

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GATEMBU, NYAMWEYA & MUCHELULE, JJ.A.)**

**CIVIL APPEAL NO. 7 OF 2020**

**BETWEEN**

**BARCLAYS BANK OF KENYA LTD.....APPELLANT**

**AND**

**BANKING INSURANCE & FINANCE UNION.....RESPONDENT**

*(An appeal against the judgment and decree of the Employment and  
Labour Court at Nairobi (M. Nduma Nderi J.) dated 15<sup>th</sup> April  
2016*

*in*  
**ELRC Cause No. 1251 of  
2014)**

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**JUDGMENT OF THE COURT**

1. The suit before the superior court was initiated by the Banking Insurance & Finance Union (the respondent) on behalf of Ms. Yasmin Namsi Athman (the grievant) against Barclays Bank of Kenya Ltd (the appellant). It was alleged that the grievant was employed by the appellant on 12<sup>th</sup> September 1988 as a subordinate staff member and rose through the ranks over time as the appellant restructured its operations to the position of a B2- Supervisory Level Officer. In August 2012 she was appointed Acting Branch Operations Officer, a position that was repeatedly extended until her employment was terminated on 30<sup>th</sup> April 2013.

2. The respondent contended that the dispute arose from transactions conducted in December 2012, specifically two withdrawals made on 5<sup>th</sup> and 7<sup>th</sup> December 2012 in the sums of Kshs.2,100,000 and Kshs.2,500,000, respectively. These transactions were processed through a cashier, Julian Gikonyo, and involved M-Pesa transfers authorized by the grievant. It was asserted that due diligence was carried out by the cashier on both occasions before the transactions were forwarded to the grievant for approval due to their value. The due diligence involved inspecting the customer's physical identification, photos, the ID card, signature, and the amount for withdrawal. On 18<sup>th</sup> January 2013, the grievant received a call from the appellant's contact centre informing her that the account mandate had been fraudulently altered and that a total of Kshs. 4,600,000 had been fraudulently withdrawn. She was subsequently invited to a disciplinary hearing on 2<sup>nd</sup> May 2013 and was dismissed effective 10<sup>th</sup> May 2013 on grounds of negligence and failure to comply with the bank's regulations. Her appeal against the dismissal was unsuccessful. The dispute was thereafter reported to the Minister in accordance with the grievance procedure and referred to conciliation. Although a comprehensive report with findings and recommendations was prepared after several meetings, it was accepted by the grievant but rejected by the appellant, leading to the referral of the dispute to the superior court for final determination.

3. In her evidence, the grievant stated that she did not refer the two transactions to the Bank's fraud monitoring system, BASIS, because, based on past practice, she was required to interrogate the customer and verify the supporting documentation. She maintained that she did so before approving the transactions.
4. In its submissions, the respondent posed the question for the determination of who, between the branch and the department known as KYC (Know Your Customer), changed the account mandate, as the banking procedures were adhered to by the grievant. Secondly, the appellant spared the cashier but terminated the grievant. According to the respondent, despite due diligence, this was a fraud that was not preventable. The respondent thus sought judgment inter alia: reinstatement of the grievant back to work without any loss of employment benefits and seniority in service; the grievant to be paid all her salaries and allowances as a result of the unfair and unlawful loss of employment from the date of dismissal to the date of judgment; compensation of twelve (12) months for having suffered unfair/unlawful loss of employment; and any other relief deem fit.
5. In opposing the suit, the appellant stated that the grievant was initially employed as a messenger on 12<sup>th</sup> September 1988 and, at the time of her separation, held the position of Retail Support, earning an annual salary of Kshs.1,283,268

and a house allowance of Kshs.90,000 per annum. The appellant further

contended that in or about January 2013, a customer, Mr. Muigai, holder of account number 082-\*\*\*\*\*, disputed seven transactions in his account totaling Kshs.5,235,000, which he discovered upon receiving his bank statement. It was alleged that some of these transactions were conducted while the customer was out of the country, as confirmed by his passport showing that he had travelled on 20<sup>th</sup> December 2012 and returned on 29<sup>th</sup> December 2012.

6. Following the complaint, the appellant conducted investigations and established that the customer's account details had been altered on 24<sup>th</sup> November 2012. The customer denied ownership of the mobile phone number and address linked to the account, and the photograph on record did not belong to him. Further investigations revealed that a new Premier Life account had been opened in the customer's name on 22<sup>nd</sup> November 2012, whereas his original account, opened in 1997, was a sole signatory savings account that had only received regular credits with no debits for two years prior to the disputed withdrawals totaling Kshs.5,235,000. It was also established that a counterfeit National Identification Card had been used to open the Premier Life Account, which was processed through the appellant's direct sales team at Bank House and remained inactive. The appellant concluded that this account had been created to facilitate fraudulent updates to the Customer

Information File of the original savings account by linking the two accounts.

