



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 354 of 2009**

**John Kipkurui Cheruiyot**

**CLAIMANT**

**and**

**Equity Bank Limited**

**RESPONDENT**

**AWARD**

**Background**

1 John Kipkurui Cheruiyot (the Claimant) filed a Memorandum of Claim on 9 July 2009 against Equity Bank Ltd (the Respondent). The issue in dispute was stated as *wrongful discriminative and unlawful termination of employment of the Claimant's services without notice*.

2 The Respondent filed its Reply to the Claim on 30 July 2009.

3 On 13 August 2009, the parties appeared before Justice Chemmutut (as he then was) and hearing was fixed for 23 October 2009. Hearing did not proceed on that day but the record bears that the parties appeared again before the Judge on 14 April 2010 when hearing was fixed for 3 August 2010. For reasons which are not on record the file was placed before Justice Chemmutut on 29 July 2010 and not on 3 August 2010. Hearing was rescheduled to 6 September 2010. After several mentions the hearing finally took off on 22 September 2011.

4 During the hearing on 22 September 2011, Mr. Leonard Chelule appeared for the Claimant while Mr. Patrick Anamu appeared for the Respondent. The hearing was not concluded and was therefore rescheduled to 4 October 2011 but again was further rescheduled to 9 February 2012 at the request of the Respondent.

5 On 9 February 2012, the Respondent did not appear for the hearing and because the Claimant had closed its case, the Judge ordered that the award would be given on Notice.

6 Due to reasons which are in the public domain, Justice Chemmutut ceased being a Judge of the Industrial Court before he could prepare and pronounce an award.

7 Because of the transition in the Industrial Court and appointment of new Judges of the Industrial Court, the Registrar of the Court wrote to both parties on 10 September 2012 asking them to appear before me for directions on 21 September 2012.

8 On 21 September 2012 only the Claimant's representative appeared before me and I directed him to serve a mention notice upon the Advocates on record for the Respondent and set a mention date for 5 October 2012. The Claimant duly served the Respondent with a mention notice for purposes of taking directions on the pending award. The Respondent did not send a representative to Court on 5 October 2012.

9 Having satisfied myself that the Respondent's Advocate on record had been served and an affidavit of service sworn by Mathias Mboya Maithya on 4 October 2012 filed in Court on 5 October 2012, I directed that I would prepare and pronounce an award based on the pleadings and submissions taken before Justice Chemmutut. The Respondent had been given an opportunity to attend before me to take directions on how the Claim should proceed but did not avail itself of the opportunity.

### ***Claimant's case***

10 According to the Claimant, he was employed by the Respondent on 1 March 2007 as an Accounts Assistant. He pleaded that he served the Respondent with loyalty and diligence until his services were unlawfully terminated on 19 March 2009 by being summarily dismissed. He was not given any notice or hearing. At the time of dismissal the Claimant was earning Kshs 60,000/- per month.

11 According to the Claimant he was dismissed based on false accusations even after police investigations had absolved him of any criminal charges. The dismissal, he claims was not only discriminative but also illegal and was meant to deny him terminal benefits.

12 As a consequence the Claimant seeks *salary in lieu of notice, annual leave for one year, salary arrears, gratuity and compensation for wrongful dismissal.*

### ***Respondent's case***

13 Although the Respondent did not lead any testimony or make submissions before Justice Chemmutut, he had put in a Reply and I will consider the Reply. The rules of the Court allow for determination of Claims on the basis of the pleadings and I would proceed as if the Claim herein proceeded on the basis of pleadings and submissions on the side of the Respondent.

14 According to the Respondent, the dismissal of the Claimant was guided by the terms and conditions of employment in the Claimant's contract and that the Claimant was involved in the theft of two bankers' cheques from the Respondent's finance department or refused to give information about the theft.

15 The Reply is otherwise a general denial and traverse of the Memorandum of Claim.

### ***Issues for determination***

16 From the pleadings and submissions the issues which I see as arising for determination are:

- (i) Whether the dismissal/termination of the Claimant was unlawful
- (ii) What would be appropriate remedies if the answer to (i) is in the positive.

### ***Whether the dismissal/termination of the Claimant was unlawful***

17 Before embarking on an examination of the issues, I once again wish to deplore the practice of neglecting to indicate in the pleadings or submissions, *any principle or policy, convention, law or industrial relations issue or management practice* relied on by a party despite the clear requirement in the rule 4 (e) of the Industrial Court (Procedure) Rules, 2010 that the parties should set out this information.

18 I cannot think of any reason why parties who are represented by Advocates fail to comply with

this rule. In many instances the determination of an employment/labour dispute will vary depending on the law relied upon by the parties. Stating the law relied on will help the Court to clarify and apply the proper legal test and principles in making a determination of the issues in dispute before it.

