saturday. Rose Mukoba the Human Resource Manager was a Witness in the criminal case. She produced several of the Grievant's employment records. There was no letter to show cause among the records. The Bank did not appeal against the criminal case decision. The Grievant testified he only met George Barongo during the criminal trial where Barongo gave evidence. Barongo was described as Branch Manager Supervisor in the Statement of Response. The Grievant was only paid Kshs. 32,000 as terminal dues, 2 ½ years after he was acquitted. He testified he has not been able to secure employment because of this bad history. He lost his dignity, his employability, and was separated with his family consequently. He prays the Court to restore to him his job.

9. Questioned by the Respondent's Advocate, the Grievant testified the Bank was a good Employer and raised his salary frequently. Jimmy Mwithi arrested the Grievant at 8.30 a.m. on 5<sup>th</sup> June 2010. The grievant agreed he referred to Kennedy Oyamo as a stranger, while on other occasion he referred to him as a former Employee of the Respondent. The Control Operations Unit coordinates all the operations of the Bank. RTGS transfer of money was done here. Only Employees who worked there, were allowed access. Non-staff had to produce their identity cards to be let in. The Grievant did not know that Kennedy

Oyamo was arrested in this room. He did not know who authorized Oyamo to be there. The Grievant was the only Employee of the Bank charged. He was found to have a case to answer, and placed on his defence. He worked on Saturdays. The Management was aware the Grievant was on duty on the particular Saturday. He did not know if Jimmy Mwithi had placed the Grievant and Kennedy Oyamo together at the scene, to execute a grudge. The letter of summary dismissal gave the reason for dismissal to be breach of security, contrary to Clause A 5 of the CBA. He did not breach any security. The incident strained his relationship with the Bank. Clause 4 of his contract required the Grievant to observe strictest secrecy in the performance of his role. Trust between him and the Bank, was broken. The criminal case required proof beyond reasonable doubt. The Grievant did not know what the standard of proof in a termination of employment process, is. He was paid salary for days worked. He knew Barongo as a Security Guard during the criminal trial; he did not know him before this.

10. Redirected, the Grievant concluded his evidence with the explanation that RTGs is a real time money transfer facility, and only operated Monday to Friday. It could not be done on Saturdays. The system operated through the Central Bank. Without the Grievant, the systems at the Bank would not have operated. He was therefore required to work even on Saturdays. He emphasized he did not go through a disciplinary process, and did not communicate with Kennedy Oyamo. The Grievant testified he can still work with the Bank. He prays the Court to uphold his Claim.

11. George Barongo testified he is employed as a Security Guard Supervisor by Bob Morgan Security Limited. He was at the material time allocated guard duties at the Respondent's ATM booth in front of the Respondent Bank. The Grievant, who was well known to Barongo, approached Barongo and requested Barongo to assist him in accessing the office. The Grievant told him there was something he needed to do in the office. Barongo contacted Jimmy Mwithi. Jimmy and the Operations Manager advised Barongo to keep them informed on the moves taken by the Grievant. The Grievant called Barongo and told him some people would go to the Bank's Central Operation Unit [COU] on Saturday, and that Barongo should grant them access without registering them at the security desk. The Grievant promised Barongo he would reward him comprehensively after the operation. On 8<sup>th</sup> May 2010, the Grievant introduced Barongo to Kennedy Oyamo. Oyamo was in a car parked outside the Bank. Barongo kept the Bank Security informed. The Grievant told Barongo he would receive Kshs. 40,000 from him at the end of the operation, as start-up capital for a business of his own.

