

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. E001 OF 2021**

**BENEDICT KITHUKU MATIVO.....CLAIMANT**

**VERSUS**

**KCB BANK KENYA LIMITED .....RESPONDENT**

**Background**

1. By the Memorandum of Claim dated 5th January, 2021, the Claimant sued the Respondent Bank and prayed for judgment against it for:
  - a. A declaration that the Claimant is still lawfully employed by the Respondent.
  - b. An order directing the Respondent to unconditionally reinstate the claimant to his employment services and former position with the Respondent without any loss of benefits or seniority and without any conditionality.

- c. An order for the Claimant to be paid salary arrears from 17<sup>th</sup> October, 2018, to the date of judgment.
  - d. In the alternative and without prejudice to the foregoing, the Respondent to pay to the Claimant general damages for wrongful termination, Kshs. 91,000/=equivalent to one (1) month's salary in lieu of notice
  - e. Maximum compensation in law for unfair termination in the sum of Kshs. 1,092,000/-being twelve months' salary.
  - f. Payment for accrued leave days.
  - g. Costs of this suit and interest at Court rates.
2. The Respondent resisted the Claimant's claim by filing a Statement of Response dated 24<sup>th</sup> May, 2021. The Respondent maintains that the Claimant's termination was lawful, following the Claimant's gross misconduct.

### **Claimant's case**

3. The Claimant, Benedict Kithuku Mativo, states that he was employed by the Respondent bank on 16<sup>th</sup> April 2013 as a Clerk and was confirmed in employment on 19<sup>th</sup> October

2014. He avers that he served continuously at the Wundanyi Branch until 17<sup>th</sup> October 2018, when he was summarily dismissed. At the time of dismissal, he was earning a gross monthly salary of KShs. 91,000.

4. The Claimant states that in September 2018, while attending a staff workshop in Mombasa, he was summoned back to Wundanyi, where the Branch Manager, Zachary Okoth, caused his arrest, which led to his arraignment and charge in court under Criminal Case No. 696 of 2018 before the Senior Principal Magistrate's Court at Wundanyi.
5. He asserts that the prosecution was malicious and orchestrated by the said Branch Manager, and that he was merely caught up in internal wrangles involving the Branch Manager and a co-accused person. He further asserts that the Branch Manager withheld the dismissal letter despite knowing his whereabouts and contact details.
6. It is the Claimant's case that he was never subjected to any internal disciplinary proceedings and was not afforded

an opportunity to be heard before the summary dismissal. He contends that he was not served with any allegations, was not supplied with evidence, and was condemned unheard, contrary to constitutional and statutory guarantees of fair labour practices.

7. He also argues that the decision to dismiss him was premeditated, lacked substantive justification, and was made by the Branch Manager contrary to the applicable Collective Bargaining Agreement between the Kenya Bankers Association and the Banking Insurance and Finance Union (Kenya). In particular, Clause A5 of the CBA provides for suspension on half pay pending the determination of a criminal case, rather than summary dismissal.
8. The Claimant therefore maintains that the termination was both unfair and unlawful, having been based on malicious and false allegations without a valid reason and without adherence to due process.
9. Cross-examined by Counsel for the Respondent, the Claimant testified that at the time of his summary

dismissal, he had worked for the Respondent for approximately five [5] years. He was only knowledgeable about matters in his area of assignment and had no knowledge of the strong room's operations, as he had never worked there.

10. The Claimant further testified that on 17<sup>th</sup> September 2018, he was not among those holding the keys to the strong room. He was not certain whether Mr. Gonda was among those who had the keys on that day. He further stated that he did not perform teller duties on that day.

11. He further stated that the Respondent had installed CCTV cameras at his workplace, including in the banking hall.

12. He did not have a staff welfare account.

13. The bank had a complaints procedure, which he was familiar with. He did not at any time complain against the Branch Manager, Zachary, using the procedure or otherwise.

14. The Claimant further testified that the address on the dismissal letter dated 17<sup>th</sup> October 2018 is 1268-40200.

