



**Chege v Bank of Baronda (Kenya) Limited (Cause 59 of 2023)  
[2024] KEELRC 1399 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1399 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 59 OF 2023**

**M MBARŪ, J  
MAY 16, 2024**

**BETWEEN**

**JOHN GITHERE CHEGE ..... CLAIMANT**

**AND**

**BANK OF BARONDA (KENYA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent bank as a bank clerk effective 1<sup>st</sup> April 1993. He was promoted to section head through a letter dated 15 October 2002. On 30 December 2004 he was promoted to officer grade I and his last position was officer grade II up to 29 October 2021.
2. During this period, the claimant worked in several branches of the respondent which included Sarit Centre, NMO, Digo Road- Mombasa, Thika, Nakuru, and Nyali branch. On 3 December 2020, the claimant complained about his constant transfer which he found discriminatory and led to suffering and disruption to his family. In five years he was moved 3 times and no other employee had been treated in this manner. He gave the example of Justus Muga who had been in the Nakuru branch since inception and Mary Kathambi the long-serving staff at the Nakuru branch.
3. The claim is that the claimant was transferred from Nakuru to the Nyali branch through a letter dated 31<sup>st</sup> August 2020. He reported on 10 October 2020 and his duties exchanged with those of a junior officer, Shirley Mutemi. He protested and asked to know why such an arrangement was being put in place as he was supposed to be supervising 2 other clerical staff. The issue was resolved but created tension between the claimant and Shirley Mutemi.
4. On 30 October 2020, the claimant wrote to the branch head noting that the clerk, Nasra Farook refused to fill Form SAM required for reporting to head office which was her lawful duty to perform, this was insubordination. On 31<sup>st</sup> October 2020, Nasra realized her mistake and wrote a letter purporting to report to the claimant that he had spoken to her in a disrespectful and rude approach.



5. On 19 February 2020, Nasra neglected to perform her duty when renewing FDRs. the claimant as a supervisor realised the error and brought this to her attention. On 22 February 2021, Nasra wrote a complaint against the claimant that he had violently threatened her.
6. On 10 May 2021, Shirley Mutemi complained that the claimant had used verbal abuse by labeling her stupid. On 15 June 2021, the head of internal audit requested the claimant to furnish him with a statement on alleged violent threats to Nasra and verbal abuse towards Shirley.
7. Through a letter dated 26 June 2021, the claimant responded to the allegations and noted the background of the unfortunate allegations. The claimant noted that;
  - a. Wilson Sore should recuse himself from the investigations due to lack of impartiality towards the claimant;
  - b. Nasra had refused to take lawful instructions to fill SAM required by the treasury department for high RTGS/SWIFT;
  - c. There was insubordination by Nasra when she refused to fill SAM form which was her duty;
  - d. Nasra neglected to perform her duty diligently and carefully when renewing FDR of the branch which had errors detected by the claimant as the supervisor;
  - e. There was no use of disrespectful and demeaning tone when addressing Shirley;
  - f. The allegations by Nasra and Shirley were disapproved by the CCTV footage;
  - g. Agata Sila refused to follow lawful instructions by refusing to relocate him from the forex counter to the cash counter;
  - h. Disciplinary action should be taken against Nasra, Shirley, and Agata for insubordination to their superiors.

Following the response, the matter rested.

8. However, on 27 September 2021, the claimant was suspended pending investigations on complaints raised by Shirley and Agata;
  - a. A complaint had been lodged by Shirley regarding an incident that occurred at the Nyali branch on 22 September 2021 in which she alleged that the claimant addressed her in a disrespectful and demeaning tone, also described her as a woman of loose morals, and called her a prostitute in the presence of her colleagues;
  - b. A complaint was lodged by Agata Sila regarding an incident at the Nyali branch on 22 September 2021, in which she alleged that the claimant shouted and threatened her while serving a customer and later threatened to beat her up at the parking lot. It was also alleged that the claimant had stated that there was no CCTV system at the parking lot and that “she will thereafter take a P3 form and you will take yours then meet at the police station.”
9. The claimant’s case is that he responded to these allegations and denied them through his letter dated 3 October 2021. He noted that Shirley reported to work late together with another colleague, Ms Moraa. When asked about her conduct, she became rude and told him to deal with the colleague who was behind her. The claimant turned to Ms Moraa who explained that she was late as the vehicle she had used was involved in a traffic incident. Shirley remained disrespectful and told the claimant he was a mere employee who did not know what he was doing in the office while people of his age were busy running business outside—Shirley shouted at the claimant to open the door and remained rude.