12. On 5<sup>th</sup> June 2010, the Grievant informed Barongo the person who was to carry out the operation was on his way to the Bank. The Grievant gave this person's mobile phone number to Barongo for ease of communication. Barongo and the Grievant went to the Central Operation Unit Room, where the Grievant opened the computer in readiness for the operation. The Grievant returned to his ICT base to monitor the operation. The visitor called Barongo who ushered him into COU Room, where the Grievant had earlier set up the computer for operation. Barongo recognized this visitor was Kennedy Oyamo, whom he had earlier been introduced to by the Grievant. Barongo took Oyamo to COU and left him at the computer. Barongo pulled the door gently, and locked Oyamo inside. Oyamo could not open the door from the inside. Barongo then called Jimmy Mwithi and 2 other Security Officers for reinforcement. They went and opened the COU Room, and found Oyamo hiding under the computer table. Oyamo and the Grievant were arrested.

13. Cross-examined, Barongo testified he is a Security Guard Supervisor. He patrolled the whole Bank building. Only the Grievant would know why he chose Barongo to assist in the operation. The Grievant set up the computer in the COU before Kennedy Oyamo arrived. Barongo was a Witness in the criminal case, but did not know the outcome of the case.

14. Jimmy Mutuku Mwithi told the Court he is in charge of Security and Fraud at the Bank. He was called by Barongo; a Bob Morgan Security Guard Supervisor who was assigned to the Bank, and told the Grievant had made the request to Barongo, for facilitation of a stranger in accessing the Bank's Central Operation Unit. Jimmy and Barongo laid an ambush for the stranger who initially did not appear on 2 occasions when he was expected. He arrived on 5<sup>th</sup> June 2010. He entered the Central Operation Unit Room where Jimmy found him hiding under a computer table. The stranger was Kennedy Oyamo, a former Employee of the Bank. A quick search carried out on him showed he carried customers' account

numbers, indicating certain amounts of money against the respective account numbers. Jimmy called the D.C.I.O and the Anti-Banking Fraud Unit. Photos of Kennedy Oyamo cowering underneath the computer table were taken. The Officers did an audit showing funds had not been moved, although at around 7.45 a.m. there were attempts to move customers' funds through the EFT system. The Grievant and his accomplice Oyamo were charged for the offence. Jimmy prepared a report in which he concluded that the Grievant George Agutu Ningu was involved in a computer crime, in which the bank stood to lose Kshs. 6.3 million. 5 Employees were implicated, but upon investigations, some were absolved while the Grievant was charged, tried, placed on his defence and eventually acquitted on technicality. The intention of the fraudsters was to remove money from the Bank through the RTGS, hold the same in a suspense account, and then transfer the money to own accounts electronically. It was recommended the Grievant be summarily dismissed.

15. On cross-examination, Jimmy testified he had worked for the CID and the Anti-Corruption Commission for years, before joining the Respondent. Barongo was referred to as Manager in the Statement of Response by error. He was a Security Guard Supervisor, employed by Bob Morgan Security Limited, assigned to the Bank. Kennedy Oyamo was an Employee of the Bank before the incident, attached to the operations department. He was implicated in another fraud case in 2007. Jimmy found Oyamo hiding under the workstation on the material day. Photographs were taken to enhance evidence. The search yielded bits of paper with customer account details. The 2 suspects were rearrested by Anti-Banking Fraud Officers. Bank to Bank transfer did not go through the Central Bank; it was internal. The communication link between the 2 suspects' phones was not established by the time Jimmy prepared his report. It was incorrect to say Jimmy 'fixed' an innocent Employee. The Witness closed his evidence on redirection with the confirmation that Barongo gave him the information that unraveled the conspiracy. The Criminal Court found the failure to produce phone transcripts material to the case and gave the suspects the benefit of the doubt.

16. Rose Mukoba confirmed that the Grievant was employed by the Bank on 1<sup>st</sup> September 2005. He was unionisable, and his terms and conditions of service, subject to the CBA concluded between the Parties. Clause 5 required him to live on his salary. People complained the Grievant was borrowing money from shylocks. Secondly, he allowed unauthorized persons into the Bank. He lived above his means. He was allowed by the Bank to borrow money from another Bank, the National Bank of Kenya. He owed a total of Kshs. 418,000 to shylocks. He did not account for money borrowed from the National Bank. He was expected, as a Bank Employee, to live within his means.

