



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 298 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 23<sup>rd</sup> September, 2014)**

**TUBMAN DAMIEN OCHIEL ..... CLAIMANT**

**-VERSUS-**

**ECOBANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

The claimant Tubman Damien Ochiel filed his memorandum of claim on 4.11.2013 through the firm of Charles Gomba & Co. Advocates. The claimant's case is that he was employed by the respondent on 19.6.2009 as a Grade 1 Officer with effect from 1st July 2009 at a gross salary of Kshs 71,965/= as per **App TDO – 1(a) & (b)**. The contract was subject to 3 months probationary period which claimant served and was duly confirmed in employment.

The claimant avers that he served with zeal and commitment and even earned a promotion with increment of salary to Kshs 74,719/= gross pay as per **App TDO 3(a) & (b)** on 24.11.2010. In June 2011 he was promoted to DB Credit Analyst level of Assistant Manager and his salary increased to Kshs 85,389/=. Between September 2011 to October 2011, however, there were a series of fraudulent transactions carried out in respondent's bank and claimant was implicated. The claimant avers that he was not responsible for any of these allegations and the his work ethic was always above reproach.

The respondent however carried out some independent internal investigations which implicated claimant and vide a letter dated 14.10.2011, dismissed the claimant from duty. It is the claimant's case that he carried out his duties diligently and that the dismissal was actuated by malice and clear breach of employment contract. The claimant avers that he was not accorded an opportunity to be heard and this was in breach of the law.

The claimant was charged in court as a result of the respondent's accusations but the case was terminated by the State on 13.12.2011 who entered a *nolle prosequi*. The claimant now prays for a declaration that the dismissal was null and void and he seeks to be reinstated on duty and in the alternative be paid terminal dues as computed under his memo of claim.

The respondent on the other hand filed their memo of reply on 11.12.2013 through the firm of Njoroge Regeru & Co. Advocates. It is the respondent's case that indeed the claimant worked for them and progressed to the designation of DB Credit Analyst at a basic salary of Ksh 68,504. Later an inquiry was made into teller differences at United Mall Branch where claimant was stationed. Investigations revealed that claimant was involved in fraudulent transactions. Further, that the claimant admitted taking part in the said fraud as he refunded the amounts he had fraudulently obtained. The claimant was thereafter dismissed from employment on 14.10.2011.

The fraud perpetrated at United Mall Branch led respondent to record a complaint to the Kenya Police regarding the manipulation of its customer's account by under banking, double crediting and double debiting resulting in unauthorized withdrawals of Ksh 160,530/=

The police carried out their investigations and identified claimant as a suspect. Ultimately the decision to arrest and charge claimant was solely made by the Kenya Police and respondent had no role whatsoever in the same. Further the respondent avers that this suit is subjudice as claimant has also filed Kisumu HCC No. 66/2012 where he prays *inter alia* for general damages for unlawful termination, the substantive prayer being made in the present suit. They want the entire claim dismissed with costs.

After hearing both parties, the issues for determination are as follows:-

1. **Whether the case is subjudice.**
2. **Whether claimant was given an opportunity to be heard before being dismissed.**
3. **Whether the claimant is entitled to prayers sought.**

On 1st issue, the respondent had contended that the case is subjudice. The respondent has not however exhibited any documents to prove that allegation. This remains just a mere allegation not proved.

On 2nd issue, the respondents did their internal investigations which they found were implicating the claimant in fraud. They had their audit which they used to dismiss the claimant. They also reported the matter to the police and claimant was arrested and charged in court. The process however followed by respondents before dismissing the claimant flouts the provisions of S. 41 of Employment Act which states as follows:-

**“(1)Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2)Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

The respondents may have valid reasons to warrant dismissal of claimant. However, the failure to give claimant a hearing contravenes his right to be heard and rules of natural justice as enshrined in our Constitution Article 50(1) which states:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal and body.”**

This also contravenes the provisions of Convention of 158 of ILO and Recommendation 166 Article 7 of Convention states:-

**“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”**

This provision is restated by the Report of of the Committee of Experts of the International Labour Conference 82nd Session 1995 at Article 150 which states:-

**“It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment, and even if the termination is not considered as final until the appeals procedures are exhausted, it is necessary for the application of Article 7 that the worker be given an opportunity to defend himself before his employment is considered to have been terminated.”**

It is therefore clear that claimant was not given a hearing and the decision made to dismiss him from service fails. I find the dismissal unfair and unjustified and I convert it to a normal termination. What prayers is the claimant then entitled to? I find for claimant and I award him as follows:-

- 1. 1 month salary in lieu of notice = Kshs 85,389/=**
- 2. 12 months salary as compensation for unlawful termination = 85,389 X12 = Kshs 1,024,668**

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**TOTAL = KSHS 1,110,057/=**

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**Less statutory deductions.**

**Prayer for service pay is not tenable by virtue of the fact that claimant was a NSSF contributor and a member of his employer's pension fund.**

**The claimant should also be issued with a certificate of service. Respondents will pay costs of this suit.**

**HELLEN S. WASILWA**

**JUDGE**

**23/9/2014**

**Appearances:-**

Chepkwonyi h/b Gomba for Claimant present

N/A for Respondent

CC. Wamache