

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E514 OF 2024

BANKING INSURANCE & FINANCE UNION (K)

.....**CLAIMANT**

VERSUS

SBM BANK (K) LTD.....

RESPONDENT

J U D G M E N T

1. The Claimant union instituted the present claim on behalf of the grievant, **Philip Solia Kilei**, whom it avers is its member.

2. It is not in dispute that the grievant was employed by Fidelity Commercial Bank (K) Ltd on 3rd June 2013 and, upon completion of a six-month probation period, was confirmed into permanent and pensionable terms on 10th December 2013. It is further uncontested that his employment subsequently transitioned to the Respondent Bank following its takeover of the operations of Fidelity Commercial Bank (K) Ltd.

3. The Claimant states that on 8th February 2023, while serving as a teller at the Respondent’s Diani branch, the grievant was issued with a notice to show cause

regarding alleged fraudulent transactions involving a customer's account. A disciplinary hearing ensued, culminating in the termination of the grievant's employment on the basis of these allegations.

4. The Claimant maintains that the allegations against the grievant were unfounded and amounted to a witch hunt, resulting in unfair termination contrary to Section 45 of the Employment Act. On this basis, the Claimant seeks the following reliefs on behalf of the grievant:

- 1) ***THAT the Honourable Court do find and declare that the termination of the grievant herein Philip Solia Kilei was unfair/ unlawful and therefore invalid.***
- 2) ***THAT the Claimant pray to the Honourable Court to order the reinstatement of the grievant herein back to his position in the bank with all the ensuing back pay arrears from the date of termination to the date of reinstatement.***
- 3) ***THAT the Honorable Court order for the payment of twelve (12) Months' salary of Ksh. 1,485,649.80 as Compensation for having suffered an unfair and unlawful loss of employment.***
- 4) ***THAT the Honourable Court order an award of damages of Ksh. 1,500,000 for having suffered Humiliation, inability to provide food, clothing, health, education, and other basic needs to his young family members, which the said young members of his family had constitutional rights to receive from a father, since there is no expectation of securing alternative employment.***
- 5) ***Prayer for Notice of Ksh 123,804.15 and leave pay.***

6) Costs of this suit and interests on prayer (3) and (4) above.

5. In response to the Claim, the Respondent filed a Memorandum of Response alongside a Counterclaim. The Respondent avers that on 21st November 2022, it received a complaint concerning suspected fraudulent transactions posted into a customer's account at the Diani branch. Upon conducting investigations into the alleged fraudulent activities, the Respondent initiated disciplinary proceedings. It asserts that the internal investigations revealed that the grievant had been grossly negligent in the performance of his duties.
6. The Respondent maintains that the grievant's termination resulted from his own misconduct and that the disciplinary process was carried out in full compliance with due process requirements.
7. The Respondent argues that the Claimant has no valid cause of action against it and accordingly seeks the striking out of the suit.
8. In its Counterclaim, the Respondent asserts that the grievant has defaulted on repayment of his loan and is currently in arrears. To this end, the Respondent claims a sum of **Kshs 809,744.40**, together with interest at the contractual rate until settlement in full. The Respondent also seeks the costs of both the suit and the Counterclaim.

9. The matter proceeded for hearing on 15th October 2025, during which both sides called oral evidence.

Claimant's Case

10. The grievant, testifying in support of his case, began by adopting his initial witness statement together with the initial and supplementary lists and bundles of documents, filed on his behalf, as his evidence in chief.

11. The grievant testified that he provided a detailed response to the Notice to Show Cause. Nevertheless, he was invited to a disciplinary hearing, after which his employment was terminated on 21st September 2023.

12. The grievant further stated that he lodged an appeal against the termination. He indicated that he disagreed with certain portions of the appeals committee's minutes, which the Respondent undertook to amend.

13. According to the grievant, the Respondent has not yet furnished him with the corrected minutes, nor has it communicated the outcome of the appeals committee's deliberations.

Respondent's Case

14. The Respondent presented its oral evidence through **Simon Muriithi Maina**, who testified as RW1. Mr. Maina identified himself as the Head of Employee

Relations and the Human Resources Service Centre at the Respondent Bank. Similarly, he adopted his witness statement together with the Respondent's list and bundle of documents to constitute his evidence in chief.

