



**Bolo v SBM Bank Limited (Cause 757 of 2019)
[2024] KEELRC 2485 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2485 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 757 OF 2019
NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

SALOME BOLO CLAIMANT

AND

SBM BANK LIMITED RESPONDENT

JUDGMENT

1. The Claimant through her Memorandum of Claim dated 6th November, 2019 pleaded inter alia as follows: -
 - a. That the Claimant was employed by the Respondent on or about 8th May, 2014 to the position of Human Resource Officer. That she conducted her duties without any problems during her tenure of office as her clean record of employment attests.
 - b. The Claimant averred that on or about 14th February, 2018 at 17.33 hours she received an official email communication sent to her by Ms. Jackie Ogonji the Head of Human Resource and Administration stating that the Claimant was added to the list of employees who were earmarked for redundancy process. That she was disturbed, stressed and suffered immense psychological torture as a result of the said email communication to the effect that she was one of the employees whose position was to be declared redundant.
 - c. The Claimant averred that she sought advise from the Respondent's Legal Manager, on the procedure for such process in compliance with the law. That she received an email from Ms. Ogonji on 14th February, 2018 at 9.36 PM with a copy to Ag CEO and Chief Operations Officer regretting that the email she had sent to her was in error and the same should not be shared to anyone and to ignore its contents. That the Claimant responded to the email immediately that she had already shared the email with the bank legal Manager seeking opinion of process of redundancy only.



- d. The Claimant averred that the Ag. CEO and Chief Operations Officer apologized about the wrong email and promised that her job was safe. That she thought the matter was then settled by meeting the Respondent's top official who apologized for the torture only for her to be called by the Ag CEO on 24th April, 2018 on issues of employees joining BIFU union where the Ag CEO stated that she was the one who advised Respondent's employees to join the Union a fact she denied.
- e. The Claimant averred that on 27th April, 2018 Ms. Ogonji wrote an email through the Human Resource Group inviting all employees to attend a town hall meeting on 28th April, 2018 where the Ag CEO addressed employees on their right to join the Union freely. That the Ag CEO insisted on her explaining the meaning of BIFU despite another colleague answering and answered pass. That at the end of the meeting employees who had joined the union increased from 30 to 70.
- f. The Claimant averred that on 5th July, 2018 Ms. Ogonji called her in Chief Operating Officer office where upon joining them she was surprised when the COO told her that even though he promised her to look after her job security with the Respondent he was under pressure to suspend her because a number of employees had joined the union where it was believed that the Claimant played a role in it. The Claimant denied participating in the same. That the COO handed her a letter of suspension dated 5th July, 2018 on the same day.
- g. The Claimant averred that the suspension letter had charges of giving a recommendation letter in respect of Bank's branch manager which letter could only be issued by immediate supervisor and signing the same as HR Manager. The Second charge was sharing confidential list of employees earmarked for a possible redundancy. That she responded to the said suspension letter vide her letter dated 9th July, 2018 where she alleged that the suspension was unfair and against the Respondent's policy of progressive discipline.
- h. The Claimant averred that on 18th July, 2018 she received a letter extending her suspension for a further two weeks and the Respondent noted that she had sent three emails with sensitive and confidential information about the bank to her personal email. That the Respondent went further to cite section 17 of its HR Policy and *Employment Act* Section 44 to justify her suspension and gave her 7 days to respond to the allegations which she did respond vide a letter dated 23rd July, 2018.
- i. The Claimant averred that her suspension ended in 3rd August, 2018 but the Respondent did not bother to advise on the way forward where she resumed her duties on 6th August, 2018. That upon reporting back she was given a letter inviting her to attend a disciplinary hearing on 10th August, 2018 and she was sent back on suspension for another two weeks.
- j. The Claimant averred that on 10th August, 2018 she attended the disciplinary hearing where she asked for an assurance that the hearing would be fair considering that Ms Ogonji who was her accuser was also part of the disciplinary committee. That she requested to be supplied with copy of investigation report which the Respondent failed to provide. That during hearing she requested the Respondent to provide her with HR Policy/Manual that states that HR department letters should be co-signed as stated in Notice to show cause letter. That she asked the Respondent to name the employees who she was accused of advising to join the union but the Respondent failed to do so.
- k. The Claimant averred that she got the Minutes of disciplinary hearing on 22nd August, 2018 through Kilimani Branch from Ms Ogonji as agreed on 20th August, 2018. That she received



a text message from Ms Ogonji that the Respondent would complete the disciplinary process by 24th August,2018. That the Claimant noted that the minutes did not contain all the deliberations that took place especially her responses and issues raised by the Claimant in matters relating to her suspension. That she wrote an email to Ms. Ogonji with a copy to company secretary who was present during the hearing who acknowledged her feedback and noted her concerns and advised Ms Ogonji will provide the Claimant with the final version which she later did although the Respondent sent the Claimant unsigned minutes.

