



**Ali v SBM Bank (Kenya) Limited (Cause E010 of 2024)
[2024] KEELRC 1955 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1955 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E010 OF 2024**

**M MBARŪ, J
JULY 18, 2024**

BETWEEN

AMINA AHMED ALI CLAIMANT

AND

SBM BANK (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The claimant is an adult female. The respondent is a limited company carrying out banking business in Mombasa County and Diani within Kwale County.
2. In January 2011, the claimant was employed by Fidelity Commercial Bank Limited in the Diani branch working as an operations manager.
3. On 28 June 2017, the claimant was served with a letter indicating that the respondent had taken over her employment together with accumulated benefits and was assigned new roles from 11 May 2017.
4. On 22 March 2019, the respondent issued the claimant with a contract stating that the terms of the contract by Fidelity Commercial Bank Limited which had come to effect on 3 January 2011 would be aligned with those of the respondent.
5. The claim is that the claimant worked diligently and the respondent refused her application for voluntary early retirement on 3 November 2021.
6. On 12 December 2021, there was a fraud incident that the claimant reported. It related to another employee but was not acted on but this was used to terminate her employment. From 15 October to 17 December 2022, there was an incident of fraud by an employee who later resigned. This was used to terminate employment after a disciplinary hearing on 20 February 2023.

7. Through a letter dated 21st September 2023, the respondent established that the claimant willfully neglected to perform her duties or carelessly and improperly performed her duties. This amounted to poor performance of duty and was not a ground for termination of employment.
8. On 4 October 2023, the claimant was served with a notice terminating her employment unfairly. This was in disregard to the policy framework that regulates poor performance. The claimant had done nothing wrong to justify termination of employment and no terminal dues were paid.
9. The claim is that the claimant worked overtime and was not paid. The office was understaffed and the claimant would attend work for 6 days each week doing an average of ½ hour overtime from 8 am to 5.30 pm despite the contract providing work from 8.15 am to 5.15 pm. The last salary paid was Ksh.186, 751.62 per month and the claim is overtime pay for Ksh.472, 111.31.
10. Following the transfer of the claimant from Mombasa to Diani, her household goods got damaged and the respondent offered to compensate the claimant and hence claim Ksh.143, 995.
11. While under Fidelity Bank, the claimant was entitled to service pay and claimed Ksh.1, 864,267.50. The contract dated 22 March 2019 requiring the claimant to work without overtime pay was an unfair Labour practice.

The claimant is therefore seeking the following orders;

- a. A declaration that employment was terminated unfairly;
 - b. 12 months compensation Ksh.2,982,828;
 - c. A declaration that the respondent engaged in unfair Labour practices through a contract dated 22 March 2019 that removed the benefit of overtime pay;
 - d. Overtime pay Ksh.472,111.31;
 - e. Breakages Ksh.143,995;
 - f. A declaration that the initial contract of 22 March 2019 was null and void for failing to align with the contract dated 3 January 2011 hence unfair Labour practice;
 - g. Service pay Ksh.1,864,267.50;
 - h. Costs of the suit and interests.
12. The claimant testified in support of her case that throughout her employment with the respondent, she had no disciplinary case or warning. She had a good record and had wanted to take voluntary early retirement but the respondent declined. There was a fraud incident on 12 December 2021 which she reported but was not acted upon and the employee resigned. The incident of fraud committed by a fellow employee started on 15 October 2022 to 17 October 2022.
 13. The claimant testified that she was accused by the respondent that on 17 October 2022, she approved or facilitated the approval of payments without following the procedures of the bank. She received and processed fraudulent instructions that were alleged to have been issued by a customer in the name of Hans Ulrich without undertaking proper KYC or due diligence but she sat at the back office and her colleague employee was expected to meet the customer and her role was to approve. She did her work well and relied on the filed records. She was required to call the customer before effecting any change but this was done later and she explained her circumstances to the respondent.