The same address appears on the Certificate of Postage, dated 18th October 2018. He was arrested on 21st September 2018, and by 17<sup>th</sup> October 2018, he had not been released on bail. His freedom came in almost two months after the arrest.

15. In his evidence under re-examination, the Claimant reiterated that, per the Collective Bargaining Agreement, he wasn't supposed to be summarily dismissed but suspended. The relevant stipulation provided that where one was in custody, he was supposed to be suspended for 90 days. The employer would extend the suspension until the conclusion of the criminal case.

16. Further, under the Collective Bargaining Agreement, while on suspension, he was entitled to half salary and, if found innocent in the criminal case, reinstated.

17. Although he was arrested on 21st September 2018, he was not arraigned in court until 8th October 2018, at the Respondent's request for more time to conclude its investigations.

18. The Manager - Operations [Alfred Ongonda] was responsible for the CCTV Cameras. If, for any reason, the cameras were switched off or the power went off, he would note it immediately.

### **Respondent's case**

19. The Respondent presented three witnesses to testify on its behalf. Mr. Bramwell Simiyu Mbiriiri [Rw1], the Head of Human Resources at the Respondent's, stated that the Claimant was arrested and charged in Windanyi SPM Court, criminal case number 696 of 2018. He was not able to secure his release within 14 days.

20. The Claimant was a member of the Banking Insurance and Finance Union, which has a Collective Bargaining agreement with the Respondent. Under Clause A5[a] [vii] of the Collective Bargaining Agreement, the Respondent was entitled to summarily dismiss an employee who is arrested and detained in lawful custody and who fails to secure his release within fourteen days from the date of the arrest and detention.

21. The Claimant did not secure his release within fourteen [14] days. The Respondent, therefore, made the decision to summarily dismiss him from employment. This was communicated to him through a letter dated 17<sup>th</sup> October 2018, sent by registered post to his last known postal address.
22. The witness further stated that ordinarily, the Respondent could issue a notice to show cause to the Claimant; however, in the circumstances of the matter, it was impossible for it to do so, as the Claimant was in lawful custody, it was impossible to serve him with the notice to show cause; even if the letter was to be served, it would be impossible to secure his attendance for the disciplinary hearing; the Respondent had already received his written explanation when he was interviewed by the Security Department as well as the police. Another written explanation would be inconsequential. An oral hearing was, in the circumstances, impossible, and the position of a custodian, the Claimant held, is central to the safety and security of money held by the Respondent. It is not a position that could be allowed to remain open indefinitely.

23. The termination of the Claimant's employment was justified and fair. In any event, seeing as he stole or aided and abetted the stealing of KShs. 21, 060, 000.00 from the Respondent, he should not be rewarded by the Court for such criminal conduct.
24. Cross -examined by Counsel for the Claimant, the witness stated that at the material time, he was stationed at the Respondent's Head Office. The certificate of postage was sent to him from the Branch. The summary dismissal letter was authored by the Branch Manager, Zachary Okoth. He is the one who posted the same.
25. On 17<sup>th</sup> October 2018, the Claimant was in lawful custody at Windanyi Police Station. However, the letter was posted to his last known address.
26. The witness further testified that no disciplinary hearing was held against the Claimant. However, he had been issued a show-cause letter, to which he responded. However, when pressed further, he admitted that the

Respondent hadn't presented such a show-cause letter in evidence.

27. Disciplinary action was recommended against Zachary Okoth over the same incident that formed the basis of the dismissal of the Claimant.

28. Prior to the manager's decision to terminate the Claimant's employment, the Security Department had not provided him with the incident report. The report recommended that suitable measures be taken against the manager for neglect. Nonetheless, it was appropriate for the Respondent to have allowed the manager to impose disciplinary action on the Claimant.

29. The 2<sup>nd</sup> witness to testify was Joseph K. Yegon. The witness stated that on 20<sup>th</sup> September 2018, the Respondent's Head of Corporate Security Services received a report of some 21,060,000.00 missing from a safe at the Respondent's Wundanyi branch. The safe had earlier been reported as jammed.