17. Around June 2010, Mukoba was informed by the Security Manager that the Grievant was found to have assisted a stranger in an attempt to defraud the Bank. The Human Resource Manager considered the report of the Security Manager. The Grievant was dismissed from the Bank. He was invited to show cause why disciplinary action should not issue against him. This was done on 5<sup>th</sup> June 2010. He was dismissed under Clause A5 of the CBA. He was aware, and was informed of, the reason for the dismissal decision. Clause A5 provided for instant dismissal. He was acquitted in the criminal case on technicality, made demands for reinstatement after acquittal, and was informed his dismissal did not hinge on the outcome of the criminal proceedings. The Conciliator recommended the Grievant be paid 5 months' salary for breach of procedure. The Respondent was not ready to pay him this, or reinstate him, as the decision against him was taken under Clause A5 of the CBA, which allowed for instant dismissal.

18. She testified on cross-examination that the Grievant was not an ideal Employee. He gave the wrong information about his personal details to the Respondent. His performance was okay, but he lacked in integrity. Barongo was a Security Officer assigned to the Bank from Bob Morgan Security Firm. Kennedy Oyamo was the stranger brought to the Bank by the Grievant. He was a former Employee of the Bank. The Grievant was arrested on 5<sup>th</sup> June 2010, the same day he was issued with the letter to show cause why disciplinary action should not be taken against him. It was written as an emergency. Mukoba did not know when the letter was handed over to the Grievant. He was in custody on Saturday, Sunday and Monday. The letter to show cause was not exhibited in the criminal case. It was not viable to grant the Grievant a disciplinary hearing. He was not heard. He was paid Kshs. 32,084 comprising leave days. The list of shylocks owed money by the Grievant was availed to the Respondent by the Grievant. The Conciliator recommended the Grievant be paid 5 months' salary in compensation. The Claimant rejected

this, but the Respondent was willing to consider the recommendation. Mukoba testified on redirection that the Grievant accepted the terminal benefits of Kshs. 32,084 paid to him. The Respondent was fair to the Grievant. The decision to summarily dismiss him was fair. The Respondent asks the Court to dismiss the Claim.

*The Court Finds and Awards:-*

19. The Grievant was employed by the Respondent Bank on 1<sup>st</sup> September 2005 as a Graduate Clerk. He rose to become a Section Head in ICT department at the Respondent's Head Office in Nairobi, as shown in his letter of confirmation dated 16<sup>th</sup> February 2010. He earned a monthly basic salary of Kshs. 73,833, and a monthly house rent allowance of Kshs. 6,055- total Kshs. 79,888. He was summarily dismissed from employment on 7<sup>th</sup> June 2010.

20. It is the common position of the Parties that the Grievant was arrested at the instigation of the Respondent, on the 5<sup>th</sup> June 2010, which was a Saturday. He was arrested alongside Kennedy Oyamo, a former Employee of the Respondent. There is irrefutable evidence, consisting photographs and direct oral testimony, that Kennedy Oyamo was arrested inside the Central Operations Unit Room, on the 5<sup>th</sup> June 2010. The area was a high security and restricted area. Someone must have let him in. A search on Kennedy Oyamo upon arrest yielded bits of papers with customer accounts details. This man was up to no good. An audit carried out on the same day revealed the intruder had not managed to transfer money electronically, but that an attempt to transfer such money was made at about the time Kennedy Oyamo was locked up in the room.

21. There was sufficient evidence to involve the Grievant and Kennedy Oyamo in the conspiracy to commit a felony. It was clear to the Court that the Grievant contacted BM Security Guard George Barongo to assist in granting Kennedy Oyamo access to the Central Operations Unit Room. Although the Grievant was familiar with Oyamo, having worked together at the Bank in the past, and having on no less than 2 occasions introduced Oyamo to Barongo, the Grievant lied to the Court that at the time of his arrest, he was arrested alongside a stranger and taken to the Anti- Banking Fraud Office. The Grievant's attempt to dissociate with Kennedy Oyamo was a poor attempt at distancing himself from the conspiracy to commit a felony. He similarly attempted to deny being familiar with Barongo. He knew Barongo well, and it did not seem likely, that he first encountered Barongo at the criminal trial.