14. The claimant testified that she was accused that she received a fraudulent internal account transfer voucher that was issued on 15 October 2022 though it was post-dated 17 October 2022 to transfer Ksh.1, 160,000 from account No.0671369414001 in the name of Hans Ulrich. This amount was transferred to a fraudulent account No.0672369514017 in the name of Hans Ulrich Wanner. The claimant denied these allegations and that as the operations manager, she was allowed to make corrections which in her view did not affect the transaction. The employee who had initiated these transactions had worked closely with the customer. She tried to call the customer to confirm that the money transfer to an outside bank was approved but could not reach the customer.
15. Hakim worked as a sales representative at the branch and he was not in charge of RTGS or the vault. To open an account, Hakim was required to introduce the customer and present him physically at the branch. It was the duty of the claimant to ensure that the correct procedures were followed.
16. Upon cross-examination, the claimant testified that on 13 March 2023, she had worked the whole day and was tired. She failed to do her work well and was issued with two caution letters. Following the incident with Hans, she was issued with a notice to show cause and noted there were irregularities in the account opening, vouchers and transfer of funds to another bank account. While the claimant was looking into the system as part of her duties, she noted an alteration in a cheque which required that it be returned to the customer and for the customer to approve it for processing. A cheque cannot be changed at the bank but in this case, a voucher from the customer had alterations. She called the customer but the call did not go through. She went ahead with the transactions.
17. The claimant testified that as she interacted with Hans, she noticed that there was overwriting on his cheque. It was an RTGS for 17 October 2022 and the claimant was required to check the system. The RTGS had no alterations but the voucher for the transaction had alterations. It was her role to note the alteration of an address with the customer which she failed to do since she could not reach him. The customer was not illiterate but old. He could write but very slowly.
18. The RTGS and money transfer to another bank had no problem save for the oversight in dates. In the voucher, the last digit of the account number was not correct.
19. The claimant testified that when called to attend the disciplinary hearing, she explained her circumstances but the respondent terminated her employment unfairly and without payment of her terminal dues.
20. In response, the respondent admitted that the claimant was an employee earning a gross monthly salary of ksh.248, 569. The claimant was issued with communication concerning the redundancy exercise after the voluntary separation scheme failed to attain the desired number of staff.
21. The claimant was employed by the defunct Fidelity Commercial Bank, Diani branch. She was appointed as operations manager, Diani branch on 29 December 2011. Her employment was taken over by the respondent with effect from 11 May 2017 through a letter of transfer of employment dated 28 June 2017. On 3 July 2017, the claimant accepted the terms of the transfer of employment.
22. On 18 February 2021 and 3 March 2023, the claimant was issued a cautionary letter for processing a cheque that was dishonoured for payment due to a missing drawer's signature.
23. On 21st November 2022, the respondent received a complaint regarding suspected fraudulent transactions that were transacted into one of its customers, Hans Ulrich Wanner at the Diani branch. Upon investigation, the claimant was issued with a notice to show cause on 5 February 2023 but her responses were unsatisfactory. She was invited to a disciplinary hearing on 20 April 2023 and it was established that she was grossly negligent by facilitating approval and payments without following

- established procedures thereby facilitating cash loss. The respondent paid the claimant her full terminal dues and certificate of service which she failed to collect.
24. The response is that the claimant was found to have contravened the code of conduct, the [Employment Act](#) and her employment contract leading to the termination of employment on 4 October 2023. The claimant had committed gross misconduct which warranted summary dismissal but a termination was issued.
 25. The employment contract stipulated working hours and an employee who worked more than the same had to seek approval within 24 hours. Nothing accrued in overtime.
 26. The claim for household goods is without evidence.
 27. The claim for service pay is not justified since the claimant was registered with NSSF.
 28. Through a staff loan application dated 25 August 2021, the claimant applied for a refinancing facility for Ksh.2, 000,000 and was approved on 14 October 2021. The counterclaim of the staff loan facility is for this amount and despite the claimant receiving a letter of demand to pay on 16 April 2024, there is no compliance hence the same is due with interests and costs.
 29. The counterclaim is that on the loan facility, the claimant has paid Ksh.957, 110.61 and the outstanding is Ksh.1, 339,948.29.
 30. In evidence, the respondent called Samuel Mureithi Maina the head of employee relations and human resources service Centre and testified that in this case, termination of employment was justified and the counterclaim should be allowed as prayed.
 31. He testified that part of the records relating to the claimant's employment relates to her tenure with Fidelity Commercial Bank from 17 May 2017 where she was employed at the Diani branch through a letter of appointment dated 7 December 2010.
 32. Mureithi testified that the claimant was the operations manager, of the Diani branch from 29 December 2011. The claimant was taken over by the respondent effective 11 May 2017 through a letter dated 28 June 2017.
 33. On 3 July 2017, the claimant accepted the terms of her transfer with the respondent. She executed the code of conduct binding her in employment.
 34. In the year 2021, the respondent undertook a restructuring and the claimant was pre-designated as service delivery manager on 20 December 2021. On 18 February 2021, the respondent issued the claimant with a cautionary letter for processing a cheque that was dishonoured for payment due to a missing drawer's signature. A similar cautionary notice was issued on 3 March 2023.
 35. Mureithi testified that on 21st November 2022, the respondent received a complaint regarding suspended fraud into a customer account, Hans Ulrich Wanner at the Diani branch. The incident was investigated which established that the claimant was grossly negligent in her duties and on 8 February 2023 was issued with a show cause notice which was unsatisfactory and hence was invited to a disciplinary hearing on 20 April 2023. A decision was taken that the claimant was culpable for gross misconduct and should be dismissed but the respondent opted to terminate her employment. The claimant had facilitated the approval of payments without following the established procedures, occasioning financial loss.
 36. At the time employment was terminated, the claimant had not fully settled her staff loan facility and the respondent is claiming Ksh. 1,339,948.29.