10. The claimant noted that he was executing his duties as the supervisor. The complaint by Agata was dropped.
11. On 21<sup>st</sup> October 2021, the claimant was called for a disciplinary hearing through a letter dated 14 October 2021. The hearing was rescheduled to 22 October 2021 but did not proceed as the panel was not properly constituted. On 27 October 2021, the hearing took off and the claimant gave his representations. The witness statements presented were contrary to the CCTV footage. When the claimant saw the disciplinary hearing minutes, they did not capture events as they had taken place. The sequence of events as explained was not captured correctly.
12. On 29 October 2021, the claimant was issued with a notice of summary dismissal. The reasons given were that;
  - a. Using abusive or insulting language at your workplace;
  - b. On various occasions, addressed Ms. Shirley Mutemi in a disrespectful, abusive, insulting, and demeaning manner.
13. The claim is that the respondent failed to apply the Human Resources Clause 8.7 on the summary dismissal. The findings were not objective and the complaint that he had used abusive and insulting language was when Shirley provoked him as the supervisor when she complained that he had a “choking smell”.
14. The claim is that the summary dismissal was unfair and unprocedural. The respondent failed to protect the claimant from junior staff when discharging his duties, particularly when dealing with disciplinary matters of lateness by Shirley. The disciplinary hearing was cosmetic targeting the claimant and hence premeditated. The CCTV footage captured Shirley and her witness taking a “high five” to confirm the contradictory statements made by the witnesses as to the truth of the events and allegations. The events leading to summary dismissal were tainted by malice as the claimant did not abuse other employees as alleged and instead, he was dealing with insubordination and lateness at work. No action was taken despite Shirley stating that the claimant had a “choking smell”.
15. On 4 November 2021, the claimant appealed against the summary dismissal, he was invited to a hearing on 16 November 2021 and the summary dismissal was held on 14 December 2021. At the time, the claimant was earning a gross salary of Ksh.443,700.
16. The claim is that there were underpayments by illegal withheld and automatic annual salary increments;
17. On 3 March 2011, the claimant received a letter on alleged irregularities observed in the Thika branch. On 25 August 2011, he replied and denied the allegations. He was invited to a disciplinary hearing on 8 July 2011 and was exonerated.
18. Without good cause, his salary was reduced by 5 stages from Ksh.158,628 per month to Ksh.137,193 per month with effect from the date of the Oder, 19 March 2012 based on allegations of irregularities which were disproved.
19. On 9 May 2012, the claimant appealed against the order and sought restoration of his salary. On 29 June 2012, the respondent reinstated the salary but withheld the annual increments for 3 years effective January 2013 when he was due for the next annual increment. Through a letter dated 16 March 2013, the respondent maintained that he was not eligible for the annual increment. There was no performance review to justify withholding his annual increment and hence there was unjustified underpayment.



On 23 June 2013, the claimant appealed. There was no response.

20. The claim is that the claimant was entitled to a salary increment in January every year. He was entitled to a general salary increment effective March each year. This was based on the salary structure for non-unionised staff from 2011 to 2021. The underpayments are;

- a. January to February 2013 Ksh.180,382 – 176,077 = 4,305 x 2 = 8,610;
- b. March to December 2013 Ksh.195,299 – 190,163 = 5,136 x 10 = 51,360;
- c. January to February 2014 Ksh.200,440 – 190,163 = 10,277 x 2 = 20,544;
- d. March to December 2014 Ksh.216,475 – 205,376 = 11,099 x 10 = 110,990;
- e. January to February 2015 Ksh.222,031 – 205 = 16,655 x 2 = 33,310;
- f. March to September 2015 Ksh.237,573 – 219,752 = 17,821 x 10 = 178,210;
- g. January to February 2016 Ksh.247,069 – 225,688 = 21,381 x 2 = 42,762;
- h. March to December 2016 Ksh.263,128 – 240,358 = 22,770 x 7 = 159,390;
- i. October to December 2016 Ksh.268,196 – 245,416 = 22,780 x 2 = 68,340;
- j. January to February 2017 Ksh.275,775 – 253,015 = 22,760 x 2 = 45,520;
- k. March to December 2017 Ksh.292,322 – 268,196 = 24,126 x 10 = 241,260;
- l. January to February 2018 Ksh.300,371 -276,241 = 24,130 x 2 = 48,240;
- m. March to December 2018 Ksh.318,393 – 292,815 = 25,578 x 10 = 255,780;
- n. January to February 2019 Ksh.326,919 – 301,346 = 25,573 x 2 = 51,146;
- o. March to December 2019 Ksh.346,534 – 319,427 = 27,107 x 10 = 271,070;
- p. January to February 2020 Ksh.358,601 – 328,453 = 30,148 x 2 = 60,296;
- q. March to December 2020 Ksh.372,945 – 341,591 = 31,354 x 10 = 313,540;
- r. January 2013 [2021] to February 2021 Ksh. 385,472 – 341 = 34,475 x 2 = 68,950;
- s. March 2013 [2021] to December 2021 Ksh.397,036 – 361 = 35,509 x 8 = 284,072.

Total underpayments Ksh.2,313,420

- 21. The claim is also that following the failure to award the annual salary increments, the respondent acted contrary to Section 10(5) and 26 of the *Employment Act* and Article 41 of *the Constitution* by engaging in unfair labour practices. This resulted in the change of employment terms and conditions of employment which was unilateral and led to underpayments that were not justified.
- 22. The claimant is seeking underpayments of disturbance allowances as a result of illegally withheld automatic annual leave increments.
- 23. The client is entitled to a 2-month basic salary as a disturbance allowance. Upon transfer on 19 September 2019 from Sarit-Nairobi to the Nakuru branch, he was paid disturbance at the rate of Ksh.319,427 against the adjusted salary of Ksh.346,534 with an underpayment of Ksh.54,214 x 2 months.



