IN THE COURT OF APPEAL
AT ELDORET

(CORAM: MATIVO, GACHOKA & KORIR,

JJ.A.) CIVIL APPEAL NO. 96 OF 2020

BETWEEN

DANIEL LELEI.....APPELLANT

AND

KENYA WOMEN MICRO-FINANCE BANK LTD.....RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 19th September 2019

in

ELRC Cause No. 24 of 2017)
****

JUDGMENT OF THE COURT

1. The appellant, Daniel Lelei, is dissatisfied with the judgment of the Employment and Labour Relations Court (ELRC) (Abuodha, J.) delivered on 19th September 2019, through which the learned Judge dismissed the appellant's claim for unfair termination of employment while ordering the respondent, Kenya Women Micro-Finance Bank Ltd, to pay the appellant's terminal dues as per the termination letter upon clearance. The appellant is now before us raising seven grounds of appeal which we condense to four as follows: whether the trial court erred in failing to appreciate that

the

respondent adduced no evidence at trial thus leaving the appellant's evidence uncontroverted; whether the trial court's finding that the termination was substantively justified was based on unproduced and untested documents; whether the trial court erred in failing to find that the termination was procedurally unfair for want of adequate notice and time to prepare for the disciplinary hearing; and whether the appellant is entitled to the remedies sought.

2. In summary, the dispute giving rise to this appeal arose from an employment contract under which the appellant was employed by the respondent on 28th January 2013 as a Business Development Officer before rising through the ranks and being confirmed as a Unit Manager on 30th September 2015, earning a consolidated salary of Kshs. 44,000 per month. His employment was terminated by a letter dated 6th December 2016 for alleged negligence in the discharge of his duties. The termination process commenced with a letter to show cause dated 6th September 2016, followed by a disciplinary hearing on 20th September 2016. Aggrieved by what transpired, the appellant filed a Memorandum of Claim dated 13th April 2017 seeking various remedies, including compensation for

unfair termination, one month’s salary in lieu of notice, unpaid

house allowance, overtime dues, leave pay, gratuity, and refund of Uaminifu SACCO savings and share capital. The total claim was for Kshs. 3,860,598.

3. The respondent filed a Memorandum of Response dated 31st August 2017 denying liability and asserting that the termination was lawful and procedurally fair. The matter proceeded to hearing where the appellant testified and closed his case. Despite the parties taking the defence hearing date by consent, there was no show for the respondent on the scheduled hearing date. The respondent did not, therefore, call any witness or produce any of its listed documents as exhibits.

4. In its judgment, the trial court dismissed the appellant's claim, holding that the allegations against him were serious, that he had conceded to flouting the respondent's policies, and that the termination was therefore justified. The court further rejected the claims for house allowance and overtime on the ground that the appellant was paid a consolidated salary and was part of management. However, the learned Judge ordered the respondent to pay the appellant his terminal dues as set out in the dismissal letter.

5. When the appeal came up for hearing, learned counsel Mr. Odiya appeared for the appellant, while there was no appearance for the respondent despite service of the hearing notice. The respondent having not filed submissions, counsel for the appellant opted to rely on the filed written submissions.

6. Through the submissions dated 19th February 2026, learned counsel, Mr. Odiya, argued that the respondent's pleadings remained mere allegations without probative value, and that the trial court erred by relying on the minutes of the disciplinary committee, which were never produced as exhibits nor tested through cross- examination. Adverting to the holding of the Court in **Edward Muriga through Stanley Muriga vs. Nathaniel D. Schuler, Civil Appeal No. 23 of 1997 (unreported)** that allegations in a defence does not amount to evidence and remain forever allegations, counsel submitted that where a defendant fails to call evidence, the plaintiff's evidence remains uncontroverted and must be believed unless it is inherently incredible.