37. At the close of the hearing, both parties filed written submissions which were analyzed and the issues for determination are whether there were unfair Labour practices; whether there was unfair termination of employment; and whether the remedies sought should be issued. The respondent has a counterclaim.
38. The claim is that, upon the claimant's employment being taken over by the respondent from Fidelity Commercial Bank, her terms and conditions of employment were reviewed to her disadvantage resulting in unfair Labour practices. Indeed, through a letter dated 28 June 2017, the claimant's employment was transferred to the respondent from Fidelity Commercial Bank. It was noted that your employment contract will remain as they were before the takeover. The only change is that as of 11th May 2017, you are now an employee of SBM Bank (Kenya) Limited.
39. On 3 July 2017, the claimant accepted the transfer of employment.
40. Section 10(5) of the *Employment Act*, 2007 (the Act) allows parties to an employment relationship to review, revise and make changes to the employment contract, subject to the written approval of the employee. The provisions are;
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
41. Upon the claimant accepting the changes in her employment status to the respondent, the effect was the application of Section 13(6) of the Act concerning her employment;
- (6) Where, after an employer has given to an employee a statement under section 10 either—
- (a) the name of the employer is changed without any change in the identity of the employer; or
- (b) the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken, and subsection (7) applies in relation to the change, the person who is the employer immediately after the change is not required to give to the employee a statement under section 12 but the change shall be treated as a change within subsection (1).
42. The employment particulars are as indicated, the claimant was regulated under the contract of employment and the policies applicable to the respondent. The claim that there were unfair Labour practices because the contract with Fidelity Commercial Bank provided for service pay which the respondent failed to address is not justified. Upon the takeover and approval by the claimant in writing, she became bound under the employment terms with the respondent.
43. The employment contract dated 7 December 2010 compared to the contract letter dated 22 March 2019, the latter has superior terms and conditions of employment. An example is the benefit of pension which is not provided under the former contract.
44. Further, work hours are acceptable in many sectors at 8 hours each day. The respondent had a policy requiring work hours from 8.15 am to 5.15 pm for 6 days with lunch breaks. Indeed, as the claimant correctly submitted, she was required to get prior approval or post-approval for overtime worked within 24 hours. Such a condition and requirement assessed by the court is procedural and reasonable. There was a policy of the respondent regulating overtime work and this was objectively applied upon the claimant.

45. The claim that there were unfair Labour practices whereas the claimant approved the changes in her employment is without merit.
46. On whether there was an unfair termination of employment, clause 11 of the claimant's employment contract required her to offer quality service to the respondent's customers as a banking business. She was also required under the Code of Conduct and Ethics for the bank.
47. For her work, the claimant was issued 2 cautionary letters for negligence when she processed cheques that were dishonoured for payment due to missing drawer signatures. The claimant admitted to this negligence of duty.
48. The issue for the claimant was that she processed and passed the cheque for payment without noting that it had not been signed by the drawer resulting in the cheque being unpaid.
49. The claimant also admitted that following a fraudulent transaction/incident at her branch in Diani on 15 to 17 October 2022, she was issued with a notice to show cause leading to her disciplinary hearing and termination of employment.
50. In a show cause notice dated 8 February 2023, the claimant was invited to address the issue of why on 17 October 2022 you approved or facilities approval of payments without following the established bank procedures in that you received and processed fraudulent instructions that were allegedly issued by a bank customer in the name Hans Ulrich Wanner without undertaking due diligence. ...
51. The details of the negligence were outlined. The claimant testified in court that upon noticing the alternations in the vouchers, she tried to call the customer but could not reach him. Instead, she went ahead to clear/approve the transactions. This led to financial losses for the respondent.
52. The claimant testified to the fact that as the operations manager of the branch at Diani, she was aware of the bank operations and the requirement that before effecting any alternations in a financial transaction including a voucher, she was required to call the customer for approval. In this case, she called but could not get the customer but proceeded to clear the transaction.
53. In employment and Labour relations, sector-specific regulations are allowed. For banks, full trust and confidence are paramount. In the case of Banking, Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd [2015] eKLR the court held that specific functionalities in a bank, require full trust and confidence. Where an employee such as the claimant was required to follow procedures where a vital record had been altered, due diligence as a seasoned bank staff called for the utmost level of attention and detail.
54. In the case of Lawrence Onyango Oduori V Kenya Commercial Bank Limited [2014] eKLR the court defined such duty as follows;