24. The claimant was transferred on 31<sup>st</sup> August 2020 from Nakuru to Nyali and paid a disturbance allowance of Ksh.341,591 against Ksh.372,945 an underpayment of Ksh.67,708 x 2 months.  
The total due is Ksh.121,922.
25. The claim is that there was underpayment of encashed annual leave days as a result of underpayment of salary increment.
26. The claimant was paid 28 leave days pending at the rate of Ksh.361,527 at Ksh.326,541 against a basic salary of ksh.397,036 total of Ksh.358,613 being an underpayment for Ksh.32,073 which is due.
27. Notice pay was due under the contract clause 18(d) which provided for 3 months notice pay upon termination of employment for officer grade II. What is due is ksh.443,700 x 3 = Ksh.1,331,100.
28. Gratuity is due per the policy of the respondent that an employee who served for over 10 years was eligible at the rate of one-month basic salary for each completed year of service. The claimant worked from 1<sup>st</sup> April 1993 to 29 October 2021 28 years and hence eligible for payment of gratuity. The gratuity was capped at 21 years of service hence entitled to Ksh.397,036 x 21 = Ksh.8,337,756.  
The claimant is seeking payment for air tickets and taxi costs.
29. The claimant was transferred from Nakuru to Nyali, Mombasa through a letter dated 31<sup>st</sup> August 2020. He was refunded transport costs for his household goods and paid for two months' disturbance allowance. Upon transfer from Nakuru through Nairobi to Mombasa, he was entitled to travel by air and other incidental expenses like a taxi as approved by the respondent through a circular dated 30 June 2010. Travel by air for the officer of his rank entitled him to costs of ksh.6,860.
30. The respondent refused to pay these costs on the basis that the claimant had been paid a disturbance allowance. The claimant relied on the circular issued by the respondent and incurred the due claimed costs.
31. The claimant was transferred from Nairobi's main office to the Digo Road branch in Mombasa on 4 January 2005. Through a letter dated 7 July 2005, he requested a transfer which was declined. He moved his household goods to Mombasa. He was not paid transport costs amounting to Ksh.55,385. This was due to the human resources policy of the respondent.  
The claimant is seeking judgment on the following grounds;
  - a. The summary dismissal of the claimant from his employment was substantively and procedurally unlawful and unfair;
  - b. The claimant be compensated twelve (12) month's gross salary for unfair/unlawful dismissal from employment Ksh.5,324,703;
  - c. The claimant be paid all underpayments of basic salary ksh.2,313,420;
  - d. The claimant be paid underpayment of transfer disturbance allowance ksh.121,922;
  - e. The claimant be paid air ticket and taxi costs amount of Ksh.6,860;
  - f. The claimant be paid personal transport/air ticket and goods amount at Ksh.55,385;
  - g. The claimant be paid underpayment of the encashed annual leave days (28) Ksh.32,073;
  - h. The claimant be paid three (3) months' pay in lieu of notice at Ksh.1,331,100;
  - i. The claimant be paid twenty-one (21) years gratuity at Ksh.8,337,756.



32. The claimant testified in support of his claim. He relied on his witness statement and that the events leading to his summary dismissal related to a complaint made by Shirely while at the Nyali branch of the respondent. The dismissal was unprocedural and unfair because, upon suspension, the respondent relied on clause 9.2 of the policy which did not exist.
33. During the suspension, he was never called by the investigator to give his side of the story and events. It ended up with a one-sided report contrary to the policy. The investigator confessed during the disciplinary hearing that he did not accord the claimant a hearing. The notice of disciplinary hearing increased the allegations made from 2 to 5.
34. The claimant protested the composition of the disciplinary panel and this was addressed and the respondent reconstituted the same. Of the 5 allegations leveled against him, only 2 were addressed. The others were dropped.
35. The claimant challenged the disciplinary proceedings on the basis that the CCTV footage on the material day was not produced. The minutes were not written properly and his narration of events was not properly captured. This meant that the respondent had a pre-determined conclusion, his summary dismissal.
36. The claimant testified that after the disciplinary hearing, he was dismissed through a notice dated 29 October 2021. He got the minutes and lodged his appeal which was dismissed on 14 December 2021.
37. The allegations made against him related to the sexual harassment of Shirley which was not true.
38. He claimed compensation for unlawful and unfair termination of employment. The claimant also sought underpayment of his salaries over the years which was not justified and is based on contractual obligations. On 29 June 2012, the respondent stopped his salary treatment over various allegations but he was cleared. He was not appraised to justify the non-increments that were effected on other employees. He addressed his claims through various letters and applied the grades and schedules issued internally but there was no payment.
39. Upon cross-examination, the claimant testified that he was suspended following an incident that took place at work. There was an argument between him and Shirely while he was executing his duties as the supervisor. She reported being late for work together with Ms Moraa. He noted through an idiomatic expression that Malaya haheshimiwi [a prostitute has no respect].
40. The respondent had a policy and procedure on how to address lateness. The claimant admitted that he did not apply such a policy when Shirley and Moraa reported to work late. Only Moraa noted that she had transport problems.
41. Agata made a complaint that the claimant had used abusive language but this charge was later withdrawn.  
Response
42. In response, the respondent admitted the claimant was an employee. under clause 1.3.20 of the human resources policy, every employee was subject to transfer anywhere within Kenya to any branch or any subsidiary.
43. The claimant was always an antagonistic employee and various complaints were raised against him by other employees. He was at some point physically violent with other employees, a case in point being 10 September 2019 while working at the Sarit Centre branch where he aggressively and forcefully pushed a chair towards Ms Emily Nyaruri Nyagero who was then pregnant. A criminal case was lodged against



him and it took the intervention of the respondent to convince Ms Nyagero to withdraw the charges against the claimant.