- l. The Claimant further averred that on 23rd August, 2018 she received a text message from Ms Ogonji requesting to meet her with the COO on 24th August,2018 at 3pm which she requested it be postponed to 5 pm and they agreed. That when she met the dual at 5pm she was asked to resign which she denied since it was not her free will. That the COO informed her he had tried what he could to safeguard her job but the said Ms Ogonji handed her termination letter on the same day 24th August,2018 which letter was dated 24th July,2018.
 - m. The Claimant was surprised that the bank had already decided to terminate her contract even before she attended the Disciplinary hearing on 10th August,2018 and before her suspension ended on 20th August,2018. That the hearing was a fabricated formality. That the Claimant was never issued with any warning letters in the alleged misconduct. That since her termination she has being unemployed, with outstanding loans, wages and vacations pay, pay in lieu of notice, medical cover and severance pay among other benefits.
 - n. The Claimant averred that at the time of termination she was earning a monthly gross salary of Kshs 142,400/= plus benefits and variable sales-based incentive. That due to the termination she suffered general damages for lost wages, reasonable notice, bonuses, severance benefits and aggravated damages resulting from emotional distress. That she was wrongfully terminated and her contract breached while the Respondent acting negligently.
 - o. The Claimant averred that the Respondent breached her constitutional rights ranging from Articles,27,28, 41, 47 and 50 of *the Constitution* which were actuated by malice resulting to loss and damage.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A Declaration that the Respondent intentionally breached the provisions of sections 5(1)(a), (2) and 41 of *Employment Act*, Articles 27,28,41,47 and 50(1) of *the Constitution*.
 - b. A declaration that the Claimant has suffered unfair wrongful termination exercise in the first instance.
 - c. An Order for reinstatement of the Claimant to her former employment and positions without any loss of benefit and /or seniority and continuity of service.
 - d. In the alternative the maximum compensation for loss of employment including the payment to the Claimant actual pecuniary loss suffered since her date of wrongful termination including payment for salary/wages as would have been earned, housing allowance and together with all accruing allowances.
 - e. Constitutional damages for the infringement of the Claimant's fundamental rights under Articles 27,28, 41,47 and 50(1) of *the Constitution*.
 - f. General, Aggravated and Exemplary damages.
 - g. Costs and interest of the suit



3. The Respondent filed its Response and counterclaim to the Memorandum of Claim dated 24th July,2020 and averred inter alia as follows;
- a. The Respondent admitted that the Claimant was its employee who was engaged on 5th May,2014 by Fidelity Bank Limited which was bought by the Respondent and the Claimant transferred in to service of the Respondent. That it was an express term of the Claimant's contract that she will maintain secrecy in her duties at all times as provided in her Appointment letter. That her contract was also subject to the Respondent's HR Policies as amended from time to time and clause 22 on confidentiality.
 - b. The Respondent averred that the Claimant during her tenure misconducted and misrepresented herself on occasion by assigning herself the non-existent position of HRM at the Respondent Bank. That she was terminated on 24th August,2018 for failing to properly conduct her duties by misrepresenting to 3rd parties that she was the Respondent's HRM and purporting to carry out duties not assigned to her when in fact she was the senior HR officer.
 - c. The Respondent averred that at about 5.33 pm on 14th February,2018 an email on preliminary but yet unconfirmed redundancy was erroneously sent out to the Claimant by Ms Ogonji who intended to send the same to COO. That Ms. Ogonji shortly thereafter telephoned the Claimant and explained the error and instructed her not to share the same with any other person owing to the sensitivity of the document and followed this up with an email at 9.36pm on the same date.
 - d. The Respondent averred that in blatant breach and disregard of her supervisor's instructions the Claimant proceeded to share the email with the Respondent's legal manager. That the process of redundancy was at a preliminary stage without any concrete steps undertaken. The Respondent denied having conversations and meetings alleged by the Claimant hence the same a fabrication.
 - e. The Respondent averred that it recognizes BIFU by dint of Recognition Agreement between BIFU and KBA the Bank's umbrella body and it has always cooperated with BIFU. That the free environment accorded to BIFU and its unionisable employees resulted in to increase in union membership. That the Claimant was suspended from employment effective 5th July,2018 to 19th July,2018 for reasons stated by Claimant of sharing confidential information and the recommendation letter where she signed as HRM. That the Claimant had previously misconducted herself by sending Respondent's sensitive emails to her personal email and signing documents as HRM a role which never existed.
 - f. The Respondent averred that the Claimant's actions were in direct breach of the Respondent's code of Ethics & Business Conduct on email and Internet particularly clause 6.1(g) and 6.2. That she tendered a response to the letter of suspension dated 9th July,2018 where she failed to explain her various lapses and on 10th July,2018 she was issued with a show cause letter and her suspension extended to 3rd August,2018. That she responded to the show cause letter vide a letter dated 23rd July,2018 but she failed to offer any reasonable explanation for her actions.
 - g. The Respondent averred that the suspension was lawful and within contract. The Respondent denied that the Claimant was hardworking, committed and dedicated. That when she reported on 6th August,2018 she was issued with a notice to attend disciplinary hearing on 10th August,2018. That the Claimant opted to attend the disciplinary hearing alone thereby waiving her right to bring along an employee of her choice and was accorded a fair hearing in line with Respondent's policy and practices.