The employment relationship is dynamic and based on mutual trust and confidence.
55. Where trust and confidence is lost, the conduct of the employee having compromised such trust and confidence, under the provisions of Section 43 of the Act, the employer has a valid, reasonable and genuine reason to terminate employment. In this case, the claimant called to account for her conduct, indicated that she made efforts to call the customer about the voucher and the alterations concerning Hans Ulrich Wanner but could not reach him. Before making an approval, the duty was to ensure completeness of details. By proceeding to approve the transaction, the claimant in essence facilitated fraud leading to loss of money.
56. Employment was terminated upon due process and the reasons given were justified.

Compensation is not due.

57. Even in a case where the claimant may have a justified claim, which is not the case here, her work record is replete with cautionary letters. These cautionary letters related to negligence in the performance of duty. Section 45(5) of the Act requires the court to take these matters into account particularly the poor work record of the employee. Where compensation is to be assessed, on account of the poor record of employment, no allocation would arise for the claimant.
58. The Court of Appeal has emphasized in a similar matter in the case of Violet Kadala Shitsukane v Kenya Post Savings Bank [2020] eKLR, the court 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.
59. On the claim for overtime, the claimant was bound under her contract and the policy of the respondent. The claimed overtime worked was not approved within the provisions of the employment contract or policy. Objectively assessed, the respondent had no notice of any overtime work. There is no duty to pay.
60. On the claim for reimbursement for breakages when the claimant moved from Mombasa to Diani, the promise to be paid is not submitted. The claim in its nature is similar to special damages which call for specific proof which is missing in this case.
61. Service pay is claimed on the basis that under the employment contract taking effect on 3 January 2011 with Fidelity Commercial Bank, the claimant had the benefit of service pay and the contract dated 22 March 2019 which changed such terms was null and void.
62. As outlined above, the contract of employment with Fidelity Commercial Bank compared to the contract the claimant had with the respondent had superior terms.
63. Under the contract dated 7 December 2010, the benefits accruing to the claimant included;

At the next anniversary, you will be entitled to join the bank's Provident Fund/Pension Scheme where both the employer and employee contribute a sum equal to 5% of the employee's salary.
64. Where such benefit moved with the takeover of the claimant's employment, Section 13(6) and (7) of the Act apply.
65. Under the contract dated 22 March 2019 clause 9 has the benefit of a medical scheme and clause 10 has the benefit of a pension scheme. Combined, the last contract with the respondent has superior terms and benefits than the earlier contract.
66. The claim for service pay would only arise where the respondent failed to meet the threshold of Section 35(6) of the Act which is not the case here.
67. On the counterclaim, there is no response by the claimant. Save to urge the court that she is unemployed, upon securing the bank loan facility on preferential terms of an employee, she has not

made any efforts to repay at the end of her employment. No effort whatsoever was demonstrated to the court. The loan facility was conditional to the employment relationship. As a business, the respondent is entitled to recover its funds advanced to the claimant.

68. The respondent has since paid terminal dues including salary for days worked, 3 months' salary in notice and accrued leave days.
69. Upon the findings that employment terminated fairly, the loan facility having accrued with employment, the claimant should repay the same as agreed. The grace period is extended to the date of this judgment. The claimant is to repay the due amounts of Ksh.1,339,948.29 with interest at staff rates within 30 days and failure to which, the same shall be paid and accrue interests at commercial rates from 4 October 2023. Each party bears its costs. Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and