



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1063 OF 2012

BETWEEN

EVANS OCHIENG NUDIH CLAIMANT

VERSUS

EQUITY BANK LIMITED RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Achach instructed by Achach & Company Advocates for the Claimant

Mr. Kioko instructed by Muriithi & Ndonge Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant was employed by the Respondent Bank as the Credit Officer Group Lending, through a letter of appointment dated 13th November 2008. Appointment became effective from 17th November 2008. His contract was terminated sometime in June 2011. He holds termination was unfair and unlawful, and under paragraph 11 of the Statement of Claim filed on 21st June 2012, alleges he is entitled to damages and/ or reinstatement. However, in his prayers under paragraph 12, he foregoes reinstatement and pursues the following:-

- a. Damages for unlawful termination
- b. 1 month salary in lieu of notice
- c. Service pay
- d. Costs; and any other relief as the Court may deem fit

2. The Respondent filed its Statement of Response on 17th August 2012. It concedes to having employed the Claimant and terminated his contract on the dates given in the Statement of Claim. Termination was fair. The Claimant failed to observe work ethics. He was summarily dismissed for grave unprofessional conduct, being un-cooperative and having used abusive language to Customers. He was given several opportunities to explain himself, and mend his ways, but the change did not materialize. He appeared before the Disciplinary Panel. He was issued a written letter of summary dismissal dated 27th June 2011.

The Respondent prays for the dismissal of the Claim with costs to the Respondent.

3. Ochieng' Nudih gave his evidence and rested his case on 15th May 2013. The Respondent called its Human Resource Manager John Wamwati, who gave evidence on 8th April 2014 when the hearing closed. The dispute was last mentioned on 22nd July 2014 when Parties confirmed the filing of their Closing Submissions, and the Award reserved for 7th November 2014. The delivery of the Award has been brought forward, as the undersigned Trial Judge has been transferred to Mombasa.

4. The Claimant was first posted to Equity Branch, in the Rift Valley Town of Kericho. His first salary was about Kshs. 25,000. His duties included group management, training, loan repayment and monitoring, and business development. He could be assigned any duty by the Loans Manager, who was his Supervisor. The Supervisor was Collins Oyugi.

5. After about 3 years in Kericho, he was transferred to Bungoma in the Western Region of Kenya. The Branch Manager, Edwin Barasa, refused to release him. The Claimant did not have major problems with the Management while at Kericho. The only minor problem he encountered was in debt collection. Bank Customers had been dispersed to different places by the ethnic violence that followed the bungled Presidential ballot in 2007. The Claimant had difficulty in tracing debtors, and collecting debt from them.

6. In February 2011, he was transferred to Hola in the Coast Region. He was encouraged by the Kericho Manager to move to Hola, and advised it would provide him an opportunity to develop. Hola was a new Branch. He transferred to Hola as the In-Charge, Credit Department. He and Ms. Tawhida Abdulfaraj the Credit Manager started the Branch from Zero. He was still serving as the Relations Manager, Credit. It was only him and Tawhida at the Credit Department, assigned the role of building up the infrastructure. Other Officers were in the Operations.

7. There were no group accounts at Hola. These were hived off from the North Eastern Region Town of Garissa. The Claimant oversaw all the agricultural, consumer, and business loans. His relationship with Tawhida was initially good. She later became petty, after a dispute arose on a credit risk file.

8. There were complaints made against the Claimant to the Respondent by two Women Groups- Uzuri Women Group and Maisha Bora Women Group. They alleged that the Claimant disrespected them, used offensive and abusive language. Tawhida informed the Claimant she would investigate the complaints and get back to him. She never did.

9. During his stay at Kericho, there were no complaints against him. There were no letters of complaints or warnings while the Claimant was at Kericho. He was asked by Tawhida, after the complaints by the Women's Groups, to report to the Human Resource Office at the Nairobi Head Office, and see one Madam Gathai. It was a Friday and he was to travel on the following Monday. While at the Head Office, the Claimant was called through phone by Tawhida, and advised to instead see Phyllis Wawire, Head of Credit, Group Lending. He found Phyllis typing. She told him he was hard on Customers. She then directed him, to Head of Human Resource Wamwati.