- h. The Respondent further averred that the correct date for the termination letter ought to be 24th August, 2018 and not as captured as 24th July, 2018 in the termination letter replicated in the certificate of service and final dues settlement as a typographical error owing to Respondent's digitized operations. That the minutes were a true record of the hearing and Ms Ogonji was forced to seek out the Claimant who refused to accept or sign the minutes on the material day of hearing on 10th August, 2018.

SUBPARA i.

The Respondent denied forcing the Claimant to resign or any promise of her job safety and that the managers handed over termination letter to her. That the Claimant did not appeal her termination an avenue open to her under the Respondent's HR Policy at clause 17.8 thereby failing to exhaust internal mechanisms prior to moving to court.

- j. The Respondent further denied that the Claimant was entitled to variable sales incentives, the particulars of wrongful termination and breach of contract, negligence, breach of constitution, malice and loss and damages alleged by the Claimant. That her termination was for justifiable reason, done in accordance with her contract, *the constitution* and the law as well as the principles of natural justice hence not entitled to reliefs sought.
4. The Respondent raised its counterclaim and averred that at the point of the Claimant's termination she had an outstanding personal loan worth Kshs 248,389 which remained outstanding and which the Respondent counterclaimed together with costs and interests from the date of termination till payment in full. That the Claimant's claim be dismissed with costs while allowing its counterclaim.
5. The Claimant filed a reply to the statement of response and counterclaim dated 14th June, 2021 and averred that she was the de facto Head of HR at the Bank before the appointment of Ms. Ogonji. That her termination was a witch hunt and not on failure to conduct her duties as alleged by the Respondent. That she had never received any warning or disciplinary proceedings due to her performance or any other misconduct until the issues at hand arose.
6. The Claimant maintained that she did not disobey Ms. Ogonji instructions to share the email as she shared the email at 17:44 pm to the Respondent's legal manager in good faith to get advice on the redundancy while Ms. Ogonji cautioned her not to share vide an email of 9.36pm when she had already shared and she did not share as per her instructions thereafter. That she had a right to be stressed since her livelihood was at stake being earmarked for redundancy. That the reasons for suspension as captured in her claim and not as put in the response.
7. The Claimant maintained that she shared the information and emails to her personal email out of necessity more so when she was working from home or outside the office since her laptop had issues and she could not carry along the assigned desktop, putting in extra hours to meet deadlines. That it was the practice to use one's email when the Bank's email server was down and there was no memo or policy barring the banks employees from using their personal emails. That she shared the Respondent's banks contacts as per the COO assignment to provide safety and security information and advisory updates through bulk SMS to all employees during electioneering period and she required the contacts for ease of communication. That she could access her email at a cybercafé which was safer than using the Bank's email which could be hacked. That she used her personal email for work related purposes and never shared the information to third parties.
8. The Claimant maintained that the bank had MOU and CBA with Standard Chartered Bank and she was the only signatory and when the Respondent took over from Fidelity bank they should have notified her that she should no longer recommend anyone for loan at standard Chartered bank.



That she was the only one allowed to sign out of practice. The Claimant reiterated that if she was not hardworking there was no way she could run the HR department all alone from 2014 to 2018 when Ms.Ogonji was hired and she was confirmed as permanent employee after probation. The Audit reports showed her good performance. That the typographical error raised by the Respondent was made to shield it from responsibility as usual. That she could not appeal as she did not have any new information to adduce as per Clause 17.8 of HR policies. That the appeal would have changed nothing as the Respondent was hell-bent on ensuring she was terminated.