7. With regard to the grievant, the appellant asserted that she authorized two fraudulent withdrawals from the customer's account on 5<sup>th</sup> and 7<sup>th</sup> December 2012 in the sums of Kshs. 2,100,000 and Kshs.2,500,000 respectively. She also approved three M-Pesa transactions totaling Kshs.370,000 on 24<sup>th</sup> December 2012. Investigations further revealed that the customer's savings account had been flagged by the appellant's fraud monitoring system, BASIS, with a caution requiring verification of all transactions before processing. Despite this, the grievant proceeded to authorize the transactions without complying with the caution.
8. In her statement to investigators, the grievant indicated that upon referral by the cashier, and despite noting that there had been no withdrawals from the account for two years, she interviewed the customer and confirmed the details against the system before approving the withdrawals on 5<sup>th</sup> and 7<sup>th</sup> December 2012. She was subsequently invited on 24<sup>th</sup> April 2013 to attend a disciplinary hearing scheduled for 2<sup>nd</sup> May 2013. During the hearing, at which she was represented by Mr. Charles Mulinga, she acknowledged that she neither consulted the Branch Operations Manager nor referred the transactions to BASIS. She further stated that the M-Pesa transactions did

not raise any suspicion, notwithstanding that they were for the maximum permissible amounts.

9. Following the disciplinary hearing, and taking into account that the grievant was an experienced authorizer who had held the role since 2007, the panel concluded that she had been negligent in the performance of her duties. In particular, she failed to refer the transactions to BASIS despite the caution on the account, and the nature, amounts, and frequency of the transactions ought to have raised concern. The panel, therefore, recommended termination of her employment. Consequently, on 10<sup>th</sup> May 2013, her services were terminated on grounds of negligence and failure to adhere to the appellant's established regulations and cash payment procedures, contrary to Clause 12 of her employment contract.
10. The grievant appealed the decision on 14<sup>th</sup> May 2013, arguing that, based on past practice, the fraud team had advised that once a customer was interviewed and the officer was satisfied, the transaction could proceed. The appeal was unsuccessful. The dispute was subsequently referred to a conciliator, who found that the grievant's termination was unfair within the meaning of **section 45** of the **Employment Act**.
11. In evidence, the Forensic Investigations Manager testified that all accounts flagged with a caution were required to be

referred to BASIS before any transactions were processed.  
He stated that

had the transactions in question been referred, the fraud would likely have been detected, as subsequent investigations revealed that the signatures did not match, despite the relevant documents having been presented to both the cashier and the grievant. He further clarified that although the grievant was not involved in the opening of the new account, she failed to properly vet the transactions in light of the caution placed on the account.

12. It was submitted on behalf of the appellant that the grievant's failure to exercise due care and skill, as well as her failure to comply with lawful instructions from her employer, led to a loss of Kshs.5,235,000. The appellant maintained that, in accordance with **sections 44(4)(c) and (e) and 41** of the **Employment Act**, the grievant was lawfully dismissed following thorough investigations in which she participated. It was further contended that the conciliator, in making his findings, failed to take into account that the grievant had disregarded the caution placed on the account, thereby facilitating the fraudulent withdrawals.
13. In the judgment, the superior court (Nderi Nduma, J.) found that the grievant had served the appellant diligently for 23 years, rising through the ranks without any prior warnings, and had acted in a higher position for an extended period without confirmation, contrary to the CBA. The superior court held that the applicable Collective Bargaining Agreement

formed part of

the grievant's contract of employment and required that termination for negligence under **Clause A5(b)(iii)** could only occur after the issuance of two prior written warnings within a 12-month period, followed by a third offence. However, the appellant instead terminated her employment with notice without adhering to this structured warning-based process.

14. Further, the superior court found that the grievant's role in the impugned transactions was minor, limited to failing to refer the transactions to BASIS, while the fraud largely resulted from systemic failures and the actions of other employees. Accordingly, the superior court concluded that the respondent breached the grievant's contract and failed to comply with the CBA and statutory requirements. The termination was therefore unjustified, wrongful, and unfair within the meaning of **section 45** of the **Employment Act**, entitling the grievant to remedies under the law.
15. Aggrieved by the above decision, the appellant appealed to this Court on 13 grounds, but whose substance can be summarized as follows:- whether the grievant's employment contract was terminated for valid reasons; whether the learned judge erred in fact and in law in finding that the grievant was unlawfully and unfairly terminated; and whether the trial court erred in fact and in law in awarding the grievant remedies for unfair termination.