10. Wamwati informed the Claimant that Bank Customers had been complaining about him. He was told he had been dismissed. He was not given a letter of dismissal. He was not heard, or given details of the complaints against him. He was only paid salary for the days worked.

11. Questioned by the Respondent's Counsel, the Claimant testified he was issued a letter of appointment. He was familiar with the Human Resource Manual. His boss at Kericho was Collins Oyugi. The Officers of the Bank were trained at the Head Office, before posting. The Claimant's duties revolved around group lending. Edith Kamau was the Group Lending Officer at the Head Office. She facilitated trainings. Habil Owiti acted as the Regional Supervisor for some time. The Claimant worked under the supervision of Habil for some time. Jane Ogutu was also a Regional Supervisor. The Claimant did not have the occasion to work with her at a personal level.

12. In July 2009, there was training held at Equity Centre, Nairobi. Ochieng' Nudih was aware that Edith Kamau made complaints about his conduct, during this training. The Claimant denied the contents of the document dated 21st July 2009, which recorded a series of cases where the Claimant's conduct was questioned by various Officers. He denied making the handwritten comments on the document, but conceded the handwriting resembled his handwriting on the letter of appointment. He was not informed of any complaints made against him, by Edith or Habil.

13. There was a complaint written to the Claimant by Regional Supervisor Jane Ogutu, alleging that there was a minimal growth of his loan book, and that the Claimant managed to disburse 37 loans only, below the expected standards. The Claimant did not discuss personal attributes with Edith Kamau. He had gone to the training smartly dressed in casual clothing. Edith told the Claimant he needed to be in a tie.

14. Edith sent an e-mail to Elizabeth Gathai dated 21st July 2009, complaining about the Claimant's dressing. The Claimant responded verbally, saying the Officers were only supposed to dress in smart casual. He described his participation at the training as vibrant. According to him his Colleagues were bent on muzzling him, because they suffered low self esteem.

15. Habil also wrote an e-mail alleging the Claimant engaged in outbursts with Edith, over dressing. The Claimant confirmed the correctness of the e-mails. There was nothing available to the Claimant, showing Barasa refused the Claimant to go on transfer to Bungoma. He was at Hola for 3 to 4 months.

16. There were several e-mails exchanged between the Claimant and Tawhida. Just a month after the Claimant arrived, Tawhida wrote to him an e-mail, alleging he used loud voice while in the Bank. She complained again that he was rude in training. He replied to this complaint, saying it was an isolated incident. He had told the M-pesa Officer who was training the Bank Officers that he was going beyond the hours assigned to him, for the training. He conceded Management appointed the Trainers, and it was not in his place to advise on time. He did not defy the Management.

17. Uzuri Women's Group had disintegrated, and the Claimant was pursuing individual debtor Members. He would visit their homes and talk to the women's husbands. The Community was diverse. He talked to the husband of Mwanahamisi Jillo. Money was raised and paid to the Bank. Ochieng' Nudih did not think the complaint was genuine. It is not true that he had a problem with his attitude. He did not have a low opinion of his colleagues. He was not given the letter of summary dismissal dated 27th June 2011. He was paid his salary for June 2011. He did not go back to the Bank to clear.

18. Redirected, the Claimant testified he was told by Mr. Wamwati that he was dismissed for using abusive language on Customers. There was nothing about insulting Workmates. He was not overly aggressive in pursuing debtors while at Hola. Money was paid. He did not know why Tawhida complained about his loud voice. He was handling 23 Groups, and only 2 complained. There was nothing told to the Claimant by Wamwati, arising from Kericho. He did not author the document dated 21st July 2009, or make any handwritten notes on it.

19. John Wamwati has over 5 ½ years' experience as the Human Resource Manager of Equity Bank Limited. He manages disciplinary issues and Employees' exits. He confirmed the Claimant was employed, and dismissed by the Bank. The Claimant worked as the Credit Officer. The Claimant worked at Hola, and Kericho Branches.