30. The witness further stated that the Respondent's Wundanyi Branch has a strong room and a safe used to

store large amounts of cash. For security and to safeguard public funds, the strong room and safe are operated under strict protocols. A CCTV camera is placed directly facing the entrance to the strong room to ensure that anyone entering or leaving is captured. Not every employee of the Respondent, however senior, can have access to the keys or safe combination. Specific officers are designated as custodians of the safe combinations or keys.

31. At the material time, the custodian of the keys as at 15<sup>th</sup> September 2018 was Dorothy Mueni. However, she was to attend training in Mombasa from 17<sup>th</sup> September 2018. She therefore handed over her custodial duties to the Claimant.
32. On Monday, 17<sup>th</sup> September 2018, the branch was opened as usual. The Claimant was the custodian of the strong room and safe keys, while Peter Elfrod Ngonda had the combination to the safe and strong room. Naturally, therefore, access to the strong room required their joint efforts.

33. On 17<sup>th</sup> September 2018, at around 1516Hrs, the CCTV camera for the strong room only was shut down. It did not reappear until 18th September 2018 at 14:24 hours, when the Respondent's ICT champion at the branch found the power cable unplugged from the power source.
34. However, the last CCTV Camera footage recorded on 17<sup>th</sup> September 2018 at 1516 Hrs shows the Claimant bending at the point where the power cable is connected to the power source. Immediately thereafter, the CCTV Camera stops recording.
35. Within one hour or so of the CCTV Camera stopping recording, the safe, which had been functioning optimally a few minutes earlier, abruptly jammed. The technician who brought the safe in for repair indicated that the safe jammed because the time lock had been tampered with.
36. The witness further stated that the branch is never locked and armed until all employees have completed their duties. It is closed to the public after official working hours, but it is never locked or armed until all employees have finalised the day's tasks.

37. According to the Alarm Activity/History Report, the branch was locked and armed at 21:07 hours. The intruder alarm then went off at 21:59 hours. The night guard, Mwamto Mghanga, who was on duty at the time, confirmed that Claimant, Efrog and another person named Chris were in the branch when the alarm was triggered.
38. With all those unusual events, the Respondent reasonably believed that it had been defrauded. It lodged a complaint with the police, who interviewed all necessary parties. The Claimant issued a statement dated 27<sup>th</sup> September 2018; Efrog issued a statement dated 27<sup>th</sup> September 2018; and Mwamto issued a statement dated 27<sup>th</sup> September 2018.
39. From the investigations, the police decided to charge Efrog and the Claimant in Wundanyi SPM Criminal Case No. 696 of 2018.
40. In furtherance of the investigations, the police were able to trace a total of Kshs. 5,259,000.00 from the Claimant's rural home. The witness further stated that he was present when the inventory was being taken.

41. Additionally, on 18<sup>th</sup> September 2018, the Claimant deposited Kshs. 180,000.00 into his welfare account with the Respondent. The deposit was made at a local KCB agent.
42. The Claimant was earning a gross monthly salary of Kshs. 91,000.00. It was peculiar that, merely a day following the theft, he managed to deposit Kshs. 180,000.00 into his welfare account. Additionally, he was found in possession of Kshs. 42,000.00 at his residence, and an additional sum of Kshs. 40,000.00 was deposited into his bank account.
43. He did not provide any reasonable explanation for the sudden change. The Respondent, therefore, believed that this was part of the stolen funds; thus, he recovered it from him and preserved it as an exhibit for the criminal case.
44. For those reasons, the Respondent's Security Department recommended that appropriate disciplinary action be taken against the various employees adversely mentioned.