22. The Court is satisfied that the Grievant was engaged in a fraud against his Employer. He was arrested on 5<sup>th</sup> June 2010, and arraigned in Court on 7<sup>th</sup> June 2010. He was acquitted of the offence of conspiring to commit a felony, in a Judgment dated 27<sup>th</sup> January 2012. He immediately demanded to be reinstated, arguing that the criminal case had absolved him of the accusation of conspiracy to commit a felony.

23. It is the duty of the Employer under Section 43 and 45 of the Employment Act 2007, to establish the validity and correctness of the reason for termination of employment. The question raised by the Grievant's acquittal in the criminal case, is whether it effectively, deprived the Respondent of the right to rely on the same facts relating to the offence of conspiracy to commit a felony, in justifying the summary dismissal. Was the Grievant entitled to reinstatement upon acquittal?

24. The Respondent took the decision to summarily dismiss the Grievant on 7<sup>th</sup> June 2010. There was no communication made by the Respondent to the Grievant, that the decision at the workplace, depended on the police investigations of the criminal offence, or on the outcome of the criminal proceedings. Employers are not limited in initiating workplace disciplinary proceedings against Employees, by police investigations and criminal trials against their Employees which may be initiated by public authorities, based on the same facts.

25. In the *Industrial Court of Kenya Cause Number 981 of 2011 between James Mugeru Igati v. the Public Service Commission of Kenya [2014] e-KLR* and *Industrial Court of Kenya Cause Number 875 of 2010 between Peter Omachi Nyakoi v. Nairobi Java House Limited [UR]*, the Court found that disciplinary proceedings at the employment place would only be affected by the criminal process, where

the Employer has communicated to the Employee that the disciplinary process, is dependent on the outcome of the criminal process.

26. The individual contract of employment, the collective agreement, policy and procedure document, the letter of suspension, or the law to which the employment relationship is subject, may join the public criminal process to the private disciplinary process, so that a finding of not guilty in the public process, is imposed on the disciplinary process.

27. In the absence of such workplace instruments, the Employer has no reason to wait for the outcome of the criminal process before taking disciplinary action against a delinquent Employee, or adopt the outcome of the criminal process as the logical result of the private disciplinary process. Conversely, an Employee under such disciplinary process should have no expectation that the related criminal process, where it culminates in an acquittal, exonerates the Employee from all culpability for the employment offence.

28. Courts have concluded that the police investigations and criminal proceedings are public processes, undertaken by public authorities to safeguard public order; the disciplinary process is essentially a private process, by a private enterprise, aimed at protecting the private interest of the enterprise. The standards of proof in the two processes are different. As submitted by the Respondent, the criminal trial against the Grievant required the prosecution to establish its case beyond reasonable doubt. At the workplace, all the Employer is required to have are reasonable and sufficient grounds to act, more or less on the balance of probabilities.

29. The criminal case against the Grievant came to a cropper as do most criminal cases in Kenya, due to poor preservation and presentation of evidence by the prosecuting authorities. The police did not take the cell phone records of the accomplices, photographs of Kennedy Oyamo which we allowed at the Industrial Court could not be produced at the criminal trial based on evidential restrictions, and evidence of CCTV camera was not led. The Grievant in the end was found not guilty, because of failure by the prosecution to meet the high standards of proof required in the criminal trial.

30. These pieces of evidence on the other hand, would not be necessary to establish the fairness and validity of termination, under Section 43, 44, and, 45 of the Employment Act 2007. The Respondent submitted very persuasively that in any event, assuming the findings in the criminal case were relevant to the disciplinary process, the Grievant was, notably, found with a case to answer and placed on his defence at the criminal trial. The finding of a prima facie case against the Employee at the criminal trial would be strong evidence of the Employee's culpability for the employment offence at the workplace, considering the lower standards of proof required in the workplace to justify termination. The Court is satisfied that the Respondent had valid reason in summarily dismissing the Grievant from employment, as required under the Employment Act 2007.

