



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1367 OF 2010**

**BETWEEN**

**JOSPHAT NGIGI NDEGWA.....CLAIMANT**

**VERSUS**

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

*Rika J*

*CC. Elizabeth Anyango*

*Mr. Isaiah Kubai Advocate and General Secretary of the Banking Union appearing for the Claimant*

*Mr. Anam Advocate instructed by Sichangi and Company Advocates for the Respondent*

---

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

**AWARD**

1. The Claimant initiated the dispute through a Statement of Claim filed on 3<sup>rd</sup> November 2010. The Respondent filed a Reply to the Claim and Counter-Claim, on 4<sup>th</sup> March 2011. It similarly forwarded to the Court Supplementary Bundle of Documents on 12<sup>th</sup> May 2011. The Claimant gave his evidence and closed his case on 11<sup>th</sup> July 2011. On 27<sup>th</sup> February 2012, Mr. Anam for the Respondent informed the Court the Respondent would not give testimonial evidence, but would rely entirely on the pleadings, submissions and bundles of documents filed by the Respondent. Parties agreed to file their Closing Submissions by 30<sup>th</sup> March 2012. The dispute was scheduled for highlighting of the submissions on 4<sup>th</sup> July 2012. The Claimant indicated he wished to file supplementary submissions. Mr. Kubai highlighted

Claimant's submissions on 21<sup>st</sup> May 2013. The Respondent's Advocates did not attend Court during the highlighting. The Court advised the Parties Award would be delivered on Notice.

2. The Claimant testified he was employed in the position of Micro Credit Officer-Group Lending, on 18<sup>th</sup> February 2008. His starting salary was consolidated at Kshs. 30,000 per month. On 29<sup>th</sup> January 2009 he was promoted to the position of Relationship Officer- Micro Credit, and his salary revised to Kshs. 37,500. On 27<sup>th</sup> November 2009, he was suspended on the allegation that there was an ongoing investigation being carried out by the Security Team, relating to a fraudulent transaction, whose details the Claimant was privy to. He was placed on half pay and ceased to draw other benefits and allowances. He subsequently did not receive any letter terminating his contract of employment, or lifting the suspension. He did not receive the letter of summary dismissal dated 4<sup>th</sup> October 2010 from the Respondent, attached to the Respondent's Supplementary Bundle of Documents as 'EQBK3.'

3. The Claimant worked at the Respondent Branch in Nkubu, Meru. He dealt with the Youth and Women Groups. He was under the supervision of the Branch Manager. He applied for leave two months in advance as required, in September 2009. He proceeded on 20<sup>th</sup> November 2009. He was wedding on 28<sup>th</sup> November 2009. While on leave, he received a short text message from the Credit Manager asking him to report back at the workstation. He went back on 23<sup>rd</sup> November 2009. He was advised to meet the Security Officer. The Security Officer did not come. The meeting was rescheduled later the same week, but again the Security Officer did not show up. The Claimant was advised by his Branch Manager to avail himself at the Police Station. He recorded a statement with the Police. He also visited the Head Office in Nairobi, saw the General Manager and was required to record a statement. It was alleged Claimant disbursed two loan amounts totaling Kshs. 900,000 into two customers' accounts by fraudulently using the Nkubu Branch Manager's password to effect the transfers. He was asked to resume his leave after recording the statements. Ndegwa was supposed to return to work on 14<sup>th</sup> December 2009, but received the suspension letter around 10<sup>th</sup> December 2009. Later in January 2010, he recorded statement with the Anti-Banking Fraud Unit.

4. Following the suspension, the Respondent froze all the Claimant's Bank Accounts. It continued to pay the Claimant salary up to January 2010 when the salary was stopped without notice or explanation. The Claimant sold his Safaricom shares held through the Respondent valued at Kshs. 45,000, but was prevented from recovering the proceeds by the Respondent. Ndegwa was servicing three loans on suspension through salary check off, but was unable to continue paying upon stoppage of salary. The Respondent then maliciously referred the Claimant to the Credit Reference Bureau on 10<sup>th</sup> August 2010, alleging the Claimant was unable to service debts, while the Respondent was fully aware of the cause of this inability. His Account with the Respondent was frozen by the Branch Manager. The Claimant's medical cover was suspended, and he had to meet medical costs from borrowed funds. After the investigations were completed, the Anti-Banking Fraud Officers informed the Claimant that he was not implicated in their findings. The Claimant then visited the offices of the Respondent on several occasions demanding advice of his employment status; he received no word on suspension, or the outcome of the investigations. He was tossed around for months on end by Officers from the Respondent's Human Resources and Security departments.

