



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO.59 OF 2014**

**(Formerly Industrial Court Cause No. 1543 of 2012 at Nairobi)**

**DAVID NYAGA IRERI.....CLAIMANT**

**-VERSUS-**

**EQUITY BANK LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> November, 2014)

**JUDGMENT**

The claimant's case is based on the further amended statement of claim dated 24.06.2013 and filed by the claimant in person. The claimant prayed for judgment against the respondent for:

1. A declaration that the claimant's summary dismissal was unlawful, unfair, unprocedural and unconstitutional.
2. The respondent to pay the claimant due allowances, severance pay, maximum compensation and general damages amounting to Kshs. 15, 193, 554.30.
3. A declaration that subject to the law or terms and conditions of employment, the claimant shall not forfeit any rights or claims he enjoys in regard to leave or passage at the respondent's expense and the respondent shall pay such entitlement forthwith.
4. A declaration that 20% interest is granted on the award given to the claimant until settlement in full.
5. The respondent to bear costs of the suit.

The claimant subsequently appointed Gori & Ombogi Company Advocates to act in the suit on his behalf.

The respondent filed the amended memorandum of response on 15.07.2013 through Waweru Gatonye & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent to the position of a bank clerk by the letter of appointment dated 11.09.2007 at a consolidated salary of Kshs. 30, 000.00 payable monthly in arrears inclusive of house allowance. In recognition of the claimant's sacrifice and commitment in the realization of the respondent's overall targets, by the letter dated 26.01.2009, the claimant's salary was increased to Kshs. 37, 500.00 and his designation changed to that of relationship officer- operations with effect from 1.01.2009. The claimant was transferred as the relationship officer- micro finance with effect from

8.02.2010.

The claimant testified that on 25.03.2010 he went to the field for what he called recovery assignments and returned at about 7.00pm to his station of deployment at respondent's Embu branch. He was then informed that he had been summoned to appear before his section head, the credit manager at the respondent's head office in Nairobi. The claimant testified that he travelled that night and the following morning he went to the credit manager's office as scheduled. The manager informed him that he had been accused of harassing customers and the credit manager asked him to write a letter stating that he had been late for the appointment that morning. The manager told the claimant that if he failed to write the letter he would be sacked. The claimant testified that he then wrote the letter to avoid being sacked and stated that he had reported late and stressed up with job related issues and he pledged not to repeat again. The court has observed that the reference in the claimant's letter of 25.03.2010 thus, "**LATE COMING**" has been crossed and "**DRUNKNESS**" inserted. Further, the court observes that the word "**late**" was crossed and "**drunk**" inserted.

The respondent subsequently delivered to the claimant the letter dated 26.03.2010. The letter stated as follows:

**"RE: SUMMARY DISMISSAL**

**This is to inform you that you have been summarily dismissed from the Services of Equity Bank Ltd with effect from 26<sup>th</sup> March 2010. This is as a result of you reporting to work late and under the influence of alcohol which you have admitted to in writing. Your actions have impacted negatively on your work as a Relationship Officer – Micro Credit. This contravenes the Banks Code of Conduct and has a negative impact on the Banks' image. Your actions show a lack of commitment on your part and as a result of this, we regret to inform you that your credibility as an employee of the Bank has been severely compromised. The decision to dismiss you is in accordance with the Employment Act 2007.**

**You will be paid up to and including March 26, 2010 which was your last date of service.**

**Please organise to hand over any company property in your possession to the Business Growth & Development Manager –Embu Branch. In addition, ensure that you have cleared with all the departments and hand over the duly completed clearance form to the Payroll Accountant, after which your final dues will be payable on the next payroll date.**

**Yours faithfully,**

**EQUITY BANK LIMITED**

**Signed**

**John N. Wamwati**

**Human Resource Manager"**

The claimant was dissatisfied with the dismissal and he filed the suit.