31. The additional justification given by the Respondent's Human Resource Manager, was that the Grievant was involved with shylocks and did not exercise financial prudence in his affairs, contrary to his calling as a Banker. These allegations were not the reason given in the letter of summary dismissal dated 7<sup>th</sup> June 2010. These were mere and unnecessary allegations, which the Court finds had no bearing on the main ground given in establishing the reason for termination which was: the Grievant's role in the conspiracy to defraud the Bank of Kshs. 6.3 million. The allegations on the shylock transactions are rejected.

32. Was the procedure fair? Section 41 of the Employment Act 2007 requires the Employer to explain to the Employee the charges against the Employee, in a language understood by the Employee. The Employee has the right to be accompanied to the disciplinary session by a workmate or shop floor level trade union representative. Any representations made by the Employee or the person accompanying him to the session, must be considered by the Employer before a decision is taken.

33. The Respondent through its Human Resource Manager conceded the Grievant was not accorded these minimum procedural protections. There was no hearing in any form. Ms. Mukoba testified the Grievant

was not heard. Strangely, the Respondent alleged to have issued the Grievant with a letter to show cause why disciplinary action should not be taken against him. This was issued on the same date the Grievant was arrested. There was no opportunity to respond to the letter to show cause. The Grievant was in police custody on the date the letter to show cause, and the letter of summary dismissal issued.

34. The Respondent seems to have misapprehended Clause A5 of the Parties' CBA, which stipulated that specified acts of gross misconduct, would be punishable through instant dismissal. This did not mean that there would be no hearing; it meant the Claimant would be dismissed instantly, but upon according him a fair hearing.

35. The law no longer contemplates on-the-spot termination of employment on disciplinary grounds, devoid of a hearing. Summary dismissal is defined under Section 44 [1] as termination of employment without notice, or with less notice than that to which the Employee is entitled, under any statutory provision, or contractual term. This definition does not suggest that summary dismissal is not preceded by a fair hearing. Fair hearing should always be given, regardless of the length or absence of notice of termination.

36. The terms and conditions of employment prescribed in individual and collective employment agreements must be consistent with the Employment Act 2007. Employees have the right to be heard before termination, regardless of the nature of the termination notice. The Respondent misapprehended Clause A5 of the CBA to justify on-the-spot termination, without regard to procedural protections granted to the Employee under Section 41 of the Employment Act 2007. The Respondent failed the fairness test, on account of the procedure adopted.

37. What is the appropriate remedy? The Employer was able to demonstrate fair and valid reason for termination of the Grievant's contract of employment. The Grievant, quite honestly, conceded that the activities over which he was investigated and charged, eroded the qualities of trust and confidence, which are the cornerstones of an employment relationship. The Respondent placed reports from reputable media houses, before the Court, showing that Banks lost at least Kshs. 1.5 billion in 2012/ 2013, to rogue, techno-savvy, Employees. The Respondent stood to lose Kshs. 6.3 million. It would be irresponsible and unreasonable of the Court to grant an order returning the Grievant to the Bank. He does not express any remorse for his conduct. He insists he did no wrong. His attitude makes it impossible for the Court to grant him the restoration of his contract of employment. His presence there would not foster trust and confidence between him and the Bank and would by extension, shake the confidence and trust of the Customers in the Consolidated Bank of Kenya. The Grievant laments that he has been blacklisted in the banking industry and cannot secure employment, owing to the summary dismissal. He cannot blame the Respondent for that. He only has himself and peers to blame.

38. In the end, the Court finds summary dismissal was preceded by fair and valid reason. However, the Grievant was not heard at all, ***and is granted 5 months' gross salary as compensation for the procedural violation, calculated at Kshs. 399,440. No order on the costs and interest.***

Dated and delivered at Nairobi this 18<sup>th</sup> day of July 2014

James Rika

Judge