7. Turning to the question as to whether the termination was procedurally fair, counsel pointed out that the appellant was served with the invitation to attend the disciplinary hearing on the

morning

of 20th September 2016 and was required to attend that day. He argued that this violated the cardinal principle that an employee must be given reasonable time to prepare a defence. He relied on the decision of the Employment and Labour Relations Court in **Patrick Abuya vs. Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR**, to urge that procedural fairness requires not only advance notice of the charges but also sufficient time for an employee to prepare psychologically, as the employee is under the threat of losing his livelihood.

8. Regarding substantive fairness, counsel argued that the respondent failed to discharge the burden of proving valid reasons for termination as required under **section 43** of the **Employment Act, 2007**. He cited **Charles Maina Munyua vs. Victory Construction Limited [2013] eKLR** to submit that an employer is obliged to produce records to rebut an employee's claim, and failure to do so attracts an adverse presumption in favour of the employee.

9. As already observed, the respondent did not file any written submissions in this appeal and the appeal therefore proceeded

unopposed.

10. This is a first appeal, and it is our duty, in addition to considering submissions herein, to analyse, to examine and re-assess the evidence on record and reach our own independent conclusion in the matter. In doing so, we bear in mind the fact that unlike the trial court we did not have the advantage of seeing and hearing the sole witness who testified. The role of a first appellate court was expressed by the Court in **Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR),** thus:

> ***"Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re- appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs Attorney General & 8 Others [2013] eKLR, where it was stated: "[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter."***

11. In line with the foregoing mandate, we have addressed our minds to the record of appeal, the submissions by counsel for the appellant, and the applicable law and legal principles. In our view, the question that arises for our determination in this appeal is whether the appellant's termination was fair and in compliance with the law. Any other issue is an appendage to the identified

substantive question.

12. We start by stating that we do not agree with the appellant's submission that the failure by the respondent to call witnesses gave him a walkover. Our view is that the correct position of the law where a respondent or defendant has filed a response but does not call witnesses is as was succinctly stated by the Court in **Charterhouse Bank Ltd (Under Statutory Management) vs. Kamau [2016] KECA 153 (KLR),** thus:

> ***"The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities."***

13. It is not disputed that the record shows that on 29th March 2019, the parties by consent listed the matter for hearing of the respondent's case on 10th April 2019. However, on the hearing

date, counsel holding brief for the appellant appeared, but there was no

show by counsel for the respondent. At the request of the appellant's counsel, the trial court ordered the respondent's case closed and directed the filing of written submissions. It is therefore clear that the respondent did not call any witness, and none of its documents made it to the court record. All that the respondent could rely on were the filed pleadings with no supporting evidence. On the other hand, the appellant testified and was cross-examined. The question, therefore, is whether the appellant proved his case to the required standard. We will answer this question shortly.

14. The appellant, at paragraph 6 of his Memorandum of Claim, particularized the unlawfulness of his termination as follows:

> ***"(a) The claimant trade union was not informed of the intention to declare the claimant redundant.***
> ***(b) No overtime dues were paid.***
> ***(c) That due procedure was not followed.***
> ***(d) Unpaid public holidays.***
> ***(e) No leave pay was given.***
> ***(f) No one month's salary in lieu of notice was paid.***
> ***(g) The required severance pay was not paid.***
> ***(h) Underpayment of wages.***
> ***(i) No house allowance was paid.***
> ***(j) Breach of contract."***

15. Earlier at paragraph 5 the appellant had averred that:

“The claimant avers that that the respondent without
compliance with section 40 of the Employment Act No.

11 of 2007 proceeded to purport to terminate his employment."

16. The respondent filed a detailed rebuttal to the claim and specifically at paragraphs 23 and 24 averred that:

"23. The respondent avers that the termination was lawful since:

a) Due procedure was followed before the claimant was issued with the termination letter. In compliance with section 41 of the Employment Act, 2007 the claimant was informed about the allegations levelled against him.

b) He was taken through disciplinary proceedings where he was given a chance to respond to the allegations.

c) The respondent carried further investigations to affirm that the offence levelled against the respondent was justified.

d) The respondent gave the claimant room to appeal the respondent's decision to terminate his employment. The appeal and the claimant's response were considered.

e) The claimant was given a termination letter giving reasons why his employment was terminated.

f) Finally, the respondent computed the claimant's terminal benefits which he refused to claim.