44. The respondent received numerous complaints against the claimant from other employees.
45. The claimant's transfer to the Nyali branch was in the capacity of an assistant manager which role he held while in the Nakuru branch.
46. The claimant was issued with notice concerning various complaints and he responded through his letter dated 24 June 2021. It was procedural to be suspended pending investigations and in this case, it was allowed under clause 9.2 of the Policy. The suspension on 27 September 2021 was procedural. He responded thereof on 3<sup>rd</sup> October 2021.
47. On 27 October 2021, the claimant was invited and he attended a disciplinary hearing through a letter dated 29 October 2021, he was issued with a notice of summary dismissal. There were investigations into his conduct and he was found culpable.
48. The claimant appealed against his dismissal and through a letter dated 14 October 2021 he was invited for a hearing and the summary dismissal was found justified. The compensation claim is not due on the basis that summary dismissal was lawful and justified.
49. On the claims made, the respondent has an elaborate human resources policy that guides the salary increase. The claimant was not in a position to predict how much salary he should have received if at all, to claim the same. There were no automatic salary increments as alleged. The alleged underpayments are statute-barred and should be dismissed.
50. The claim for underpayment of encashed annual leave days is based on an alleged denial of automatic annual salary which is not justified.
50. Employment termination through summary dismissal and notice pay is not due. Dismissal for gross misconduct under the policy removes the claimant from earning gratuity.
51. The claimant was paid an appropriate disturbance allowance under the policy incidental to his transfer from Nakuru to Nyali. He was transferred from the Nairobi Main Office to the Digo Road branch and the claims thereof are not justified. He was paid an appropriate allowance under the policy and the claim for refunds, if any, is statute barred and the entire claim should be dismissed with costs.
52. In evidence, the respondent called Shirley Mutemi who was working with the claimant at the Nyali branch in the year 2021. She testified that on 22 September 2021, she reported to work at 8.55 am and the claimant summoned her for reporting late in a rude manner that "uko na ujinga sana" [you are stupid]. She proceeded on with her duties but the claimant followed up and stated the "aka kamtu". While in the vault and the presence of Florence Minage, she asked the claimant to address her with respect but he responded rudely and that she was going around exposing herself to other men. That he could not respect a prostitute. This was said in the presence of Moraa, Agata, Florence, and Benard.
53. Shirley testified that she was later called to the disciplinary hearing and gave her evidence against the claimant. She was later transferred from the branch and is currently at the Kakamega branch.
54. She had been at the Nyali branch for a year before the claimant's transfer. She was the joint-custodian and the claimant was the assistant cashier and co-custodian. There were adjustments to roles in the banking duties and it appeared like she was supervising the claimant. She had previously complained against him and it was addressed. It related to his use of abusive language in the presence of Moraa and Benard but he later denied and the matter was dropped.



55. Shirley testified that on the material day, they were in the vault room with Florence, and due to the claimant's body odor, they joked about it. Florence said she was suffocating due to the body odor in the strongroom but the claimant responded by using abusive words and she was forced to call security guards when she realized the claimant was becoming too harsh.
56. Shirley testified that after reporting to work late, no action was taken against her. She did not tout the claimant to touch him so that she could make a case of sexual harassment and have him arrested as he had alleged.
57. Agatta Nduume testified that on 22 September 2021, she was at her desk at the Nyali branch of the respondent when she heard an argument between the claimant and Shirley. They were in the strong room when the claimant shouted that mimi siwezi kuheshimu Malaya. The claimant said these words loudly in the presence of other employees and clients. She was shocked and frightened and she went to see what was happening. The claimant confronted her and told her to stay away from his issues. He confronted her in the presence of a client that he would beat her up at the car park which was not covered by CCTV. He also told Florence that he would deal with her. She got afraid and made a report and complaint to the branch manager.
58. Agatta testified that later in the day the claimant confronted her. He called and due to shouting, she hung up the phone forcing him to approach her pointing his finger at her and threatening to physically beat her up. This was done in the presence of a customer of the respondent. This was done in the presence of Florence she filed a complaint and later was called for a disciplinary hearing. Her complaint against the claimant was dropped. She did not follow up and was later moved to Nairobi.
59. Florence Minage testified that she is an employee of the respondent at the Nyali branch. On 22 September 2021, she witnessed an argument between Shirley and the claimant after reporting to the office. They all proceeded to the strongroom where they continued with the argument. Shirley asked the claimant to address her respectfully but the claimant retorted back that she had no respect for herself. Shirley asked him to use respectful language but he responded and stated the mimi siwezi heshimu Malaya.
60. Minage testified that later in the day, she observed the claimant approaching Agatta in a very angry state pointing at her and asking her to stop getting involved in his issues. At the time, Agatta was serving a customer and she requested the claimant to go away but he stood there attacking her in the presence of the customers before he left.
61. Later the claimant went to his office and while she was picking vouchers from his desk, he told her that he would wait for Agatta in the evening at the parking lot and beat her up before going home. That there was no CCTV in the parking lot.
62. Minage testified that she was called to the disciplinary hearing where she gave her evidence against the claimant.
63. While in the strongroom with Shirley and the claimant, they teased each other about his body odor. It was true they teased and made fun of his body odor.
64. Upon cross-examination, Minage insisted that while at the strongroom, they teased the claimant about body odor but this related to money odor. Money in the strongroom is stuffy. They did a high-five with Shirley about the claimant's body odor.
65. Billiah Ogenge Moraa testified that on 22 September 2021, she reported to work late and the claimant questioned her about it. The matter was resolved. The claimant had a right to question her about this conduct and he resolved the matter.