16. When the appeal came up for hearing, learned counsel Mr. Achiando appeared for the appellant. The respondent was not represented in court and did they file any written submissions in opposition to the appeal, despite having been duly served.
  
17. Mr. Achiando argued that the appeal raised a single issue, namely whether the trial court erred in finding that the termination of Ms. Yasmin Namsi Athman was unfair and unlawful and in awarding remedies for unfair termination. He submitted that the dismissal was both procedurally and substantively fair because the appellant complied with the requirements of **section 41** of the **Employment Act**, which governs the mandatory procedure before termination. He further relied on **Clause A5(b)** of the applicable **Collective Bargaining Agreement**, contending that the disciplinary framework under the CBA and the **Employment Act** allowed the employer to choose between summary dismissal and termination, both of which are recognised forms of sanction. According to him, the appellant exercised this discretion lawfully by opting for a lesser sanction and therefore complied with the applicable statutory and contractual procedure. However, in the course of questioning, the Court raised concern on whether the specific **CBA** procedure, particularly the requirement of warnings under **Clause A5(b)** had been followed before dismissal, which Mr. Achiando addressed by maintaining

that the applicable procedures were complied with as submitted.

18. It was submitted on behalf of the appellant that the superior court misapprehended the evidence and consequently failed to find that the grievant's termination was lawful, based on a valid reason, and conducted in accordance with procedural fairness. Reliance was placed on **CFC Stanbic Bank Limited -vs- Danson Mwashako Mwakuwona [2015] eKLR**, where it was held that, in determining the fairness of a termination, a court must consider both the validity of the reasons and the fairness of the procedure. The appellant argued that it discharged its burden under **sections 43 and 45** of the **Employment Act** by demonstrating that the grievant was negligent in the performance of her duties and failed to comply with established regulations and cash payment procedures. It was further contended that the evidence before the superior court showed that the grievant authorized fraudulent withdrawals leading to her termination, and that this evidence was not controverted. Accordingly, the court erred in finding that, despite her negligence, the termination was wrongful.
19. On the issue of the legality of the termination, the appellant submitted that the grievant was accorded procedural fairness in line with **sections 41, 43, and 45** of the **Employment Act**, having been subjected to a fair hearing

prior to dismissal. The reasons for termination were clearly set out in the letter dated

10<sup>th</sup> May 2013, which indicated that the termination was effected under **Clause A5(d)** of the **CBA**. It was further argued that the appellant exercised leniency by imposing a lesser sanction of termination with notice instead of summary dismissal.

20. Lastly, the appellant contended that the superior court erred in awarding the maximum compensation of Kshs.2,178,444, despite the grievant being responsible for her own predicament. Reliance was placed on **Kenfreight (E.A) Limited -vs- Benson K. Inguti [2014] eKLR**, which cited **C.P.C. Industrial Products -vs- Angima (C.A. No. 197 of 1992)**, for the principle that damages for wrongful termination are generally limited to the notice period unless the employer acted in bad faith or with malice. It was also submitted that the superior court failed to consider the factors under **section 49(4)** of the **Employment Act**, particularly the grievant's conduct, and thus improperly awarded the maximum of 12 months' salary without justification. Further reliance was placed on **Freight in Time Limited -vs- Rosebell Wambui Munene [2018] eKLR**, which cited **OI Pejeta Ranching Limited -vs- David Wanjau Muhoro [2017] eKLR**, to emphasize that the maximum award is only granted where justified. The appellant therefore urged that the appeal be allowed and the impugned judgment set aside.

21. We have carefully considered this first appeal. Consistent with the duty of a first appellate court, we shall re-evaluate and

reappraise the evidence to satisfy ourselves that the trial court came to the right conclusion on the evidence, but bearing in mind that we do not have the advantage that the trial court had because it saw and heard the witnesses as they testified. (See ***Abok James Odera -vs- John Patrick Machira [2013] eKLR***).