9. The Claimant admitted that she had an outstanding loan of Kshs 248,389 with the Respondent at the time of termination. However, she maintained that the nature of outstanding loan was occasioned by illegal acts of Respondent who had soiled hands hence not entitled to any costs and interests on the principal amount borrowed since the Respondent contributed to her plight through the injustices meted on her. That the counterclaim ought to be dismissed with costs while allowing her claim.

EVIDENCE

10. The Claimant's case was heard on 13th July, 2023 and 21st September,2023. The Claimant Salome Bolo CW1 herein testified and relied on her statement and documents filed as her evidence in chief. CW1 testified that when SBM took over Fidelity Bank all the contracts were taken as they were. That she was HRO at Fidelity Bank and she moved with the same title and was given a transfer letter to that effect.
11. CW 1 further stated that she had a smooth working relationship until 14th February,2018 when she started having issues when she received an email as being earmarked for redundancy. Ms Ogonji later claimed the email was erroneously sent to her. Ms Ogonji joined the Respondent in December,2017 as the Head of HR. CW1 reiterated the averments in her claim and testified that she had been signing documents even before the Respondent took over, as HRM and sometimes as HRO.
12. CW1 stated that she objected to presence of Ms Ogonji at the hearing since she was her accuser and this was against Clause 17 of HR Policy Manual. That her suspension letters, letter of invitation to disciplinary hearing and termination letter were signed by Ms. Ogonji and COO Mr Smiles.
13. In cross examination CW1 confirmed that she was appointed as HRO in her appointment letter which she transitioned to the Respondent without being given any letter as HRM. That Ms Ogonji had not erroneously shared the email with her since she was not the CFO Mr. Smiles who she was reporting to. That by the time she received Ms Ogonji's email that it was an error she had already shared with Respondent's legal manager because her name was on the email.
14. CW1 confirmed that she did not breach secrecy as she shared with bank's legal department. That she did not share with an outsider. That she was on full salary during suspension. That she signed the recommendation in her capacity as HRM and could not remember if Chumba the one she recommended was on probation. She denied assuming a role which was not hers as Ms.Ogonji was still new.
15. CW1 confirmed that she did not consult Ms Ogonji as she had not received any memo or communication that she should consult her. That she was reporting to Mr. Smiles and not MS Ogonji. That she was still signing documents even if she was not in charge. That the show cause letter did not mention incident of 14/2/2018 and that she did not have in court medical report to show she had an operation and was working from home using her private email.
16. CW1 confirmed that she was advised to be accompanied by an employee of her choice to the disciplinary hearing. That the reasons for termination were different from those in the letter of



- 18/7/2018. That she received certificate of service. That full and final settlement letter refer to her resignation but she never resigned. That she did not settle her staff loan.
17. In re-examination CW1 clarified that she was an employee of Fidelity Bank from 2014 to 2017 and that it changed to SBM. That she was not issued with a letter that her contract transitioned as they were at Fidelity. That she was in charge of HR at Fidelity Bank and transitioned as such in SBM. That Ms Ogonji came as Head of HR and Administration and her role was not restructured when she came. That she did not receive any communication to report to her. That she shared the email with legal department because she needed to confirm if the email conformed with the law and she sought clarification from Ms. Ogonji who responded after two hours.
 18. CW1 clarified that she could not cover an error for her colleague and shared the information within the bank not outside. That she had previously signed similar letters without any adverse consequences. That the top management assured her there would be no redundancy. That she never resigned she was terminated.
 19. The Respondent's case on the other hand was heard on 5th December, 2023 where two Respondent's witnesses testified. The first witness Jackline Ogonji (RW1) stated that she was Respondent's Director HR. She adopted her statement and the Respondent's documents filed in court as her evidence in chief. She stated that the Claimant was terminated on 24th August, 2018 and that there was an error on the date of the termination letter and certificate of service. That the date indicated as 24th July, 2018 was typographical error.
 20. In cross examination RW1 confirmed that she was the Director HR and before she was VP and Head of HR at the material time. She applied for the job in August 2017 and joined as Head of HR and Admin in December the same year and that there was no HRM then. In August 2018 there were changes and it was when she moved to VP and Head of HR.
 21. RW1 stated that the suspension letter to the claimant was on gross misconduct and she signed the documents in both capacities. As per section 29 of HRM Act one was not supposed to practice HR without a valid certificate and that she had the certificate which was not in court. On the issue of the Claimant sending confidential email to legal manager RW1, she stated that the issue of redundancy was dealt with by the HR-office and the legal department came later.
 22. RW1 confirmed that the Claimant shared the email with the Legal manager after she had told her not to share it and she recalled it. That the legal manager was not yet part of the conversation. That the Claimant shared the email out of her concern over the management of the redundancy. RW1 stated that anyone conflicted could not participate in disciplinary panel. That she did not participate but was called to explain. Her position was taken by the Company Secretary who took the minutes.
 23. RW1 testified that she forwarded the Claimant's concerns to the Company Secretary and that she got the final minutes. The termination letter was dated 24th July, 2018 and that the system picked the error in date and reproduced it in the certificate of service and final settlement. It was her evidence that the Claimant used the title HRM to third parties and that the title did not belong to her.
 24. In reexamination RW1 clarified that the forwarding of email was not one of the reasons for termination and that she was senior to the Claimant who reported to her. She further clarified that her role to the panel was to provide information relating to the charges since she was the head of HR Secretariat. She talked to the Claimant after sending the erroneous email. That the recommendation of Bethwel to Standard Chartered Bank should have been done in consultation with his line manager which did not happen in the Claimant's case.