20. There were complaints from his Supervisors. They said the Claimant was rude and disrespectful. Habil Owiti listed these complaints. Edith Kamau complained about the Claimant's dressing, negative energy and lack of respect. The Claimant was cautioned in July 2009. He was posted to Hola in March 2011. The complaints followed him there.

21. His Supervisor there complained. He was disrespectful. He spoke rudely to a Trainer. Customers complained that the Claimant abused them. The Claimant responded to his Supervisor, alleging he was trying to instill discipline on the Customers, who were Women's Groups. His Manager at Hola summarized the issues the Branch was having with the Claimant and forwarded these to the Head Office.

The Manager stated the Officers at the Branch were not able to work with the Claimant. He asked for a replacement.

22. The Claimant was called to the Head Office. Phyllis Wawire prepared his case summary. She recommended the Claimant be separated from the Respondent. Wamwati then invited the Claimant to his Office on 27th June 2011. He sat the Claimant down, explained to him why he had been summoned from Hola, and why it had been decided to terminate his contract. He was agitated. When Wamwati issued the letter of summary dismissal, the Claimant refused to receive it. The Respondent had no option but to terminate his contract. His main duty was to form Community Groups and facilitate loaning money to them. Debt collection was collateral to this. The Bank had a Debt Collection Section. The Claimant was owed 27.5 days of annual leave, but did not clear with the Bank to receive annual leave pay. He collected his pension cheque.

23. Cross-examined, Wamwati testified he worked for different Organizations in the human resource role for over 20 years. Appraisal of Employees was done quarterly, at the Branch level. The main appraisal was done at the end of the year. Employees who consistently performed poorly would merit having their contracts terminated. The Claimant was performing the same role of Credit Officer at Hola. Wamwati was not sure how many Groups the Claimant handled at Hola. Tawhida was the Credit Manager and Phillip Kithome the Branch Manager. This was a new Branch. It was still being staffed. The Witness could not recall how many Officers were there at the time.

24. Debt collection was an ancillary role played by the Claimant. Debt Collection Section was based at Nairobi. There were cumulative complaints from Customers and the Supervisors against the Claimant. They were made while the Claimant served both at Kericho and Hola. The Claimant was being given time to reform. His performance met the Respondent's threshold, but he was not able to meet the core values of the Respondent.

25. Wamwati called Ochieng Nudih to his Office. The Claimant did not appear before a Disciplinary Committee. This was against the Respondent's Human Resource Manual. Wamwati only met the Claimant during dismissal. Dismissal was on 27th June 2011, the same date the Claimant was issued he dismissal letter. Wamwati could not say if the letter was written then, but denied he dismissed the Claimant verbally. The Witness did not write the letter after this case was filed. The Claimant refused to receive and sign the letter. Wamwati did not think it necessary to send the letter.

26. Many Groups complained about the Claimant while he was at Hola. The Human Resource Manager did not have a record of the loan repayment made by the Groups. There was no information about any Group which stopped borrowing as a result of the insults from the Claimant. Wamwati closed his evidence with the clarification that he did not work with the Claimant. He learnt about the accusations against the Claimant from the Supervisors. There were different persons who worked with the Claimant at Kericho and Hola. He was dismissed for unprofessional conduct. The Respondent urges the Court to uphold its decision summarily dismissing the Claimant, and dismiss his Claim with costs to the Respondent.

The Court Finds and Awards:-

27. There is common evidence that the Claimant was employed by the Respondent Bank as Credit Officer, Group Lending. His letter of appointment is dated 13th November 2008. Appointment became effective from 17th November 2008. This letter, together with the Banks Human Resource Manual containing the Code of Conduct and Core Values, regulated the employment relationship. His first salary was Kshs. 25,000 per month, a consolidated package. It is not clear from the record if this was still the rate applicable to the Claimant when he left employment on 27th June 2011. It is agreed the Claimant was summarily dismissed by the Respondent on this date. It is not agreed if the Claimant was dismissed by word of mouth, or through the letter of summary dismissal signed by Human Resource Manager John Wamwati, dated 27th June 2011.