15.RW1 testified that the Respondent's internal investigations concluded that the grievant had been grossly negligent in the performance of his duties. He stated that the grievant was aware that the customer had visited the Branch on 15th October 2022 and had been served by **Hakeem Amore**, a Direct Sales Representative. According to RW1, Hakeem delivered to the grievant a set of instructions allegedly issued by the customer, including a request to open a Jivunie account, internal funds transfer instructions, and RTGS transfer instructions.

16.RW1 further stated that on 15th October 2022, the grievant received a fraudulent internal account transfer voucher dated 17th October 2022 for Kshs 1,160,000, transferring funds from Account No. 0671*** to fraudulent Account No. 067***. He averred that the voucher had visible alterations, which the grievant failed to question. He further stated that the grievant did not conduct the mandatory customer callback as required by the Bank's policies and procedures.

17.RW1 further stated that the grievant endorsed on the internal transfer voucher that the customer had delivered the instructions at 3:00 pm on 17th October 2022,

yet CCTV footage showed that the customer only visited the Branch on 15th October 2022 and left at 10:26 am.

18.The grievant was subsequently issued with a Notice to Show Cause dated 8th February 2023, which he responded to on 20th February 2023.

19.RW1 stated that the grievant's response to the Notice to Show Cause was unsatisfactory, prompting the Respondent to invite him for a disciplinary hearing scheduled for 20th April 2023.

20.He further testified that the invitation clearly informed the grievant of his right to be accompanied during the disciplinary hearing. Thus, the grievant's decision to attend unaccompanied was of his own choosing and not due to any omission on the Respondent's part.

21.According to RW1, the disciplinary hearing established that the grievant accepted and processed fraudulent instructions delivered by **Hakeem Amore**, thereby facilitating fraudulent transactions. He testified that the grievant filled in all details on the internal funds transfer voucher except the customer's signature, enabling the transfer of Kshs 1,160,000.00 to the fraudulent account No. 067***.

22.RW1 also testified that on 18th October 2022, the grievant processed fraudulent RTGS instructions transferring Kshs 1,150,000.00 from the fraudulent account to

an account held at the National Bank of Kenya, Diani Branch. He stated that the grievant failed to question the invalid date on the RTGS form, which was dated 18th January 2022 yet delivered on 15th October 2022. RW1 added that the instructions had allegedly been handed to the grievant by Hakeem Amore on 15th October 2022.

23.RW1 averred that the grievant irregularly completed missing information on the RTGS form and internal funds transfer voucher, details meant to be filled by the customer, contrary to the Respondent's policies.

24.RW1 further stated that by completing incorrect customer information on the documents, the grievant contributed to facilitating the fraudulent transactions.

25.RW1 further stated that the grievant knowingly processed forms submitted by Hakeem Amore without raising any red flags. He stated that the grievant neglected his duty to conduct due diligence, which would have exposed the fraudulent nature of both the RTGS instructions and the internal transfer voucher.

26.He added that the grievant failed to contact the customer directly regarding the transactions, instead dealing with Hakeem Amore as a proxy, despite knowing that he was not authorized to transact on the customer's behalf.

27.RW1 testified that the Respondent made the decision to terminate the grievant's employment effective 4th October 2023 via a termination letter dated 21st September 2023. The grievant was also issued with a Certificate of Service and was further provided with a "Full and Final Dues Settlement" letter dated 5th October 2023 outlining his benefits and outstanding liabilities.

28.RW1 further stated that the grievant was informed of his right to appeal within 14 days if he wished to present new facts warranting reconsideration.

29.Although the grievant filed an appeal on 9th November 2023 outside the stipulated period, he was nevertheless invited to an appeal hearing held on 14th December 2023, at which he was accompanied by a union official.

30.RW1 testified that the grievant was issued with an extract of the appeal hearing minutes on 20th December 2023, which he acknowledged on 5th February 2024, but claimed that some parts were inaccurate. He was asked to point out the disputed areas or provide corrections, but failed to do so.

31.According to RW1, the Respondent found no new facts during the appeal process to justify overturning the termination decision.

32.RW1 further stated that on 7th January 2021, the grievant applied for and was granted an unsecured loan facility of Kshs 1,500,000.00 for home renovations.

33.It was RW1's testimony that the grievant breached the facility terms by defaulting on repayments and that as at 24th July 2024, the outstanding balance stood at Kshs 809,744.40.