22. It is common ground that the grievant served the appellant for 23 years with no prior warnings or disciplinary sanctions. Despite acting in a higher position for approximately two years, she was never confirmed to the substantive role as provided in the parties' Collective Bargaining Agreement (CBA). The grievant authorized large withdrawals without referring them to the Bank's fraud monitoring system (BASIS), in breach of internal procedures, which led to her termination.
23. The appellant's principal contention is that the superior court misapprehended the evidence before it and erroneously found that the grievant had been unlawfully and unfairly terminated from her employment. According to the appellant, the grievant was invited to attend a disciplinary hearing on 2<sup>nd</sup> May 2013, where she was represented; she was part of the investigations carried out by the appellant, and the reasons for termination were clearly set out in the letter dated 10<sup>th</sup> May 2013, which indicated that the

termination was effected under **Clause A5(d)** of the CBA. It was further argued that the appellant exercised

leniency by imposing a lesser sanction, termination with notice, instead of summary dismissal. As a result, the grievant was subjected to procedural fairness as provided for in **sections 41, 43, and 45** of the **Employment Act**, having been subjected to a fair hearing prior to dismissal.

24. The superior court in disputing the procedural fairness of the process undertaken by the appellant, argued inter alia:

***“18. this was a requirement in terms of the CBA, Clause A5(b)(iii) for an employee’s employment to be terminated. It is noteworthy that the grievant was not summarily dismissed. The letter dated 10th May 2013 clearly stated that the grievant’s employment was “terminated” for negligent conduct in performance of her duties and failure to adhere to the Bank’s laid down regulations and cash payment procedures contrary to Clause 12 of the terms and conditions of her employment.***

***19. Under Clause A5 of the CBA between the parties titled “Termination of Employment”, the parties have categorized under Clause A5 (a) offences for which an employee may be dismissed summarily for gross misconduct and or serious neglect. Clause A5 (b) on the other hand provides for offences for which an employee may be dismissed after warnings. The grievant was charged with negligence and her employment terminated with notice under Clause A5 (d) of the CBA. Termination with notice is a lesser punishment than dismissal after warning***

***under A5 (b) and summary dismissal  
under A5 (a).***

**20. It follows that this punishment is meted to an employee who is judged to have committed a lesser offence than those which appertains in category A5 (a) and A5 (d). As a matter of fact the grievant was charged with negligence under Clause A5(b) (iii) for failure to perform her work carefully and properly. Under this clause dismissal of an employee may only be meted:**

**i. After the employee has received two (2) warnings in writing and dismissal to be effected on the third (3rd) offence being committed; and**

**ii. The dismissal to be only justified if the employees has committed three of the said offences within a period of 12 months and warnings in writing have been given to the employee within such period of twelve (12) months immediately preceding the commission of the third offence in respect of two (2) such offences.**

**21. In terms of section 59(3) of the Labour Relations Act, 2007, "(3) the terms of the Collective Bargaining Agreement shall be incorporated into the contract of employment of every employee covered by the Collective Agreement". It is not in dispute that the CBA produced as exhibit 3 is valid and bound the parties to this suit in terms of section 59(1) of the LRA and the terms of the CBA by operation of law. Section 59(3) been incorporated into the contract of employment of the grievant.**

**22. In this regard, the respondent was bound to terminate the employment of the grievant with notice on a charge of negligence under Clause A5 (b) (iii) of**

***the CBA only after giving the grievant two previous warnings for offences committed within 12 months and***

*on commission of the third offence within 12 months. The grievant had served the respondent diligently and was a high performer in the words of RW1 for a period of 23 years. The grievant had in the entire period not a single warning letter.*

...  
24. *Accordingly, it is the court's considered view and finding that the respondent breached the contract of the grievant in not following the laid down disciplinary procedure in the CBA, and therefore her contract of employment. The claimant has therefore proved on a balance of probability and in terms of section 47(5) of the Employment Act, 2007 that the termination of the grievant's employment was not justified and therefore was wrongful and unfair. The action by the respondent violated section 45 of the Employment Act, 2007 therefore and the claimant is entitled to a remedy in terms of section 49 of the Act."*

25. It is common ground that the dismissal letter cited that the grievant was being terminated for negligent conduct which falls under **Clause A5(iii)** of the **CBA** which provides inter alia:

***" b) Dismissal after warning  
If after due investigation by the Management concerned the employee is considered guilty of any of the following acts, an employee may be dismissed after two (2) warnings in writing, with dismissal being effected on the third***

***offence being committed.***

- i. ...*
- ii. ...*

*iii. if he/she neglects to perform any work which it was his/her duty to have performed or if he/she carelessly or improperly performs any work which from its nature it was his duty to have performed carefully and properly.*

*iv. ...*

*Subject to dismissal being justified only if three (3) of the above offences have been committed within any period of twelve (12) months and warnings in writing have been given to the employee within such period of twelve (12) months immediately preceding the commission of the third offence in respect of two (2) such offences.*

*A copy of each warning letter and a copy of the letter of dismissal issued to any employee in accordance with the provisions of this section shall be sent by the employer to the Central Staff Committee of the Bank concerned for information.”*