The respondent's witness (RW) was Emilly Chepkemai Bett, the respondent's Assistant Manager. Her evidence was that the claimant was assigned field duties and the respondent's customers complained that the claimant served them while under the influence of alcohol. She further testified that after the termination the claimant was paid up to 26.03.2010; 25 due leave days; and employee pension contribution of Kshs. 42, 877.00 but employer's contribution of Kshs. 43, 426.43 is transferable by claimant to a scheme of his choice to be paid on due date in accordance with the law.

The court has considered the pleadings, evidence, and submissions on record. The following are the

court's findings on the issues in dispute.

The **1<sup>st</sup> issue** for determination is whether the claimant's dismissal from employment by the respondent was unfair. The court has considered the evidence. It is said for the respondent that the claimant served the respondent's customers while drunk leading to the claimant's dismissal. First, the respondent has not provided the particulars of the customers and the dates the claimant allegedly served them while drunk. Secondly, the letter relied upon by the respondent to show the admission on the part of the claimant is obviously altered to show drunkenness instead of lateness. The court finds that the letter bears no probative value to show admission on the part of the claimant that he was drunk while on duty. Thirdly, whereas it is not in dispute that the claimant attended a meeting at the head office about alleged harassment of the respondent's customers by the claimant, there is no evidence that the claimant was given notice of the allegations and the respondent has not provided evidence of the proceedings or establishing the allegations as levelled against the claimant. The credit manager or other officer of the respondent who attended the meeting did not testify before the court and in absence of a record of the hearing proceedings, the court finds the account by the claimant as the only credible evidence of the proceedings.

Taking the evidence into account, the court finds that the respondent has failed to show that the reason for termination was genuine or valid as at time of the dismissal and as envisaged in section 41 of the Employment Act, 2007. The court finds that the termination was unfair under that section. The court further finds that the termination was unfair under section 41 of the Act because the claimant was not given any notice of the alleged misconduct and there was no evidence that the hearing of 25.03.2010 was about alleged misconduct whose particulars had been disclosed to the claimant. The court upholds its opinion in **SHANKAR SAKLANI -VERSUS- DHL GLOBAL FORWARDING (K) LIMITED [2012]eKLR, Industrial Court Cause No. 562 of 2012 at Nairobi**, thus, **"Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.**

**To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract."**

The court finds that the claimant did not contribute to his termination in any way, he had been a good worker who had earned a promotion and praise from the respondent and he expected to continue in employment until the retirement date. The court finds that he is entitled to 12 months' pay being **Kshs.450, 000.00** at Kshs. 37, 500.00 per month as prayed for. However, the court finds that the claimant is not entitled to lost future earnings of Kshs.14, 400, 000.00 for 32 years as prayed for because the claimant has not established mitigating steps taken on his part to alleviate his loss in that regard and there is no evidence that the claimant will not be able to secure alternative employment or gainful engagement after the termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows.

1. The respondent has submitted that the claimant would be entitled to **Kshs. 37, 500.00** being one month pay in lieu of the termination notice as per the contractual terms. The court finds that the claimant

is entitled accordingly.

2. The parties were entitled to negotiate and agree upon the consolidated pay inclusive of reasonable provision for rent as provided in section 31(2) of the Employment Act, 2007. Thus, the court finds that the claimant is not entitled to the house allowance as prayed for.

3. RW testified that the claimant had been paid all pending leave days and the court finds that the claimant is not entitled to leave as prayed for.

4. As submitted for the respondent, the court finds that the claimant has not established the basis for the other prayers made in the memorandum of claim. The court finds that they will fail but the respondent will pay 75% of the claimant's costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the claimant's dismissal from employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.487, 500.00** by 15.12.2014 failing interest to be payable at court rates from the date of this judgment till the date of full payment.
3. The respondent to pay 75% of the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 21<sup>st</sup> November, 2014.**

**BYRAM ONGAYA**

**JUDGE**