19 Returning to the merits of the instant Cause, the Employment Act, 2007 has radically transformed the employment relationship in Kenya. Section 41 thereof has now created a statutory obligation upon employers to notify and hear representations from employees when contemplating termination the employment contract. This is what is called *natural justice* under the common law. In the Industrial relations/employment relationship it is known as *procedural fairness*. Dismissals pursuant to section 44 of the Employment Act, 2007 are also subjected to the requirements of procedural fairness in section 41 of the Employment Act, 2007.

20 This Court has attempted to lay out the implications and import of section 41 of the Employment Act, 2007 and the requirements of procedural fairness in two recent decisions, namely, ***Industrial Court Cause No. 697 N of 2009, Gilbert Nyabuto Mosome v the Standard Limited*** and ***Industrial Court Cause No.693 of 2012, Jorum Gakumo v Thika Coffee Mills Ltd.***

21 However, the radical transformation is not only in the field of procedural fairness. An employer may comply with all the procedural fairness conditionalities yet fail to meet the threshold requirements of *substantive fairness* set out in section 45 and 46 of the Employment Act. Broadly, an employer is now expected to prove the validity and fairness of the reasons for termination.

22 The question this Court has to grapple with therefore is whether the Respondent complied with the peremptory requirements of procedural fairness before making the decision to terminate the services of the Claimant.

23 In the Memorandum of Claim, the Claimant asserted that he was not given any notice or a hearing. But his appendix 2 appears to tell a different story. This is the letter of dismissal. According to the letter of dismissal, the Respondent carried out investigations concerning the two bankers' cheques. The letter further indicates that the Claimant had been placed under suspension. And that he had given explanations which had been found by the Respondent as unsatisfactory.

24 However those are deductions implied from the letter of dismissal. It cannot be expressly determined whether the Claimant was notified and also given a hearing based on the pleadings and submissions of the parties. The Respondent in its Reply merely made general denials and placed the Claimant to strict proof.

25 For unknown reasons the Respondent did not participate fully in the case and I am left with no alternative than to find that the summary dismissal of the Claimant was not in accord with the dictates of procedural fairness.

### ***Heads of Claim***

#### *Salary in lieu of Notice*

26 Having found that the dismissal of the Claimant lacked procedural fairness, it is only logical that I award him the Claim for one month's salary in lieu of notice.

#### *Annual Leave*

27 According to the Claimant's letter of appointment, he was entitled to 21 working days annual leave per year served. But the Claimant did not lay any evidentiary basis in the Memorandum of Claim or submissions for his entitlement to payment of annual leave as prayed. I decline to grant this Claim.

#### *Salary Arrears*

28 Again the Claimant just threw to the Court a claim for salary arrears. The period during which the salary was not paid .is not even alluded to. The role of the Court is to determine the disputes or issues placed before it upon the material furnished to the Court by the parties. In the instant case, the Court has no material to make a proper determination. The letter of dismissal suggests that the Claimant was to be paid for the days worked for in March 2009.If this is what the Claimant meant by salary arrears, he may have his poor pleadings to blame. Be that as it may, since the Respondent had committed to pay for this, I award him the earned salary up to 19 March 2009, if it has not been paid.

#### *Gratuity*

29 The Claimant similarly failed to lay any evidential basis, whether contractual or legal for this particular claim. The letter of employment does not refer to any entitlement to gratuity. No staff manual making provision for the payment of gratuity was placed before the Court. Indeed the Claimant did not direct the Court to any statutory provision under which he would have been entitled to gratuity. I decline to make any award under this head of claim.

#### *Reinstatement*

30 Reinstatement is akin to ordering specific performance in the employment sphere. While the Court has been given the statutory mandate to order reinstatement, it is a remedy which should be reserved for the exceptional circumstances where it would be appropriate due to the circumstances of the termination. The sector in which the Claimant was employed is one which requires absolute honesty and trust. The Respondent had indicated that it had lost faith in the Claimant. On the basis of the material placed before the Court, the Court is unable to exercise its discretion in favour of the Claimant.

#### *Compensation for wrongful dismissal*

31 Section 49 of the Employment Act 2007 has made provision for what has now become a standard prayer in nearly all unfair termination claims presented before this Court. The Court is required to take into consideration the provisions of section 49 when determining cases of unfair termination. Again based on the material placed before the Court, I am of the opinion the Court is unable to award this head of Claim.

#### **Conclusion and Orders**

32 In the final analysis I do find that the dismissal of the Claimant lacked procedural fairness and award him one month's salary in lieu of Notice in the sum of Kshs 60,000/- and earned salary for days worked in March 2009.

33 All other prayers are declined.

34 There will be no order as to costs.

***Dated and delivered in open Court at Nairobi on this 2<sup>nd</sup> day of November 2012***

**Justice Radido Stephen**

**Judge of the Industrial Court**

#### **Appearances**

Mr. Chelule instructed by J K Bosek & Co

Advocates

For the Claimant

Sichangi & Co

Advocates

On record for Respondent