5. The Claimant explained that he was the Chairman of Staff Welfare Committee Nkubu Branch. The Committee was given Kshs. 250,000 by the Group CEO James Mwangi. The Claimant was to determine how the amount was to be used. The Branch Manager demanded that he be paid Kshs. 50,000 out of the sum for personal use. The Claimant refused to do, and from then, the two Officers' relationship soured. Up to January 2010, the Claimant's loan obligation with the Bank was Kshs. 34,000. He instructed the Bank to dispose of his shares. The Bank did not pay him Kshs. 38,159 from the sale. The sale proceeds from the shares would have offset the Claimant's loan obligation. The Claimant took his grievance to the Ministry of Labour, who advised that as he was not unionized, he seeks the assistance of the Court directly. He instructed a firm of Lawyers to demand for reparation. They issued a demand letter, which the Respondent ignored. Although he initially pleaded the prayer for re-instatement, Ndegwa testified he does not wish to work for the Respondent any longer. He instead asked for the assistance of the Court in the following terms-:

- The Respondent to pay the Claimant Kshs. 417, 500 being the arrears of salary for the period under suspension which ended in October 2010.
- Further payment of Kshs. 47,500 per month from October 2010 to-date.
- Payment of Kshs. 38,159 recovered for the sale of the Claimant's safaricom shares.
- Payment of Kshs. 150,000, being the value of the outpatient cover.
- Any other suitable remedy.
- Costs of the Claim with interest.

6. Cross-examined, Ndegwa told the Court he was in Nairobi on leave, when instructed to go back to Nkubu Branch. He was suspended in December 2009. His statement with the investigators related to his whereabouts for the two days the two loans were disbursed. He came to learn of the disbursement from his Branch. He was not given a chance to explain his role, nor see the accounts where the transactions took place. His letter of appointment under clause 12.0 required he adheres to Bank's Human Resource Policies, Processes and Procedures Manual. Clause 18.6.1 placed the responsibility of safeguarding customers' funds on the staff. The Claimant denied that he was on the machine at the time the funds were disbursed. He conceded he has an outstanding loan with the Bank. It was normal to notify the Credit Bureau that the Claimant had defaulted on his loan repayment. The loan was secured through the Claimant's salary. It was being recovered through check –off. His medical cover was a right. The letter of suspension stated he would forfeit his benefits, allowances and be on half pay. His accusation against the Branch Manager was not baseless; the Manager persistently mistreated the Claimant. Redirected, the Claimant told the Court he was not shown the internal report prepared by the Bank on the incident, prior to his coming to Court. He issued the demand letter to the Bank before the report was prepared. He did not agree with the report, and did not disburse the loans. The Branch Manager and the Senior Credit Officer were charged with that responsibility. The subject accounts were neither Youth, nor Women accounts. He was never invited to any disciplinary hearing. He was never given the final decision. His duties involved outfield work with Youth and Women Groups. On the day of the suspect transactions, he was outfield at places called Tharane and Igonji, educating Women and the Youth on how to access loans from Equity. Ndegwa stated he felt he would be victimized if he was to be reinstated, and explained he preferred monetary remedies.

7. The Respondent concedes it employed the Claimant as Micro Credit Officer- Group Lending, on terms and conditions contained in the contract of employment exhibited in the Claimant's pleadings. It is true he was suspended by the Respondent on 27<sup>th</sup> November 2009, to enable the Respondent investigate fraudulent transactions which took place at Nkubu Branch. He was suspended for his role in the scam. Suspension was in accordance with the Bank's Human Resource Policy. The forwarding of the Claimant's credit information to Credit Bureau was in accordance with Banking [Credit Reference Bureau] Regulations 2007, and neither malicious nor unethical. The Respondent does not owe the Claimant Kshs. 150,000 in medical cover, or any other sum at all. He was summarily dismissed, in accordance with the Bank's Human Resource Policy and the Employment Act 2007. Investigations took place, which revealed the Claimant to have fraudulently disbursed two loan amounts of Kshs. 900,000 into two customer's accounts, through the illegal use of the Branch Manager's password. Investigations were completed about 2<sup>nd</sup> September 2010, after which the Claimant was summarily dismissed in a letter dated 4<sup>th</sup> October 2010. As a result of the Claimant's gross misconduct, the Respondent suffered loss of Kshs. 900,000, out of which the Claimant was personally liable for the sum of Kshs. 429,366. The Respondent counterclaims the amount of Kshs. 429,366 from the Claimant.