Submissions

34.Upon close of the hearing, both parties filed their written submissions. It was submitted by the Claimant that, as a teller, the grievant bore no responsibility for approving or facilitating the approval of the instructions that led to the transfer of Kshs. 1,150,000.00 from the customer's account. The Claimant submitted that the customer was physically present at the bank, read, and signed the instructions, thereby confirming authorization. It was the Claimant's position that a call-back was unnecessary since such verification is only required when instructions are issued in the customer's absence.

35.The Claimant further submitted that the fraud was orchestrated by Hakeem, who successfully deceived all staff involved in the transaction chain, from the branch level to the head office approval process. On this basis, the Claimant maintained that the grievant should not be faulted.

36.In support of these arguments, reliance was placed on the case of ***Banking Insurance and Finance Union v Consolidated Bank of Kenya Limited [2018] KEELRC 46 (KLR)***.

37.The Claimant contended that the reason for the grievant's termination was invalid, as he neither contributed to nor played any role in the transaction. It was further submitted by the Respondent that the grievant, who was a junior officer, performed his duties strictly in accordance with the policy, and that any evaluative or supervisory responsibility lay with his managers.

38.The Claimant further submitted that failure to explain the charges to the grievant in a language of his choice, coupled with the lack of representation at the disciplinary hearing, amounted to a fundamental procedural defect. According to the Claimant, these omissions rendered the process a mere formality and denied the grievant a fair hearing.

39.In view of the foregoing, the Claimant maintained that the termination of the grievant was procedurally unfair.

40.Regarding the Counterclaim, the Claimant argued that the grievant should not be condemned to pay Kshs. 809,744.00, as the termination resulted from unfair labour practices. On this score, reliance was placed on the case of ***Abraham Nyambane Atsiago v Barclays Bank of Kenya [2013] eKLR, Mulinge v Cooperative Bank of Kenya Limited (ELRC Cause E200 of 2022) [2023] KEELRC***, and ***Gisemba v Tausi Assurance Company (Civil Appeal 405 of 2018) [2022] KECA***.

41. On its part, the Respondent submitted that the grievant was grossly negligent and was therefore dismissed for gross misconduct arising from failure to adhere to established procedures, which facilitated the loss of funds.

42. The Respondent argued that, in line with its Human Resource Policies, Collective Bargaining Agreement, Code of Conduct, and the grievant's employment documents, the conduct in question amounted to gross misconduct warranting termination.

43. It was the Respondent's position that the termination was fair and justified.

44. Citing the case of *Bamburi Cement Limited v William Kilonzi [2016] eKLR*, the Respondent submitted that the applicable standard of proof is a balance of probabilities, and that an employer needs only to demonstrate that it genuinely believed the reasons for termination existed.

45. The Respondent further maintained that it followed due process before terminating the grievant's employment.

Analysis and Determination

46. Having considered the pleadings by both parties, the evidentiary material on record, as well as the rival submissions, the Court isolates the following issues for determination: -

- i. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the grievant;*
- ii. Whether the grievant was taken through a fair process prior to termination from employment;*
- iii. Is the grievant entitled to the reliefs sought? and*
- iv. Whether the Respondent's Counterclaim is merited.*

Valid and fair reason for termination?

47. The termination letter dated 21st September 2023 indicates that the grievant's employment came to an end on grounds of gross misconduct. In this regard, it was alleged that on 17th October 2022, the grievant approved or facilitated the approval of payments contrary to established bank procedures by processing fraudulent instructions purportedly issued by customer **Hans Ulrich Wanner** without conducting due diligence. It was further alleged that on 15th October 2022, the grievant received an internal transfer voucher bearing visible alterations dated 17th October 2022, instructing a transfer of Kshs. 1,160,000.00 from account number 06713*** to the fraudulent account number 06723***, yet he did not question the discrepancies.

48. Additionally, it was alleged that on 18th October 2022, the grievant processed fraudulent RTGS instructions transferring Kshs. 1,150,000.00 from the fraudulent account to an account at National Bank, Diani Branch, in the name of Stardust Tech Enterprises. The grievant was also accused of failing to note that the RTGS form bore an invalid date, 18th January 2022, despite being delivered on 15th October 2022, a discrepancy that should have raised suspicion. He was further faulted for failing to conduct a callback.