25. The second Respondent's witness, Simon Maina (RW2) the Head of Employee Relations relied on his statement as his evidence in chief. In cross examination RW2 he stated that he joined the Respondent in 2019 and the matter in question took place before he joined the Respondent. He however relied on the Respondent's documents and records kept. As per the Claimant's appointment letter she was to report to MD and no other letter was issued re-designating her even after the takeover from Fidelity Bank.

CLAIMANTS' SUBMISSIONS

26. The Claimant through her Advocates Makalla Law Advocates LLP filed written submissions dated 24th February, 2024. On the issue of whether the Claimant's termination was lawful and procedurally fair, Counsel submitted that Ms. Ogonji signed the Claimants suspension letters, accusing the Claimant and still appeared in the panel as the assistant chair person. That she cross-examined the Claimant which was against the Respondent's Policy documents as she acted as the accuser and trier against the Claimant.
27. Counsel submitted that Ms. Ogonji was the one who constituted the Disciplinary hearing and the secretary of the Panel as per attached minutes and she did produce evidence to controvert those assertions.
28. Counsel further submitted that the said Ms. Ogonji signed the Claimant's termination letter alleging that the Respondent had proved its case against her, making Ms. Ogonji the judge. That the intention of creating Ms. Ogonji position to supervise the Claimant was intended to compel her to resign from her position. Counsel further submitted that the email sent in error by Ms. Ogonji was not the Claimant's mistake. That the same was shared with the relevant legal manager not a stranger and that should have attracted a warning or a show cause letter not a suspension.
29. Counsel submitted that Ms. Ogonji was selective on documents signed by the Claimant as the Claimant signed the change of Fidelity Bank to SBM which were sensitive in her capacity as HRM yet Ms. Ogonji did not consider this further that the Claimant signed all documents as head of HR in her tenure and reported to MD.
30. Counsel submitted that the conduct of Ms. Ogonji in every manner violated the dictates of natural justice and provisions of articles 47(1) and 50(1) of *the Constitution* rendering the entire disciplinary process unlawful. Counsel relied on the case of James Mwariri Gatome & 7 Others V Republic & Another (2018) eKLR and submitted that no man should be a judge in his own cause.
31. Counsel submitted that Ms. Ogonji was hell bent to terminate the Claimant's services when she issued her with termination letter dated way before she was heard. That instead of giving her a show letter they proceeded to suspend her and she was to show cause and be heard later. That the Claimant gave her reasons and explanations which were never considered by the Respondent.
32. Counsel submitted that the Claimant's concerns raised before and during disciplinary hearing were never captured. Counsel relied on the case of Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others (2014) eKLR and submitted that the suspension letters failed to disclose the full extent of the Respondent's case against the Claimant and that omissions by the Respondent amounted to trial by ambush. On this score counsel relied on the case of Local Building and Construction Limited v Institute of the Blessed Virgin Mary Loreto Msongari & 2 Others(2019) eKLR. Counsel further submitted that despite the Claimant's objections to proceeding with hearing in presence with Ms. Ogonji her accuser and refusal to furnish investigation report to the claimant amounted to trial by ambush. This, according to Counsel was unlawful and unprocedural and went against section 41 of



the *Employment Act* on fair procedure. Counsel further relied on the case of Joshua Rodney Marimba v Kenya Revenue Authority(2019) eKLR.