45. Cross-examined by the counsel for the claimant, the witness testified that during the course of the investigation, he interviewed the Claimant whilst in police custody.
46. The Claimant was released on 18<sup>th</sup> September 2018 for the training in Mombasa. He reported on 19<sup>th</sup> September 2018.
47. Although the Respondent alleges that the Safe was said to have jammed on 17<sup>th</sup> September 2018, it has not filed any report to substantiate this. The Respondent cannot explain how the money left the Bank. There was no break-in.
48. The witness further stated that his assertion that the Claimant stuffed the money into a box and threw it through the window was mere suspicion on his part.
49. He stated that during the investigations, he identified some systemic weaknesses. For the incident, he blamed the manager and recommended action against him.
50. Gregory Sinino Katola testified as the 3rd witness. He stated that, following instructions from his supervisor, he

conducted the investigation into the theft at the Wundanyi branch, which led to the Claimant's arrest and prosecution in Criminal Case No. 696 of 2018. He confirmed that Kshs. 5,259,000 was recovered from the Claimant's rural home and recorded in a Recovered Cash Inventory. He also noted that the criminal proceedings were ongoing, with the trial currently on hold due to a revision application filed by the Claimant.

### **Analysis and determination**

51. I have carefully considered the pleadings by the parties, their respective evidence presented, and the submissions by their Counsel, and the following issues emerge for determination.

- 1. Whether the summary dismissal against the Claimant by the Respondent was fair and lawful.**
- 2. Whether the Claimant is entitled to the prayers in the Claim.**

### **Whether the Summary Dismissal against the Claimant by the Respondent was fair and lawful.**

52. From the onset, it is important to point out that the 2007 legislation on unfair dismissal /termination represents a major incursion into the common law, limiting the employer's otherwise open-ended power to bring the contract of employment to an end without the need for substantive justification, and imposing general standards of procedural fairness upon the process of dismissal.
53. As such, whenever a Court is called upon to determine whether or not an employee's dismissal, whether by summary dismissal or otherwise, was fair, the Court is enjoined to consider the presence or absence of two statutory aspects, namely procedural fairness and substantive justification.
54. In the Case of the **Chief Registrar of the Judiciary & 2 others LMN [2025] KESC 53[ KLR**, the Supreme Court of Kenya, stated;

***“We begin this judgment by declaring that the fairness of any disciplinary process is today a constitutional imperative, irrespective of the status of the officer involved. The process must***

***uphold all the tenets of fair administrative action under Article 47 of the Constitution and the right to a fair hearing under Article 50 of the Constitution. In addition, .....the disciplinary bodies are bound to ensure that any disciplinary action ..... must comply with both constitutional and statutory requirements.”***

55. Section 41 of the Employment Act sets out a mandatory procedure that any employer contemplating terminating an employee’s employment on account of the employee’s conduct, capacity, or compatibility must follow. The process comprises notification, hearing and consideration. The employer must inform the employee of their intention and the grounds for it. Secondly, the employer shall accord the employee an adequate opportunity to prepare and make a representation on the grounds, in other words, to be heard. Lastly, the employer shall consider the representation before making a final decision on the matter.

56. Undoubtedly, the procedural requirements stipulated in the aforementioned provision were not observed. The Claimant was neither notified of the Respondent's intention to terminate his employment nor informed of the reasons underpinning such an intention. Additionally, he was not granted an opportunity to present his case. The Respondent explicitly acknowledged this infringement.

57. The Respondent justifies the non-conformity by citing the circumstances at the material time, which prevented compliance. Counsel for the Respondent referenced two decisions, **Halake Guyo vs Victory Construction Company & another [2019] KEELRC 2466 [KLR]**, and **Cooperative Bank of Kenya Limited vs Yator [2021] KECA 95 [KLR]**, to buttress the assertion and argument that, given the impossibility for the Respondent to conduct a hearing under the prevailing circumstances, it cannot be concluded that the summary dismissal lacked procedural fairness.

58. With the utmost respect, the cited decisions do not in any way endorse the complacency with which the Respondent

approached the issue of procedural fairness, which appears to lack acknowledgement of its status as a constitutional imperative and the necessity of adherence to its principles as a mandatory statutory requirement.