49. In response to the Notice to Show Cause, the grievant explained that the customer, Hans Ulrich Wanner, visited the bank on 15th October 2022 and went directly to **Hakeem Amoreh** at the customer service desk. He stated that Hakeem retrieved the forms, which the customer completed in his presence, and later handed them to him (the grievant) while the customer was still present. The grievant admitted receiving instructions relating to account opening, internal transfer, and an RTGS application, all of which he forwarded to the Branch Manager for approval. He further stated that the new account for Mr. Hans was opened on 17th October 2022, and the internal transfer was effected at 3:00 p.m. on the same day. He added that the RTGS instructions could not be processed that day as they were submitted past the cut-off time and were therefore processed on 18th October 2022 at 9:00 a.m.

50. While expressing regret over the incident, the grievant maintained that he neither acted nor failed to act in a manner that facilitated the fraudulent transactions.

51. During cross-examination, the grievant affirmed the accuracy of the disciplinary hearing minutes, indicating that the form he received for the internal funds transfer was incomplete. He further admitted that he was the one who inserted the details of the date, account number and the branch, but the rest of the information was filled in by Hakeem.

52. The grievant further conceded that he wrote on the internal transfer voucher that the “*instructions were brought by hand at 3:00 p.m.*” and acknowledged that this was untrue, as the customer had visited the branch on 15th October 2022, not on 17th October 2022.

53. The grievant’s appeal letter similarly confirmed that he received the internal transfer vouchers on 15th October 2022 and inserted the date of 17th October 2022 because the customer had left it blank, not knowing when the new account would be opened or when the transfer would occur.

54. It is further notable that the RTGS application transferring Kshs. 1,150,000.00 to the National Bank of Kenya was dated 18th January 2022 and indicated that the grievant acknowledged receipt on 18th October 2022 at 9:00 a.m.

55.The grievant also confirmed, as reflected in the minutes of the disciplinary hearing, that he filled in the callback section of the RTGS form even though he did not make the callback and was not present when the Branch Manager allegedly made the call.

56.What can be deduced from the foregoing is that the grievant received instructions for opening a new account, effecting a funds transfer, and initiating an RTGS transaction on 15th October 2022. It is also clear that he did not receive these instructions directly from Mr. Hans but through his colleague, Mr. Hakeem.

57.What's more, it is apparent that the grievant received an incomplete funds transfer instruction but nevertheless proceeded with the transaction despite the new account not yet being opened. He thereafter transferred funds from Mr. Hans's main account into the newly opened account.

58.It is also apparent that Mr. Hans only visited the branch on 15th October 2022 and not on 17th and 18th October 2022, meaning the grievant acted on the instructions with respect to the internal funds transfer and the RTGS in the customer's absence.

59. Additionally, he processed RTGS instructions on 18th October 2022 bearing the incorrect date of 18th January 2022 while acting in the customer's absence and without conducting a callback.

60. As it later emerged, the instructions were fraudulent, resulting in the loss of the funds from Mr. Hans's bank account.

61. In his statement, Mr. Hans said he only became aware of the fraudulent account, numbered 06723***, and the transfer of a total of Kshs. 1,460,000.00 from his account when he attempted to withdraw Kshs. 150,000.00 and was informed of insufficient funds, as well as a transfer of Kshs. 300,000.00 to an account at the National Bank. He denied authorizing these transactions.

62. In light of the foregoing, it is evident that the grievant approved the transactions without exercising the requisite diligence and duty of care.

63. Mr. Hans further stated that Mr. Hakeem exploited his trust, frequently calling him to the branch to sign documents, which he later learned were used to facilitate the fraudulent transactions. He stated that he had no reason to suspect that the documents he signed were fraudulent.

64. Despite Mr. Hakeem's deceitful conduct, the grievant remained in a position to prevent the loss by diligently performing his duties. For example, he could have

declined to process the incomplete internal transfer forms and the RTGS instruction. Better still, he could have made a callback. Instead, he proceeded to act on the instructions, thereby endorsing the fraudulent instructions.

65.Indeed, the incorrect date of 18th January 2022 on the RTGS form was itself a red flag rendering the instruction invalid, yet the grievant processed it, contributing to the loss suffered by the Respondent's customer.

66.All things considered, the Court is led to conclude that the grievant's failure to exercise reasonable diligence in performing his duties exposed the Respondent bank to financial and reputational risk. Needless to say, the grievant was negligent in the discharge of his duties.