66. Neela Raj the branch manager testified that in September 2021 she was the branch head at the Nyali branch. She found the staff tense and later, Shirley made a report that the claimant had used harsh language towards her by verbally calling her Malaya in the presence of other employees. Agatta also complained that the claimant had called her on the intercom and told her to stay away from his issues. He then went to her counter and threatened to beat her up in the parking lot.
67. Neela testified that she called the claimant to his office who noted that Shirley had reported late to the office and he asked her to explain, they had a verbal exchange and he had made a general statement without mentioning any name. he admitted calling Agatta and told her to keep off his business because the confrontation was between him and Shirley.
68. Neela testified that she warned the claimant about the use of abusive language in the office and for this reason, she talked to all the employees about this incident. On 21<sup>st</sup> September 2021, she received a complaint from a customer Abdulkadir Moosajee that he had been to the branch to see the claimant about activating his account as he had an inward Telegraphic Transfer for payment. After a while, voices were raised and he heard an argument in the back office. She moved from her office and found the claimant arguing with the customer. She apologized to the customer and requested him to go since he was very upset. The claimant explained that he had called the customer's mother since the matter was pending payment following the inward transfer.
69. The claimant was the chief cashier and had replaced Musembi with Shirely reporting to him. The roles were switched and Shirley became the chief cashier and the claimant's chief custodian. The matter had been discussed with both the claimant and Shirley. The claimant was senior and when the incident took place, the witness was not in the office Shirley reported first and when she called the claimant, the matter could not be resolved amicably. This was followed up by the complaint by Agatta which was later dropped. A disciplinary hearing was conducted after investigations. The claimant was dismissed for use of abusive and insulting language at the workplace.
70. James Kirtela Kimitah testified that he is the head of the human resources department of the respondent. The respondent has a human resources policy that provides for the procedures to be followed in a disciplinary case. It provides for 1<sup>st</sup> to 2<sup>nd</sup> verbal warnings. The claimant had no written warning but following complaints made against him, he was taken through the due process. He was suspended to allow for investigations and then called for a hearing. The respondent commissioned Sore to conduct investigations, the claimant was not interviewed but he was invited to the hearing which he attended.
71. Kimitah testified that the claimant objected to the composition of the disciplinary panel, the hearings were adjourned twice to accommodate his objections and eventually on 27 October 2021 the hearing proceeded. The complaint by Agatta was dropped since there was no CCTV footage. Shirley's complaint related to an altercation after she reported to work late. The complaint related to sexual harassment. The claimant was found culpable and dismissed after due process.
72. At the close of the hearing, both parties filed written submissions. These submissions are analyzed and addressed in the assessment and findings of the court.

#### Determination

73. From the pleadings, evidence, and written submissions, the issues that emerge for determination are whether there was unfair termination of employment through summary dismissal; whether there was sexual harassment; whether the remedies sought should be issued; and whether costs should be awarded.