33. On the fairness of the reasons for termination, Counsel submitted that the Respondent's reasons set out in the suspension letters and termination letter never captured all the Claimant's testimonies and that the Claimant was never served with amendments to the minutes to reflect the true position. Further that Ms. Ogonji's evidence was full of inconsistency.
34. Counsel submitted that the contradictory statements by the Respondent's witnesses showed that the Respondent did not have valid reasons for terminating the Claimant. Counsel relied on section 43 of the *Employment Act* on validity of reasons for termination and relied on the case of Julius Mutana Ngingi v Cobra Security Company Limited (2021) Eklr on contradictory testimonies.
35. Counsel further submitted that the Claimant's termination was actuated by malice as the Respondent was biased in the manner of commencement of disciplinary process and her termination.
36. On the issue of whether the Claimant was entitled to the reliefs sought counsel submitted that the Claimant was entitled to the maximum compensation of 12 months and the remainder of the years until retirement. On the breach of constitutional rights counsel relied on Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules on seeking of constitutional rights and freedoms in an employment claim hence submitting that the Claimant was entitled to damages for violations of her constitutional rights. Counsel relied on the case of Kusow Billow Issack v Ministry of interior and Coordination of National Government & 3 others (2021) eKLR where the claimant was awarded damages of Kshs. 1 million. Counsel urged Kshs. 3 million in the case of the claimant for breach of her constitutional rights.
37. Counsel further submitted that the Claimant was entitled to award of exemplary damages and relied on the case of D K Njagi Marete v Teachers Service Commission (2020) eKLR. Counsel requested the court to award the Claimant Kshs. 1 million as exemplary damages as was awarded in the cases of Rumba Kinuthia v Radio Africa Limited t/a The Star (2016) eKLR and Attonery General v James Alfred Koroso (2018) eKLR.
38. Counsel further submitted that the Claimant should be awarded punitive damages of 1 million and relied on the case of Mattarelo Limited v Michael Bell & Another (2018) eKLR.

RESPONDENTS' SUBMISSIONS

39. Respondent filed its submissions dated 6th March 2024 through its advocates Obura Mbeche & Company Advocates. On the issue of whether the Claimant's termination was unfair hence entitled to reinstatement or in the alternative maximum compensation of 12 months, Counsel submitted that the Respondent discharged the burden of proof placed on it under section 43 of the *Employment Act*. The Claimant issued recommendation letter for a staff on probation to a 3rd party when she was not authorized to do so and signing off as HRM which role never existed. The Claimant's actions put the Respondent to a risk of reputational damage.
40. Counsel submitted that due process as well as rules of natural justice were followed prior to termination of the Claimant. That the court should decline to award the Claimant the reliefs sought. The prayer for reinstatement was not practicable as the claimant's the relationship with other senior staff of the respondent was already spoiled and further that the three-year widow given for reinstatement under section 12(3)(vii) of the *Employment and Labour Relations Court Act* has since lapsed since the Claimant was terminated in 10th August,2018. Counsel relied on the case of Joshua Rodney Marimbah



v Kenya Revenue Authority (2021) eKLR. Counsel submitted that reinstatement was available in very exceptional circumstances which were not available in this case.

41. Concerning maximum award for compensation, Counsel relied on the case of Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited (2021) eKLR on the considerations court should take into account before awarding the maximum compensation. Counsel urged that the Claimant was fairly terminated both procedurally and substantively.
42. On the issue of breach of statutory and constitutional provisions counsel submitted that the Claimant failed to demonstrate how the Respondent violated both the statutory and constitutional provisions or in what manner the same were violated. That the particulars of breach did not amount to violations as the actions were all part of the disciplinary process and that the Claimant was accorded right to be heard.
43. On the prayer for general damages, Counsel submitted that the Claimant failed to establish the basis for award of such damages as the only damages contemplated under *Employment Act* are those under Section 49 of the Act as read together with Section 50 of the Act is maximum of 12 months' salary as compensation. On the award of aggravated and exemplary damages counsel submitted that the Claimant failed to lay basis for these awards as well. That the Claimant misconducted herself and she was the author of her own misfortune.
44. On the prayer for pecuniary loss for anticipatory salary/wages and such other allowances counsel submitted that the Claimant was seeking to be remunerated for services not rendered. That the court has severally declined such prayers as unjustified as the Claimant's contract was subject to termination by either party. That this prayer was a specific damage which must be specifically proved not just pleaded.
45. On the issue of the Respondent's counterclaim counsel submitted that Claimant admitted to having an outstanding loan debt which she has not cleared to date. That same was captured in the full and final settlement letter and the same could be awarded on the Claimant's own admission.