67.Accordingly, the Court finds that the Respondent has proved, on a balance of probabilities, that the grievant was negligent in the performance of his duties and on this basis, it had a fair and valid reason to terminate his employment within the meaning of **Sections 43(2) and 45(2)(a) and (b) of the Employment Act.**

Fair process?

68.Regarding procedural fairness, **Section 45(2)(c) of the Employment Act** imposes upon the employer the obligation to demonstrate that the termination was carried out through a fair process. In this respect, Section 41 sets out the

specific procedural steps that must be followed, including informing the employee of the allegations against them and affording them an opportunity to respond to those allegations in the presence of a fellow employee or a shop-floor union representative of their choice.

69. It is undisputed that the grievant was issued with a Notice to Show Cause, dated 8th February 2023, and that he responded to the same on 29th February 2023. It is equally common ground that the grievant was subsequently invited to attend a disciplinary hearing scheduled for 23rd March 2023.

70. The invitation letter explicitly informed the grievant of his right to be accompanied by a representative of his choice, being either a fellow employee of the Respondent or a union representative from the Central Staff Committee.

71. The record bears that the grievant attended the disciplinary hearing without any representative. The minutes reflect that he was reminded of his right to be accompanied, and he confirmed that he was aware of this entitlement but had voluntarily chosen to proceed unaccompanied. Notably, the grievant signed the extract of the minutes of the disciplinary hearing, confirming their accuracy. Accordingly, the Court has no basis to doubt that the grievant voluntarily waived his right to be accompanied at the disciplinary hearing, rendering his current assertions an afterthought.

72. In these circumstances, the grievant cannot validly claim that the Respondent denied him representation during the disciplinary hearing.

73. In conclusion, the Court has not discerned any procedural flaw in the manner in which the grievant's termination was effected. The Court finds that the Respondent adhered to the minimum procedural requirements under Section 41 of the Employment Act and met the standard articulated in the case of *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR*.

74. To this end, it is this Court's finding that the termination of the grievant was neither unfair nor unlawful.

Reliefs?

75. Having found that the Claimant's termination was based on a valid and fair reason, and that the Respondent complied with the procedural requirements under Section 41 of the Employment Act, the claim for compensatory damages is unsustainable. Consequently, the related claims for general damages and reinstatement equally fail.

76. The claims for notice pay and leave pay also fail, as the evidence shows that these entitlements were settled as part of the grievant's final dues.

Merit in the Counterclaim?

77.The gist of the Respondent's Counterclaim is that, through a staff loan application form, the grievant applied for and was granted a facility of **Kshs. 1,500,000.00**. According to the grievant, the facility was duly approved and the funds were advanced to him.

78.The Respondent contends that the grievant subsequently fell into arrears, and as at 24th July 2024, the outstanding loan balance stood at **Kshs. 809,744.40**.

79.It is noteworthy that the grievant did not file any Defence to the Counterclaim. Consequently, the Counterclaim stands unopposed.

80.In support of the Counterclaim, the Respondent produced the grievant's loan application form, the conditional offer letter confirming approval of the facility, and a loan statement showing an outstanding balance of **Kshs. 809,744.40** as at 24th July 2024.

81.In the absence of any response from the grievant, the Respondent's claim stands uncontroverted.

82.Furthermore, there is no evidence demonstrating that the grievant has repaid the outstanding loan amount. The Court therefore has no reason to doubt that he remains indebted to the Respondent in the sum of **Kshs. 809,744.40**.

83. In view of the foregoing, the Court is satisfied that the Respondent has proved the Counterclaim to the requisite standard and is entitled to judgment for **Kshs. 809,744.40** as prayed.

Orders

84. In the final analysis, the Claim is dismissed in its entirety with an order that each party shall bear its own costs.

85. The Counterclaim succeeds, and judgment is hereby entered in favour of the Respondent for the sum of **Kshs. 809,744.40**, being the outstanding loan balance. The amount shall accrue interest at the contractually agreed rates.

86. The grievant shall bear the costs of the Counterclaim.

DATED, SIGNED and DELIVERED at MERU this 13th day of March 2026.

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STELLA RUTTO
JUDGE

In the presence of:

For the Claimant

Mr. Odero

For the Respondent

Ms. Mutisya

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO
JUDGE**