74. The claimant orally amended paragraph 54(r) and (s) of the Memorandum of Claim to relate to claims for the year 2021 instead of 2013. This was declined.
75. The claimant pleaded that he was discriminated against by the respondent. He however failed to address this issue further. There is no particular relief sought in this regard.
76. His case was that he suffered constant transfers which he found discriminatory and led to suffering and disruption to his family. In five years he was moved 3 times and no other employee had been treated in this manner. He gave the example of Justus Muga who had been in the Nakuru branch since inception and Mary Kathambi the long-serving staff at the Nakuru branch.
77. The response that the claimant had constant complaints made against him was not addressed. The facts of the claimant undergoing disciplinary proceedings in the year 2010 while at Thika branch was not contested. He did not respond to the facts that on 10 September 2019 while working at the Sarit Centre branch he he aggressively and forcefully pushed a chair toward Ms Emily Nyaruri Nyagero who was then pregnant. This conduct resulted in a criminal case being lodged against him. These facts do not focus the claimant in a good light.
78. The employer has the right to organize its business to ensure productivity. A transfer or redeployment of an employee is the employer's prerogative based on business needs as held in the case of *Moses Kirui Toroitich v County Secretary, County Government of Baringo & 2 others* [2021] eKLR. this position is emphasized in the case of *Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO)* [2017] eKLR the court held that;
- Ordinarily, an employer is free to allocate or organise work as it deems prudent to achieve optimum results. A transfer of an employee from one station to the other should thus be seen from this perspective as the employer is at liberty to organise its business. ... See *Joseph Makau Munyao & 4 others v Kenya Ports Authority & another* [2016] eKLR.
79. Subject to reasonable notice, an employee should abide by the directions of the employer concerning a transfer. See *Henry Ochido v NGO Co-ordination Board* [2015] eKLR. The conduct of the claimant as outlined above necessitated change and hence a transfer. It was noted that the respondent intervened to have the criminal charges made against him be withdrawn. Such cannot have arisen where the respondent was discriminatory or disruptive.
- The court finds no matter of discrimination against the claimant.
80. Is there a case for sexual harassment? This term of sexual harassment was interchangeably used with abusive and insulting language. They are not similar. Each has different ingredients. Sexual harassment is specifically outlawed under Section 5 of the Act while the use of abusive or insulting language is classified as gross misconduct under Section 44 of the Act.
81. The notice of summary dismissal dated 29 October 2021 related to the use of abusive and insulting language. There was no matter of sexual harassment.
82. However, the events narrated by the witnesses go deeper than just as stated. Behind the summary dismissal, the respondent had a duty to investigate the tension noted by Ms Raj when she reported on duty on 22 October 2021. The events narrated by Florence in the strongroom speak to a deeper issue touching on the personal conduct of employees on the shop floor. Wishing them away through the investigations conducted by Osore does not address the deep-rooted tension that escalated to this case.
- This shall suffice.



83. The claimant's case is that his employment termination was unprocedural because the policy of suspension dated 27 September 2021 relied on the provisions of clause 9.2 of the policy and which provisions did not exist. He filed an extract of the policy from pages 58 to 63 of his bundle which comprises pages 1 of 5, 33 of 64, 34 of 64, 39 of 64, 41 and 42 of 64. This record is incomplete.
84. The respondent as the employer did not file the full record in terms of Section 10(7) of the Act;
- (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
85. This put into account, the employer has the prerogative to suspend an employee for a given purpose. In this case, the suspension was to allow for investigations and notice issued to the claimant in this regard. This is a workplace practice that allows the employer the opportunity to carry out investigations in the absence of the subject employee.
86. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, the court held that;
- A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance, or physical incapacity and wishes to remove such an employee from the workplace to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms given by an employer.
87. The Court of Appeal in the case of *Charles Muturi Mwangi vs Invesco Assurance Co Ltd* [2019] eKLR held that;
- ... the appellant seems to be saying that there was no provision for his suspension in the contract of employment and so his suspension was unlawful. Without overstressing that argument, we can only say that we find that line of argument preposterous. We say so because, even in cases where employees are employed under permanent and pensionable terms, suspension and interdiction pending investigations for alleged misconduct is ordinarily part of the disciplinary process. Whether such suspension or termination was unfair is another issue altogether.
- The suspension in this case was procedural and for a stated reason.
88. Through notice dated 27 September 2021, the respondent suspended the claimant from duty on the allegations that;
- a. a complaint was lodged by Shirley regarding an incident that occurred at the Nyali branch on 22 September 2021 in which he was alleged to have addressed her in a disrespectful and demeaning tone described her as a woman of loose morals and called her a prostitute in the presence of her colleagues;
- b. A complaint had been lodged by Agata Sila regarding an incident that occurred at the Nyali branch on 22 September 2021 in which he was alleged to have shouted at her and threatened to beat her up at the parking lot.



89. Following investigations, through a notice dated 21<sup>st</sup> October 2021, the claimant was invited to a disciplinary hearing to respond to charges that;
- a. He used abusive or insulting language at the workplace;
  - b. On various occasions he addressed Shirley in a disrespectful, abusive, insulting, and demeaning manner;
  - c. Addressed Agata in a disrespectful, abusive, demeaning and threatening manner,
  - d. Threatened to beat up Agata at the office parking lot;
  - e. Speaking to a client by the name Abdulkadir Moosajee in an arrogant manner not ready to listen to him and refusing to apologise to him.
90. There were matters already brought to the attention of the claimant at the point of his suspension save the allegations that he had been arrogant toward a client, Abdulkadir Moosajee. Hence the claimant well knew what he was to address at the disciplinary hearing. He cannot claim that the allegations/ charges were suddenly increased to his disadvantage.
91. In his response to the complaints made against him, the claimant through a letter dated 3 October 2021 noted that Shirley and Moraa reported to work late and he asked them to render an account as their supervisor. That Shirley became hostile and Moraa explained that there was a traffic incident that caused the lateness.

On the complaints my Agata, he responded that;

When I made the idiomatic expression ‘malaya haishimiwe’ in the presence of not less than four female and one male staff member only Agatha ‘got touched’ and shouted ‘ametukanana malaya’. The rest were not offended. So nobody’s name was mentioned; how did she attribute it to her friend Shirley? ...