DETERMINATION

46. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by Counsel and has come up with three main issues;
 - i. Whether the Claimant's termination of employment was unfair and unlawful
 - ii. Whether the Respondent breached the Claimant's statutory and Constitutional rights
 - iii. Whether the Parties are entitled to the reliefs sought.

i. Whether the Claimant's termination of employment was unfair and unlawful

47. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of forwarding confidential emails and recommendation of staff by signing off as HRM, a role which did not exist at the Respondent.
48. It is now an established principle that for termination to pass fairness test there should be both substantive and procedural fairness. This was emphasized in among other cases the cases of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.



49. The considerations an employer ought to take while terminating the service of an employee are provided for under section 43 of the Employment Act and termination becomes unfair within the meaning of section 45 where an employer fails to meet the threshold set out under section 43.

50. The Respondent has a burden of proof to justify the grounds for termination under section 47(5) of the Employment Act while the Claimant has a duty to prove that the termination was unfair.

In this case it is not in dispute that the Claimant was terminated on 24th August, 2018 although the termination letter was indicated that she was terminated on 24th July, 2018 which was repeated in the Certificate of service as well as the full and final settlement letter. This the respondent clarified was a typographical error. The Court however finds it curious that the same mistake could happen in three documents without the management realizing the mistake. The Court also notes that the Respondent indicated in their full and final settlement letter that the Claimant had resigned which was not the true position.

51. On the issue of sharing of email with the Legal Manager the court notes that the same was sent to the Claimant at 17.36 pm who claimed she shared the same to the legal Manager a few minutes later because she became stressed since she was earmarked for redundancy. The Respondent on the other hand claimed that Ms. Ogonji immediately called the Claimant and notified her that the email was erroneously sent and it should not be shared. No evidence was shared about the call even though during hearing the Claimant confirmed that she talked with Ms. Ogonji on phone but not on the said issue and the only evidence before the court was an email of 9 pm communicating the same was an error to the Claimant who responded around 10 pm that she had shared with the Legal Manager. Ms. Ogonji did not say more.

52. The court notes that the Claimant shared the email with the Respondent's Legal Manager to be advised on the procedure for redundancy. The Legal Manager was not an outsider and in any case an employee who finds themselves in such a situation would act out of pressure over the imminent loss of their bread and butter. The Court therefore does hold the view as the respondent that the sharing of the email with the legal amounted to sharing confidential information with an outsider. In any event the information came to her after office hours and the email advising her not share was sent at 9:00 pm after she had shared the same.

53. On the other issue of recommendation letters to staff, the court notes that the Claimant was the only HR officer when the Respondent Bank took over from Fidelity Bank. The Claimant alleged that she signed the take over documents from the Fidelity Bank to the current Respondent as the HRM and the Respondent did not raise any concern yet that was very sensitive.

54. The court further notes that there was no letter advising the Claimant after take over that she should report to the new Head of HR Ms. Ogonji. Her (claimant's) appointment letter stipulated that she would report to the MD. It was clear during her tenure that she was acting as the head of HR until Ms. Ogonji joined the Respondent in December, 2017.

55. From the foregoing, it is the Court's view that the claimant signed the recommendations letters in the course her role as the person discharging HR functions at the time. Termination on this account is also found insufficient hence invalid.



56. Regarding procedural fairness section 41 of the *Employment Act* is the guiding law on the notification and hearing. This position was amplified by the Court of Appeal in the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR as follows;

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

57. It was not in dispute that the Claimant was first suspended on 5th July, 2018 which was extended on 18th July, 2018. She responded to all the suspension letters as well as the Show Cause Letter. The Claimant was invited for Disciplinary Hearing on 6th August, 2018 which was to take place on 10th August, 2018. The Claimant attended the hearing on 10th August, 2018 and raised the issue of attendance of one Ms. Ogonji who was her accuser.

58. This court notes that the Claimant also raised the issue of being issued with investigation report and policy manual showing how she ought to countersign the letters and the same were not given to her. The Respondent continued to hear the Claimant despite her objections. It was clear from the attached minutes and oral evidence that the said Ms. Ogonji was a panelist in the said disciplinary hearing as much as she tried to state that she attended just to assist with information. It was also clear that she constituted the disciplinary panel. The Court therefore notes that the said Ms. Ogonji acted the judge in her own matter and she could obviously not have been impartial. This was against the Respondent’s Policy manual under clause 17 as the said Ms. Ogonji was a conflicted person.