26. The evidence on record demonstrates that the prescribed disciplinary procedure was not adhered to. Investigations established that the grievant failed to refer two transactions to BASIS despite the account being flagged. The grievant was thereafter subjected to a disciplinary hearing under the provisions of the **Employment Act**. Before the superior court, the appellant maintained that it was not obligated to issue a warning letter to the grievant.
27. That position is untenable in light of the applicable statutory and contractual framework. **Section 59(1)(b)** and **(3)** of the

**Labour Relations Act** provides that a registered Collective Bargaining Agreement (CBA) is binding on the parties and all unionisable employees, and that its terms are deemed to be incorporated into individual contracts of employment. This position has been expressly affirmed by this Court in **Kenya Airways Limited -vs- Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 403**, where the Court held that a CBA is binding on the parties and all unionisable employees, and that its terms are incorporated into the contract of employment and become enforceable upon registration.

28. In the present case, it is not in dispute that the grievant fell within the category of unionisable employees under Clause A1 and was therefore subject to the terms of the CBA. The CBA expressly provided for a structured disciplinary process in cases of negligence, including the issuance of prior warnings before termination. The appellant failed to adhere to that procedure, and instead sought to rely solely on compliance with the minimum procedural safeguards under the Employment Act.
29. However, as the Court of Appeal made clear in the **Kenya Airways** case, the terms of a CBA, once binding and incorporated into the contract of employment, are enforceable as such and cannot be disregarded. It follows that where a CBA prescribes a more elaborate disciplinary

process than the statutory minimum, the employer is bound to comply with it. This position is further reinforced by **section 26(2)** of the

**Employment Act**, which provides that where contractual terms are more favourable than statutory minimums, such terms prevail.

- 30.** Accordingly, we find no basis to fault the learned judge's conclusion that the appellant breached the grievant's contract of employment by failing to follow the disciplinary procedure prescribed in the CBA. In particular, under **Clause A5(b)(iii)**, the appellant was required to terminate the grievant's employment with notice on grounds of negligence only after issuing two prior warnings for offences committed within a 12- month period, and upon the commission of a third offence within the same period. Its failure to comply with that mandatory procedure rendered the termination procedurally unfair and in breach of contract, notwithstanding any compliance with the minimum requirements under the **Employment Act**.
- 31.** The Court of Appeal has consistently held that an award of compensation under **section 49(1)(c)** of the **Employment Act** is discretionary, must be guided by the factors set out under **section 49(4)**, and must be fair and proportionate to the circumstances of each case. In **Kenfreight (EA) Limited -vs- Benson K. Nguti [2019] eKLR**, this Court emphasised that compensation is not automatic upon a finding of unfair termination and that the trial court must strictly apply the statutory criteria in determining the

quantum of damages. The

Court further underscored that the maximum award of twelve

(12) months' gross salary is reserved for the most exceptional

circumstances and must be justified by evidence.

32. Similarly, the appellate court's intervention is warranted where the trial court fails to properly evaluate the statutory factors or awards excessive compensation. In ***Kenya Commercial Bank Limited -vs- Mwita Thomas Nyangi [2019] eKLR***, the Court interfered with the trial court's award on the basis that compensation must be proportionate and grounded in the evidence and statutory considerations, reaffirming that Section 49 awards are not punitive but compensatory in nature.
33. In the present case, while the termination was found to be procedurally unfair for failure to comply with the CBA disciplinary procedure, it is not disputed that the grievant failed to refer two transactions to BASIS despite the account being flagged. This conduct amounts to contributory negligence within the meaning of **section 49(4)(k)** of the Employment Act and is a relevant factor in assessing the quantum of compensation.
34. Guided by the principles set out in ***Kenfreight (EA) Limited*** (supra) and ***Mwita Thomas Nyangi*** (supra), it is evident that the award of twelve (12) months' gross salary

was excessive and failed to adequately consider the grievant's contributory conduct and the need for proportionality. In the circumstances,

an award of four (4) months' gross salary is fair, reasonable, and sufficient to compensate for the procedural lapse while properly reflecting the employee's contribution to the termination.

35. The appeal partially succeeds with respect to the compensatory award. We accordingly set aside the award by the trial court of twelve (12) months' salary and substitute there for an award of four (4) months' salary. The appellant shall have  $\frac{1}{4}$  costs of the appeal. It is so ordered.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April 2026.**

**S. GATEMBU KAIRU FCIArb, C.Arb.**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**Signed**

**DEPUTY**  
**REGISTRAR.**