8. The Claimant's letter of appointment provided that employment could be terminated in a summary manner or by notice, under clause 14. The contract reserved the employer's right to summarily dismiss the Claimant on the ground of gross misconduct. The Claimant was required under the contract of employment to familiarize himself with, and abide by all the Bank's human resource policies, processes and procedures. These included the Employee Code of Conduct and Work Ethics. There was a duty imposed on the staff to ensure security of information at the Bank. Clause 18.6 stated that preservation of the Bank's customers and assets was the responsibility of all staff. The investigation report at page 2 concluded, “ *the system indicates Kshs. 435,261 was disbursed into account 0910193215097 on 17<sup>th</sup> November 2009 by HMOO748 [Harrison Mutegi] at 9.25.04 a.m. According to transaction logs supplied*

by IT on computer address 10.4.164.53 on 17<sup>th</sup> November 2009, HM00748 entered the finacle system at 09:53:55 and exited at 09:59:58. At 09:55:27 JN03427 [Josephat Ndegwa] entered into the same computer and exited at 9:59:59. This means that the two people [Mutegi and Ndegwa] were in the same computer at the same time i.e. from 09:55:27 to 09:59:58.” The report indicated that the Branch Manager used to lend out his password to other members of staff who took advantage of this to transact fraudulently. The findings of the investigator placed the Claimant at the centre of the fraud. “From the analysis of the transaction data presented by IT, the fraud was perpetrated by Josephat Ndegwa the Nkubu Branch TFO..... We recommend Josephat Ndegwa pays to the Bank Kshs. 429,366, which was withdrawn by the customers, [out] of the Kshs. 900,000 he fraudulently disbursed.....he should therefore be dismissed.” Summary dismissal was within the law. It was justifiable under Section 44 [1] of the Employment Act 2007. He is not entitled to reinstatement, given that he was involved in fraud. He did not provide evidence to support his allegation that the Respondent sold his safaricom shares for Kshs. 45,000 and declined to release the money to him. After dismissal, he would not be entitled to continued enjoyment of the medical cover. The Respondent urged the Court to adopt the decision of the **Court of Appeal of Kenya in Dalmis B. Ongoye v. K.N.T.C. Limited [1996] e-KLR** where the Court stated that “Courts do not order reinstatement in such cases because such an order would be difficult to enforce.” On the prayer for payment of contractual benefits, the Respondent relied on the **High Court case of Boniface M. Kabaka v. M.O.Mugasia & Another [2006] e-KLR**, where it was determined that, “An employee dismissed for breach of his contract of employment cannot choose to treat the contract as subsisting and sue on account of profits which he would have earned to the end of the contractual period.” The Respondent prays for the dismissal of the Claim, and for the Counterclaim to be allowed, with costs to the Respondent.

#### *The Court Finds and Awards:-*

9. There is no doubt the Claimant was employed by the Respondent at its Nkubu Branch, up to 27<sup>th</sup> November 2009, when he was suspended over the allegations that he had participated in a fraudulent transaction, where money was disbursed into two customers’ Accounts. He last worked in the position of Relationship Officer-Micro Credit. He remained suspended up to 4<sup>th</sup> October 2010, when the Respondent alleged to have written a letter of summary dismissal. The letter indicated dismissal to be effective from 27<sup>th</sup> September 2009, the date of the suspension. Was the decision by the Respondent made on valid grounds, fairly, and is the Claimant entitled to compensation and terminal benefits as prayed? Was the Claimant responsible for the loss of Respondent’s Kshs. 429,366 and is the Counterclaim merited?

10. Section 43 and 45 of the Employment Act 2007 requires that the Employer shall demonstrate valid reason or reasons in terminating an employee’s contract of employment, and carry out such decision fairly. The reason given by the Respondent in ending its relationship with the Claimant was that he effected fraudulent loan transactions. The Bank alleged that the Claimant’s integrity and credibility has been severely compromised, and the Bank lost confidence in him as an employee. It is not denied that Kshs. 900,000 was fraudulently disbursed by Staff to Customers at Nkubu Branch. Out of this amount, Kshs. 429,366 was withdrawn by the beneficiary of the fraud. In sum the Bank lost Kshs. 900,000. The loss is not disputed, the only dispute being whether such loss could be attributed to the Claimant.

11. The only evidence suggesting the Claimant to be culpable was from an internal investigation carried out by the Bank Head of Security and Administration. The Investigator concluded that the Claimant had used the computer through which the transactions took place, during or minutes before or after the transactions. It was alleged he used the Branch Manager’s password. The Respondent did not call any witness to fill gaps manifest in these findings. The Claimant for instance alleged he was out in the field, at places he named Tharane and Igonji. This explanation was consistent with the Claimant’s job description; he was a Relationship Officer, who worked out in the field. There was no evidence led by the Respondent placing him clearly at the Bank when the transactions took place. The Claimant explained to the Investigator, and this was found to be truthful, that the Branch Manager routinely left his password with other Members of Staff when not at the office. There was bad blood between the Branch Manager and the Claimant, over a donation made to the Staff Welfare Committee by Group CEO James Mwangi. It is highly unlikely that even if the Claimant was shown to be at the Branch on the material day, he would be one of the employees entrusted the password by the Branch Manager. The Claimant testified