The idiomatic expression has a meaning different from individual words. This expression is used by a lamenting person who perceives that one’s social stature and or respect has been tramped upon (respect has been lowered to an unacceptable level) I cannot even instruct a clerk and obey. ...

92. Use of abusive or insulting language or behaviour that in its manner is insulting to the employer or other employees is defined under the law as gross misconduct and subject to summary dismissal. Section 44 (4) (d) of the *Employment Act*, 2007 (the Act) provides that;
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
    - ...
    - (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
93. Upon such conduct, the subject employee should be issued with notice to allow him to attend and make his representation in terms of Section 41(2) of the Act.



94. Through notice dated 14 October 2021, the claimant was invited to attend a disciplinary hearing, and the allegations made against him were outlined. Witness statements of the persons to testify against him were attached. His rights during the hearing were spelt out. These included the right to be accompanied by another employee of his choice, the right to make his representations, and mitigating arguments. During the hearing, the claimant was accompanied by Ian Karwanda, Advocate.
95. The claimant admitted that he used words that, 'malaya haishimiwe'. According to him, these words meant as ... idiomatic expression has a meaning different from individual words. This expression is used by a lamenting person who perceives that one's social stature and or respect has been tramped upon (respect has been lowered to an unacceptable level). ...
96. The respondent had the chance to hear evidence on the shop floor. The use of derogatory words, abusive or applied as an idiom to depict one as of low morals was found to be unacceptable language.
97. During the hearing, the court was able to discern the frustrations that the claimant may have been going through. Here were his junior staff he was required to supervise but they did not respect him. They saw him as old and ought to have been outside doing other business. While at the strongroom, Shirley and Florence could not hide their disrespect for him and made fun of his body odor and did a Hi-Five. They teased him behind his back. They seem to have gained support from Agatta.  
This scenario must have angered the claimant to the brim.
98. He felt justified to confront those who did not seem to toe the line. Shirley had earlier reported to work late. She did not seem to care much about it less to the fact that the claimant was her supervisor and he questioned him about it. Things did not improve and they seem to have hit a crescendo when they went to the strongroom. Shirley and Florence teased him. He could not take it!
99. Frustrated, he hurled insults and used idiomatic language to the effect that 'malaya haishimiwe'.
100. He played into the hands of Shirley who was waiting for such a blunder propelled by her colleagues.
101. Unbeknown to the claimant, he fell into a serious trap. His words uttered in anger and frustration commenced a series of events leading to summary dismissal. He cannot blame Shirley or Agatta. The use of abusive or insulting language at work is outlawed at the workplace. No amount of anger should end up in such a scenario.
102. As the supervisor, the claimant had recourse in addressing late reporting for work by Shirley. He did not. As things stand, she is still serving her employment with the respondent.
103. During her evidence, Shirley stood out as a problematic employee. Making faces in court, not keen to respond to questions asked directly, and generally not a cooperative witness. She had to be cautioned by the court. This much is clear to the court.
104. The claimant, a seasoned employee of many years with the respondent, ought to have discerned this kind of character and moved with utmost caution. After the initial lukewarm welcome to Nyali branch, a complaint lodged against him within 6 months of joining the branch ought to have put in on the path of care. He failed to discern the moment.
105. He cannot extricate himself from the charge of gross misconduct. This finding is procedural and justified.

The remedy of notice and compensation is not available.



106. Under the policy, termination of employment for gross misconduct that is found justified denies the claimant the benefit of gratuity. He came out as one who understood the respondent's policy very well. He filed extracts of it.
107. On the claims for underpayments of the basic salary, the respondent in response made mere denials. That the same was not automatic and in any event, these included statute-barred claims.
108. As outlined above, the employer has the duty to file work records once the employee has filed the claim with the court. The claimant cronologised his claims for underpayment from the year 2013 to December 2020. With this outline, the burden shifted to the respondent to dispose of the same.
109. The claim for underpayments has a long history. This started way back on 3 March 2011 while the claimant was at the Thika branch of the respondent. He was alleged to have made irregular/unauthorized debits regarding various accounts and clients.
110. The claimant responded to these allegations. On 4 July 2011, the respondent invited the claimant for a disciplinary hearing on 8 July 2011.
111. Through an Order of 19 March 2012, the respondent established the following;

Hence considering the gravity of the charges proved against Mr. John Chege the following punishment is being imposed upon him-

“Reduction in salary by -5- stages thereby reducing salary from Ksh.158,628 p.m. to Ksh.137,193 p.m. with effect from the date of order. Future increments to accrue on the due date subject to satisfactory performance review by the sanctioning authority.”

The above punishment is effective from the date of the order.