59. In any event, the Claimant's complaint was not solely that he was not heard, but also that the decision to dismiss him summarily was made without the initiation of any disciplinary proceedings against him. It is pertinent to note that disciplinary proceedings constitute a comprehensive process that extends beyond a disciplinary hearing, which is merely a component of the broader disciplinary process.
60. It makes no sense that the Respondent argues that those circumstances set out prevented it from adhering to the mandatory requirements of the law. One wonders what the rush was all about. Initiation and conclusion of disciplinary proceedings against the Claimant over the alleged gross misconduct were not time-bound. The Respondent could wait for him to secure his release, noting that the Claimant was not a convicted, but a suspect charged with a bailable offence, and who the Respondent knew had been granted bond.

61. The fact that an employee is in lawful custody on allegations of a criminal offence does not in any manner whatsoever, extinguish, diminish, or suspend their entitlement to constitutional and statutory entitlement and statutory guarantees of procedural fairness. Lawful detention does not translate into forfeiture of fundamental rights.
62. An employee remains cloaked with the full protection of due process safeguards, including the right to be heard, the right to fair administrative action, and the right to a disciplinary process in accordance with established legal and institutional frameworks. Allegations-however serious-do not amount to proof of guilt, and they cannot be used as a pretext to circumvent mandatory procedural requirements.
63. Accordingly, any disciplinary or administrative action taken against such an employee must strictly adhere to the principles of natural justice, fairness, and legality. To act otherwise would not only contravene constitutional

imperatives and statutory obligations but also undermine the rule of law itself.

64. Under section 45[2][b] of the Employment Act, 2007, termination of an employee's employment is fair if it is premised on a valid and fair reason. Duty lies on the employer to prove this. The Act however does not define the phrase valid and fair reason.

65. In my view, a valid and fair reason for termination of an employee's employment within the meaning of Section 45[2][b] of the Employment Act is a reason that is lawful, genuine, and objectively justifiable, and which is related to the employee's conduct, capacity, or based on the employer's operational requirements. It is not sufficient for an employer to merely assert a reason, the employer must demonstrate, on a balance of probabilities, that the reason existed at the time of termination, that it was founded on credible and verifiable facts, and that it was one which was a reasonable employer, acting fairly and in good faith, would regard as sufficient to warrant dismissal.

66. Such a reason must not be arbitrary, capricious, discriminatory, or actuated by malice. It must bear a rational nexus to the employment relationship and be of such gravity as to justify the severance of that relationship. In essence, a valid and fair reason is one that meets the substantive justification test and accords with the overarching principles of equity and proportionality.

67. I have agonised over this due to the circumstances described above. The Respondent's first witness admitted during cross-examination that the Branch Manager, Zachary Okoth, issued the summary dismissal letter, even though he previously denied in his statement that the letter was not written or issued by the Branch Manager. He also claimed that the dismissal letter was issued before he [the Branch Manager] received the investigation report from the Security Department. Additionally, the Respondent's second witness revealed during cross-examination that his investigation report implicated and recommended disciplinary action against the Branch Manager.

68. Two vital questions arise in the absence of a concluded investigation and a duly prepared report. Where did the Manager draw the reason for the dismissal? Wasn't the Manager conflicted and biased, as he would naturally make an arbitrary decision to calm the situation? These questions prompt this Court to conclude that the decision to dismiss was arbitrary and capricious.

69. However, it should be noted that the summary dismissal of the Claimant was based on a single ground.

70. It isn't in dispute that the Claimant was summarily dismissed through a letter dated 17<sup>th</sup> October 2018. The letter read in part;

***“We note you were arrested for a cognizable offence on 21<sup>st</sup> September, 2018 and charged at Wundanyi Law Court on 8<sup>th</sup> October, 2018. It is further noted that to date, you have not been released from custody.***

***In view of the above, you are hereby summarily dismissed from employment with effect from the date of this letter in accordance with the***

***provisions of Clause A5[a][vii] of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical, Technical and Subordinate Staff.”***

**Section A5 a] of the Collective Bargaining Agreement reads;**

***“Dismissal***

***\_Any of the following acts on the part of an employee shall constitute gross misconduct and or serious neglect and shall justify lawful grounds for summary dismissal.***

***vii. If in the exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not, within fourteen [14] days, either released on bail or on bond or otherwise lawfully set at liberty.”***

71. Inarguably, the Claimant was in custody for more than fourteen days. Under the above-mentioned stipulation of the Collective Bargaining Agreement, the Respondent had a valid reason to summarily dismiss the Claimant.