and this was not contested by the Respondent, that beside the internal investigations, the matter was the subject of investigations by the independent Anti-Banking Fraud Unit. The Unit absolved the Claimant. The Respondent did not bring the findings and conclusions of the Anti-Banking Fraud Unit. It would be imprudent to give weight to the untested findings and conclusions of the internal investigator. That investigator does not seem to have given any reason why he chose to believe the explanations of the Branch Manager and the concerned Credit Officers, over the explanation given by the Claimant. The Claimant, even after the Bank alleged to have proof that he was the employee who effected the transactions, did not face any criminal charges. Until he filed this Claim, there is no material to show the Bank had initiated any action for recovery of what is claimed in Counterclaim. It was not for the Claimant in any case to show the Court that he was summarily dismissed for no valid ground or grounds; it was for the Respondent to demonstrate valid ground or grounds in the dismissal of the Claimant. From the bare pleadings and submissions of the Respondent, the Court is not convinced the Claimant was summarily dismissed on valid grounds.

12. Fairness of process demanded that the Claimant is involved in all the aspects of the investigations, and subsequently, that he is taken through the minimum statutory disciplinary procedure contemplated by Section 41 and 45 of the Employment Act 2007 before a decision to summarily dismiss him was made. The Respondent suspended him on 27<sup>th</sup> November 2009. There was little engagement with the Claimant from then until the purported letter of summary dismissal almost one year later on 4<sup>th</sup> October 2010. The only communication issued to the Claimant by the Respondent was the letter on Credit Reference dated 26<sup>th</sup> August 2010. It came after the Claimant defaulted in repaying his loan to Equity which default he explained on the ground that his salary had been stopped. There was no letter advising the Claimant on the status of his suspension and the investigation for almost one year. The letter of summary dismissal did not communicate the findings and conclusions of any investigations, internal or external. The Respondent repeated the assertion from the letter of suspension, that the Claimant was well aware of the details of the fraudulent transactions. Even after the shrouded investigations, there was no disciplinary hearing of any form. No such process is alluded to in the letter of summary dismissal. The Claimant was simply informed that he was summarily dismissed from the date of suspension. The procedure was totally below the standards of fairness set out in the Employment Act 2007. The termination of the Claimant's contract of employment was therefore unfair for lack of substantive justification as well as lack of fair procedure. He is entitled to compensation.

13. The Court agrees with the Respondent that the Claimant is not entitled to claim the medical cover benefit, which was a benefit available to him for the period in employment. The Respondent acted within the law by enforcing the terms of the suspension letter, which clearly indicated the Claimant would be on half pay, and cease to draw other benefits and allowances from the Bank. The medical cover would fall within this cessation. The claim for Kshs. 150,000 in medical benefits is rejected. The claim for the remainder of the salaries due in the period under suspension is merited. The Respondent suspended the Claimant on 27<sup>th</sup> November 2009. He was promised he would be on half pay for the period under investigations. This half salary continued to be paid, only up to January 2010. In the view of the Court, the Parties were bound by the terms of the suspension, and there was no reason why the Respondent stopped paying the Claimant his salary altogether in January 2010. Relying on the same letter of suspension, there is no basis for the Claimant to demand the full salary entitlement to-date. He is no longer an employee of the Respondent, and was advised of the terms of his suspension on 27<sup>th</sup> November 2009. He should have continued to draw half of his salary, up to 4<sup>th</sup> October 2010, when the Respondent communicated the decision to summarily dismiss him. The Court grants him half of his monthly salary of Kshs. 37,500 at Kshs. 18,750 x 10 months of suspension = Kshs. 187,500. There was no explanation how the Respondent applied the money recovered from sale of the Claimant's safaricom shares. The Claimant testified the sale could have been sufficient to offset his loan obligation to the Bank. There was no claim made by the Bank on any loan, and the Court infers that such funds must have after all, gone into redressing the loan obligation. There shall be no orders with regard to the prayer for release of money arising out of the share sale. Lastly, the Court has considered that termination was unfair both on substantive justification and procedural fairness. Compensation is allowed in the equivalent of 10 months' gross salary at the rate shown in the Claimant's pay slip of Kshs. 37,500, added up at Kshs. 375,000. In sum:-

***[a] Termination was unfair on account of both validity of reasons and procedural fairness.***

***[b] The Respondent shall pay to the Claimant Kshs. 375,000, being the equivalent of 10 months' gross salary, in compensation.***

***[c] The Respondent shall pay the Claimant arrears of salary for the period under suspension, calculated at Kshs. 187, 500.***

***[d] In total the Respondent shall pay to the Claimant Kshs. 562,500 within 30 days of the delivery of this Award.***

***[e] No order on the costs***

**Dated and delivered at Nairobi this 11<sup>th</sup> day of December 2013**

**James Rika**

**Judge**