59. The Court notes that the Respondent failed to capture the Claimant’s concerns in the minutes and shared unsigned minutes. Further, as observed earlier, it was curious that the respondent issued a termination letter, certificate of service and full and final settlement all dated 24th July, 2018, a date before the Claimant was heard claiming it was a typographical error. Further the Respondent indicated that the Claimant had resigned yet she was terminated hence there is a sense in which the claimant’s allegations of being forced to resign sounds plausible.

60. The Respondent raised the issue of the Claimant not exhausting the internal dispute mechanisms but this court notes that the appeal as per the Respondent’s HR Policy Manual under clause 17.8 would be entertained only where there was new information. This meant nothing would change if the Claimant appealed.

61. The foregoing taken into consideration, raises the question of proportionality and appropriateness of a disciplinary action to be meted against an employee found guilty of malfeasance. In the case of Leon Yang Wang vs. Equity Bank [2023] eKLR the Court observed as follows:

“Reason for termination of employment need not be strictly proved but must however be reasonable and proportional in the circumstances. Termination of employment more often than not impacts on the life of an employee hence the decision to bring a contract of employment to an end ought to be governed by reasonableness and proportionality.”



62. The accusation against the claimant were in the Court's view not so grave to warrant termination of her service. There were softer options such as warning letter or admonition. It was in the Court's view the proverbial case of "responding to a mosquito bite with a hammer." In Conclusion the Court finds and holds that the respondent did not have valid and justifiable reasons for terminating the claimant's service and further, the termination was not done in accordance with a fair procedure hence unfair within the meaning of section 45 of the *Employment Act*.

ii. Whether the Respondent breached the Claimant's statutory and Constitutional rights

63. The Claimant has claimed violation of her statutory rights under section 5 of the *Employment Act* on discrimination, article 27 of *the Constitution* on discrimination, article 28 on her right to dignity, article 41 on fair labour practices, article 47 and 50 of *the Constitution* on Fair Administrative processes.

64. The Court notes that allegations of violation of constitutional rights need not just be pleaded. The pleader ought to prove the manner of the violation with precision. In this respect the Court is guided by the dictum in the case *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR where the Court stated as follows:

It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011. Accordingly, the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case (supra)

65. Guided by the above the court finds that the Claimant has not illustrated with precision how her rights were violated by the Respondent. A termination of employment is a normal phenomenon. Of course the consequence of termination is loss of employment and in most cases that has attendant financial consequences but to look at every termination of employment in the lens of breach on constitutional rights would be overstretching an ordinary termination of a contractual relationship. For an applicant to meet the threshold of violation of constitutional rights, it must be adequately demonstrated the acts complained of were so egregious that no reasonable employer could embark on such a course in the guise of terminating an employment relationship. The claimant has in this case not met the threshold hence the claim of violation of constitutional rights is hereby rejected.

iii Whether the Parties are entitled to reliefs sought.

66. Having established that the Claimant was unfairly terminated the court proceeds to analyze the Claimant's entitlements as per section 49 of the *Employment Act*. The Claim for reinstatement is not available as the three-year widow given under section 12(3)(vii) of the *Employment and Labour Relations Court Act*. The Claimant was terminated in 2018. The prayer for compensation for unfair termination succeeds in the alternative and this court notes the period the Claimant had worked with the Respondent from 2014 to 2018, the manner of her termination and awards her 6 months compensation.

67. On the prayer for remainder of wages/salary and allowances she could have earned up to retirement this court notes that an employment contract can be terminated on notice and there are other factors of life which can cause the same to be terminated like death and as such and the court will not award such damages.



- 68. The Respondent’s counterclaim was admitted by the Claimant the same is allowed and will payable in terms and conditions prevailing before the termination of the claimant’s service.
- 69. In conclusion and considering observations above particularly concerning reasons. for termination and process, the Court is satisfied that this is a proper case to award the maximum 12 month’s salary as compensation for unfair termination. Hence:
 - i. 12 months’ salary as compensation for unfair termination Kshs 1,711,284/=
 - ii. Less Respondent’s counterclaim set off
Kshs 248,389/=
 - TOTALKshs. 1,462,445/=
 - iii. Costs
 - iv. The award shall subject to applicable taxes and statutory deductions but shall attract interest at Court rates from the date of judgment until payment in full.
- 70. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024
DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER 2024
ABUODHA NELSON JORUM
PRESIDING JUDGE-APPEALS DIVISION