28. Under Section 43 and 45 of the Employment Act 2007, Employers have the duty to give fair and valid reasons to justify termination of employment. Sections 41 and 45 require Employers to follow a fair procedure, and observe the rules of natural justice, in arriving at the termination decision. Section 49 of the Employment Act 2007, and Section 12 and 15 of the Labour Institutions Act 2007 would allow the Court to grant the Claimant the remedies sought, for his dismissal which took place on 27th June 2011.

29. The Claimant was initially posted to Kericho. While there, there was a chorus of complaints against the Claimant from his Supervisors, with regard to different aspects of the Claimant's discharge of his role. These may be encapsulated as hereunder:-

- He was reminded by Edith Kamau, Group Relationship Manager that he needed to wear a tie during training. This was during the week of 6th to 10th July 2009. The Claimant argued with his Superior, adamantly replying that all he was required to wear were casual smart attires.
- He pejoratively referred to his Credit Manager as "that Guy." He walked out on his Superior Habil Owiti saying "there is nothing that guy is saying."
- He persistently refused to avail his meeting schedule in time to facilitate group supervision, insisting that he should be notified before he could give out his schedule.
- He refused to complete report for the end of June 2009, and his May report had errors.
- On 22nd October 2010, his Regional Supervisor Jane Ogutu wrote to the Claimant complaining about the low volume of loans disbursed by the Claimant.
- Earlier on 23rd July 2009, the Human Resource Manager John Wamwati wrote to the Claimant a Cautionary Note. It was communicated to the Claimant that his Supervisors had registered their dissatisfaction about the Claimant's attitude to work.

30. Almost as soon as he arrived at Hola, there were complaints made against the Claimant by his Colleagues.

- The Supervisor Tawhida Abdulfaraj wrote to him an e-mail on 30th March 2011, complaining that the Claimant was speaking in high tones while at the Bank, disrupting everyone, as they were compelled to listen to his conversations.
- The day after, on 31st March 2011, Tawhida wrote complaining that the Claimant had shown disrespect to the M-pesa Trainer, asking why he exceeded the allocated training hours.
- While pursuing debt collection, the Claimant used offensive language against the Respondent's Women Customers, who comprised Uzuri Women's Group and Maisha Bora Women's Group.

31. The Claimant appears not to deny the correctness of these e-mails. He did not deny that the incidents took place. In the case of his conduct during the Equity Centre Training, he did not for instance dispute that he refused to wear a tie, insisting it was alright to wear smart casuals. This was against the advice of the Management.

32. He did not deny denigrating Officers such as Habil and Edith. He nonetheless explained in his evidence that his Superiors were intimidated by his vibrant contributions at the training, and therefore raised these complaints as a result of their sense of insecurity. This condescending attitude was common in the way the Claimant related to his Colleagues.

33. He told a hapless Trainer engaged by the Respondent to enlighten the Employees on the M-pesa money transfer facility, that he was training them beyond the allocated hours. In his evidence, the Claimant conceded he was not a time-keeper. He explained to Tawhida that this was an isolated incident. Habil made his private conversations loudly, disrupting his Colleagues and Customers at the Bank in Hola. Loud conversations have been shown to increase workplace stress, and affect productivity. It is important for Employees like the Claimant to keep their conversations to themselves.

34. In explaining his rudeness to the women of Hola, the Claimant alleged to be instilling discipline in them. He talked to their husbands, and managed to have the debts repaid.

35. In the view of the Court this chain of occurrences, from Kericho to Hola, portrayed the Claimant as an incompatible Employee. As held in *the Industrial Court of Kenya Cause No. 635 of 2010 between Dede Esi Annie Amanor- Wilks v. Actionaid International [2014] e-KLR*, incompatibility on the part of an Employee is a fair termination reason. Employers are generally entitled to have harmonious working relationships at the employment place, and can do so by weeding out trouble makers, eccentrics and disruptive Employees.

36. In *Wright v. St. Mary's Hospital 1992 [ILJ] 987 IC*, the Court defined incompatibility to mean *“inability on the part of the Employee to work harmoniously with fellow Workers or Managers, or failure by the Employee to fit with the corporate culture.”* The chorus of complaints against the Claimant from his Supervisors, in Kericho and Hola, as well as the complaints from the Bank Customers, cast the Claimant in this mould. He was arrogant, uncooperative and insubordinate.