112. The claimant was aware that his charge was related to serious acts of irregular and unauthorized transactions. He allowed various customers to access unauthorized funds;
  - a. On 6 September 2010 a debit of Ksh.20,000 purported to be a loan account in the name of Simon Maina Njema/Monica Wangeci Maina to cover a wrong posting mistake of Ksh.17,000 in the same account;
  - b. On 9 January 2010 debit of Ksh.40,000;
  - c. On 27 January 2010 a debit entry of Ksh.50,000;
  - d. On 2 February 2010 debit entry of Ksh.20,000;
  - e. On 27 April 2010 debit entry of Ksh.40,000;
  - f. On 6 September 2010 debit entry of Ksh.10,000;
  - g. On 22 September 2010 debit entry of Ksh.50,000.
113. During the disciplinary hearing, it was established that the claimant had no power to sanction the loans and by gross misuse of the powers granted to him he posted verified, and authorized the irregular transactions assisting individuals with financial assistance through the bank without proper appraisal or approval. The claimant was given a hearing and found culpable.
114. The sanction issued through the order of 19 March 2012 was not challenged. It stands to this date.
115. In the case of *Silvanus Lukoko Were v Ministry of Lands & Physical Planning & another* [2020] eKLR the court held that the employee cannot suffer an employment demotion or variation of his



- employment terms and conditions unless there is due process. This position is reiterated in the case of *Kiilu v Isinya Resorts Limited (Cause E022 of 2021)* [2022] KEELRC 13240 (KLR) (17 November 2022) (Judgment).
116. in the case of *Dorothy Gatakaa Angaine v Teachers Service Commission* [2021] eKLR the court held that a demotion or reduction in salary must be based upon a disciplinary process. It cannot apply without a reasonable cause.
117. In this case, the claimant as a senior banking officer was regulated under higher principles of integrity, prudence, and financial probity. This position is addressed by the Court of Appeal in the case of *Violet Kadala Shitsukane v Kenya Post Savings Bank* [2020] eKLR. The court in addressing a case of alleged unfair termination of employment held that;
- Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment and therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment. See *Agnes Murugi Mwangi vs. Barclays Bank of Kenya Limited* (2013) eKLR. See also *Evans Kamadi Misango vs. Barclays Bank of Kenya Limited* (2015) eKLR.
118. Hence, engaging in irregular and unauthorised transactions within the bank lacks such principles. In the case of *Kipchirchir Norman Kemboi v National Bank of Kenya Limited* [2021] eKLR the Court observed that it would defeat the purpose of an investigation if an employee suspected of involvement in an activity such as fraud, were alerted at the preliminary stages. Most of these investigations are in their nature discrete and snap.
119. Upon the internal procedures the claimant was taken through concerning various acts of irregular and unauthorised transactions while at the Thika branch, the sanction of reduction in salary as applied was lenient. Within the banking sector, this should and ought to have been the reason for summary dismissal. To claim underpayment in the context of his case is not justified.
120. The claim for underpayment in transfer disturbance allowance and underpayment in encashed annual leave days (28) Ksh.32,073 is premised on the mistaken belief that there was an underpayment of salary. As analysed above, the salary reduction was arrived at upon the due process and the claimant was given a hearing and a sanction issued. He did not challenge the outcome of punishment. He cannot benefit from such punishment.
121. The claim for the air ticket and taxi costs claimed at Ksh.6,860 is claimed on the basis that when the claimant was transferred from Nakuru to Nyali he was refunded transport and household goods movement and paid for two months but upon transfer from Nakuru to Mombasa, his air travel and taxi costs were not paid. Indeed there is a circular dated 30 June 2010 to this effect. It has the grande/rank and costs at a given mileage. The cost of Ksh.6,860 is due.
122. The claim for transport of personal goods following transfer in the year 2006 from Nairobi to Mombasa is on the grounds that the amount of Ksh.55,385 is due. The response is that this kind of claim is statute-barred. However, there was continuous employment and at the end following summary dismissal, the claimant had up to 3 years to claim his employment dues and benefits within the meaning of Section 90 of the Act. He made a special claim and submitted a receipt of spending Ksh.55,385 to transport his goods upon transfer. This is due.



123. Concerning costs, the claim analysed and findings thereof, the claim is without merit save for due payments for the air ticket and taxi costs amounting to Ksh.6, 860; and transport/air ticket and goods amounting to Ksh.55, 385.
124. Before conclusion, as noted above, the court does not find a case of sexual harassment. However, the court would like to bring to the attention of the respondent the provisions of Section 5(2), (3) and (4) of the Act;
- (2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.
  - (3) The policy statement required under subsection (2) may contain any term the employer considers appropriate for the purposes of this section and shall contain—
    - (a) the definition of sexual harassment as specified in subsection (1);
    - (b) a statement—
      - (i) that every employee is entitled to employment that is free of sexual harassment;
      - (ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;
      - (iii) that the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer’s direction, who subjects any employee to sexual harassment;
      - (iv) explaining how complaints of sexual harassment may be brought to the attention of the employer; and
      - (v) that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.
  - (4) An employer shall bring to the attention of each person under the employer’s direction the policy statement required under subsection (2).
125. The respondent enjoys the service and labour of many employees spread across the country as evidenced by witnesses serving at the Nyali branch, Digo Road branch, Nairobi head office, Muthithi Road branch, Thika Branch, Nakuru branch, and Kakamega branch. The gap in not having a policy as required under Section 5 of the Act is a serious lapse.
- This will suffice.
126. The upshot is that the claim has no merit. The claimant is to attend to the processing of air ticket and taxi costs amounting to Ksh.6, 860; and transport/air ticket and goods amounting to Ksh.55, 385. Each party bears its costs.

**DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:



Court Assistant:

..... and .....