72. In sum, I find that the summary dismissal against the Claimant was procedurally unfair.

**Whether the Claimant is entitled to the prayers in the Claim**

**A declaration that the Claimant is still lawfully employed by the Respondent**

73. The Claimant sought a declaration that he remains lawfully employed by the Respondent. I find considerable difficulty in understanding the basis of this claim, as it is clear that his substantive claim is for unfair summary dismissal, acknowledging that the employer-employee relationship was terminated at the Respondent's initiative. The relief is declined.

**An order directing the Respondent to unconditionally reinstate the claimant to his employment services and former position with the Respondent**

**without any loss of benefits or seniority and  
without any conditionality**

74. It is now more than three years since the Claimant was summarily dismissed from employment. Section 12 [3] of the Employment and Labour Relations Court Act deprives this Court of the jurisdiction to grant the remedy of reinstatement in situations where the period mentioned has passed since an employee's employment was dismissed or a summary dismissal has been visited on an employee. I decline the relief sought.

75. However, it would be remiss of this Court if I did not point out that in some situations this provision of the law has caused injustice to employees who, in the circumstances of their cases, might deserve an order of reinstatement but do not because of the provision. The legislature should re-examine this provision in light of the injustice it sometimes causes, with a view to amending it to leave the grant of relief solely at the Court's discretion.

**An order for the Claimant to be paid salary arrears from 17th October, 2018, to the date of judgment.**

76. I have carefully considered the material placed before me and note that none of it justifies the grant of the relief sought. In any event, the remedy is not provided for under section 49[1][c] of the Employment Act. It is hereby rejected.

**Kshs.91,000/=equivalent to one (1) month's salary in lieu of notice**

77. The Claimant's employment was terminable by months' notice under section 35 of the Employment Act. There is no dispute that it wasn't issued. I find that in the circumstances, he is entitled to notice pay.

**Compensation for unfair termination.**

78. Section 49[1][c] bestows upon this Court the power to award compensatory relief for an employee who has successfully challenged the termination of his/ her

employment as unfair. However, it must be recognised that the power is discretionary, exercised on a case-by-case basis.

79. I have carefully considered the rushed manner in which the Claimant was summarily dismissed, the Respondent's deliberate non-compliance with the dictates of both procedural and substantive fairness, the length of the Claimant's service, and the manner in which the summary dismissal letter was dispatched to his last known address whilst the Respondent knew that the Claimant was still in the custody of the police, an indicator, in my view, of bad faith, and have come to the conclusion that he is entitled to the compensatory relief of six months' gross salary.

### **Payment for accrued leave days**

80. As counsel for the Respondent correctly points out in his submissions, no evidence was led by the Claimant to establish entitlement to this relief. It is declined.

### **Costs of this suit**

81. As costs follow the event pursuant to the provisions of section 27 of the Civil Procedure Act, costs in this matter shall be in favour of the Claimant.

82. In the upshot, judgment is hereby entered for the Claimant in the following terms:-

- a) A declaration that the summary dismissal against him was procedurally unfair.
- b) One month's salary in lieu of notice, KShs 91,000.
- c) Compensation for unfair dismissal, six months' gross salary, KShs. 546,000.
- d) Interest at court rates on the sum awarded in [b] above, from the date of dismissal till full payment.
- e) Interest at court rates on the sum awarded in [c] above from the date of this judgment till full payment.
- f) Costs of the suit.

**Read Signed and Delivered this 19<sup>th</sup> Day of February 2026.**

**OCHARO KEBIRA**

**JUDGE**

ORIGINAL