37. To protect Employees from being victimized for minor eccentricities, Courts require the Employer to demonstrate there is an irreparable breakdown in the employment relationship. The Employee must be corrected, counseled and given time to mend. In the case of Ochieng Nudih, all these elements were shown to be present. He was cautioned right from the time he was at Kericho. He had written in his own handwriting on 21st July 2009, undertaking to work on his interpersonal skills, and inculcate values that enhance peaceful coexistence at the workplace. In Court, the Claimant made an attempt to disown his own handwriting. There is no doubt in the mind of the Court that the Claimant gave the undertaking in his own handwriting, but on going to Hola, soon forgot where he was coming from. He carried over his attitude to Hola. The relationship irreparably broke down when the Claimant went insulting the Women of Hola in the name of debt collection.

38. The Court is satisfied there was valid and fair reason in summarily dismissing the Claimant. The Respondent fulfilled the requirements of Sections 43 and 45 of the Employment Act 2007.

39. Ochieng' Nudih was asked by his Supervisor while at Hola to report to the Head Office. There, he was met by Phyllis Wawire Head of Group Lending. There was no hearing. Phyllis just mentioned to the Claimant that he had been rude to the Bank Customers and was unable to work with his Colleagues. She asked him to see the Human Resource Manager Wamwati.

40. This was on 27th June 2011. The Claimant testified he was summarily dismissed by word of mouth. Wamwati testified the Claimant was issued the letter of summary dismissal which he refused to take. It is difficult for the Court to say whether the Claimant was issued this letter on 27th June 2011, and whether he refused to take it, as suggested by Wamwati. Given the past attitude shown by the Claimant, it was not beyond him to reject the letter. It was however for the Respondent to show that it actually delivered the letter to the Claimant, and that he declined service, a duty which from the evidence on record, the Respondent did not discharge.

41. It was accepted by Wamwati however, that the Claimant was not heard prior to dismissal, whether dismissal was by word of mouth, or through the written word. This rendered the procedure unfair. It was against the Respondent's own Human Resource Manual and Sections 41 and 45 of the Employment Act 2007. ***Termination was unfair on account of procedure, and the Claimant is granted 3 months' gross salary at the rate applicable on 27th June 2011. He will also have 1 month salary in lieu of notice, at the rate of the basic salary receivable by him on 27th June 2011.***

42. Mr. Ochieng' Nudih did not establish his claim for service pay. He did provide the Court with any material to show the basis for this claim. It is not captured in his contract or the human resource policy and procedure. There was no reference to any collective agreement or wage instrument relevant to the Claimant, which would perhaps justify service pay. He did not argue and persuade the Court, that this was due to him under Section 35 of the Act. The prayer is declined.

43. Although the Court agrees with the Respondent on its submission with regard to the dichotomization of unfair and wrongful termination, the pursuit of damages for unlawful termination by the Claimant,

would not bar the Court from making a consideration of unfair termination. He mentioned remedies such as reinstatement, and questioned the manner of termination, which are traditional elements in unfair termination, as opposed to unlawful termination. Both ***Industrial Court of Kenya Award in Cause No. 719 of 2010 between Jane Florence Otieno v. the Insurance Regulatory Authority [UR]*** and ***Industrial Court of Kenya Cause No. 107 of 2013 between George Onyango Akuti v. G4S Security Services Limited [2013] e-KLR*** correctly show that ‘unfair’ and ‘wrongful or unlawful’ termination are distinctive concepts. The allusion to remedies and procedural standards which relate to unfair termination, in the circumstances of this case, allows the Court to consider the remedy of compensation rather than damages for unlawful termination, where fairness of procedure would not be in issue. In the end:-

- a. ***Termination was unfair on account of procedure***
- b. ***The Claimant is granted 3 months gross salary at the rate applicable as of 27th June 2011***
- c. ***The Claimant shall be paid by the Respondent, 1 month basic salary in notice pay at the rate applicable on the 27th June 2011***
- d. ***No order on the costs and interest***

Dated and delivered at Nairobi this 18th day of September 2014

James Rika

Judge