24. The claim under paragraph 6 of the Memorandum of Claim is denied for reasons that:

a) The claimant was not declared redundant and was terminated and the respondent has no recognition agreement with the claimant's union (if any) and the claimant is put to strict proof thereof.

b) The claimant was never requested to work overtime and as a manager he was not entitled to claim for overtime. The claimant is put to strict proof thereof.

c) The claimant was given a valid reason for the termination of his employment and due procedure was followed.

d) The respondent does not allow employees to work during public holidays. The claimant's employment contract clause 10 on page 13 of the memorandum of claim affirms this. The claimant is put to strict proof thereof.

e) The respondent computed the balance of the claimant's leave pay and 3 months' in lieu of notice to the claimant's final terminal benefits. The claimant has failed to clear and collect the same.

f) The claimant is not entitled to severance pay because he was not declared redundant.

g) The claimant was never under paid and is put to strict proof thereof.

h) The salary issued to the claimant was a consolidated salary. Therefore, as per section 31 (2), the salary issued to the claimant monthly factored in his housing allowance. The claimant was aware of this fact. (See page 21 of the claimant's memorandum of claim).

i) The respondent did not breach the contract of employment between the claimant and itself and the claimant is put to strict proof thereof. The respondent avers that it is the claimant who breached the terms of his contract, resulting to his termination."

17. It is therefore clear from the pleadings that the appellant's claim was met head-on by the respondent, and he was therefore

required to prove his claim by adducing evidence. Despite his spirited

submission before us about inadequate notice prior to the disciplinary hearing, the appellant in his Memorandum of Claim raised no such issue, nor did he do so in his witness statement filed on 13th April 2017. The record at pages 33 to 39 also shows that the appellant never raised the issue of insufficient notice in his testimony before the trial court. The learned Judge cannot therefore be faulted for not considering an issue that was not placed before him by the parties. Likewise, we have no authority to address an issue raised for the first time before us by way of written submissions. The only logical conclusion in the circumstances is that the appellant was given adequate notice before the hearing of the charges against him.

18. We indeed appreciate the importance of due process in disciplinary proceedings, but in the case before us, there was no scintilla of evidence adduced by the appellant to show that there was a misstep in the process of his termination. Although he faulted the learned Judge for relying on documents filed but not produced by the respondent, the record shows that the key documents relied on by the respondent, being the letter dated 6th September 2016, the minutes of the disciplinary committee

meeting of 20th September

2016, and the termination letter dated 6th December 2016, were all produced by the appellant in support of his claim. The documents were therefore part and parcel of the record, and he cannot run away from them. Those documents affirm the respondent's adherence to due process. They show that the appellant was given notice of the charges, heard, and even given an opportunity to appeal before being terminated.

19. As to whether the termination was justified, we find no error in the

learned Judge's conclusion that:

> ***"The respondent is a financial institution dealing with customers' deposits. Loss of money is therefore regarded serious as it has a high potential for eroding confidence in the institution. The allegations against the Claimant were serious and coupled by his concession that he flouted the respondent's policies and procedures of credit management in the Court's view, justifies the termination of his service."***

20. The record is clear that the appellant indeed admitted poor judgment in the execution of his managerial duties, leading to the loss of funds by the respondent. He cannot, therefore, be heard to say that there was no justification for his dismissal from the respondent's service. We must therefore reach the same conclusion with the learned Judge, which we hereby do, that

the appellant’s

claim was without merit. Consequently, the appellant's appeal fails and is dismissed. The respondent having not participated in the appeal, we make no order as to costs.

Dated and delivered at Nakuru this 8th day of May, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.
Signed
DEPUTY REGISTRAR