



**Wetangula v Co-operative Bank of Kenya Limited (Civil Appeal
154 of 2019) [2025] KECA 111 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 111 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 154 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JANUARY 24, 2025**

BETWEEN

MBAGGA WETANGULA APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of the Employment and Labour Relations
Court at Kisumu (M. Onyango, J.) dated 2nd November 2017 in ELRC Cause No. 325 of 2015)*

JUDGMENT

1. This appeal arises from an industrial dispute between the appellant, Mbagga Wetangula, and the respondent herein, Co-operative Bank of Kenya Limited, who was his former employer. The appellant had sued the respondent seeking declarations that his termination was unlawful, illegal and unfair; an order for the respondent to pay him exemplary damages; a declaration that he is entitled to his terminal dues as well as one-month salary in lieu of notice; and an order that he be paid Kshs.197, 829/- being salary not paid.
2. In response to the appellant's claim the respondent had filed a defence and counter claim in which he denied the appellant's claim maintaining that his dismissal was lawful and fair; and that he is not owed any monies. The respondent filed a defence and counter claim in which it denied the appellant's claim and counter claimed a sum of Kshs.1,814,460.45 as due from the appellant in regard to lawful advances made to him by the respondent, by way of house loan, personal loan and credit card balance.
3. During the plenary hearing, the appellant testified in support of his claim, while the respondent called two witnesses: its Security Manager, Duncan Macharia, and its Employee's Relations Manager, Simon Mureithi Maina.
4. Upon hearing the evidence and the submissions by both parties, the learned Judge delivered a judgment in which she found that the appellant was subjected to a fair disciplinary procedure, before his summary



- dismissal because he was first suspended and issued with a notice to show cause, which he responded to. Thereafter, he attended two disciplinary hearings before he was dismissed. The reasons for his dismissal were the same reasons in regard to which he had been suspended and served with a notice to show cause, and these were the fraudulent Mpesa transactions subject of a criminal case that was initiated against him.
5. On substantive fairness, the learned Judge found that there was sufficient and justifiable cause, for the respondent to take disciplinary action against the appellant, because there was loss of money through fraudulent withdrawal of money through Mpesa transactions, in regard to which, the appellant was solely in-charge; and this resulted in the appellant being charged before the criminal court. That although he was acquitted, an acquittal on a criminal charge is not an automatic release from civil liability, as the burden of proof is much higher in a criminal trial.
 6. The learned Judge found that the appellant was not entitled to any notice, his termination having been fair; and that he did not prove the amount of Kshs.197, 820/- which he claimed. Nor was there any justification for his prayer for exemplary damages.
 7. As regards the counter claim, the learned Judge found that the appellant admitted owing the respondent the amount of Kshs.1,814,460.45 and, therefore, entered judgment in favour of the respondent on the counter claim.
 8. The appellant, being aggrieved by that judgment, has filed an appeal in which he has raised six grounds faulting the learned Judge for erring in law and fact by:
 - i. finding that the appellant was subjected to a fair disciplinary procedure contrary to the evidence that was tendered;
 - ii. finding that the appellant admitted that the respondent lost money through fraudulent withdrawals when this (sic) was no such admission by the appellant hence this was no valid reason for the termination of the appellant's contract;
 - iii. finding that the appellant was duly and formerly notified of the allegations against him when he was not;
 - iv. finding that the appellant was duly notified of the disciplinary proceedings;
 - v. not awarding the appellant exemplary damages; and
 - vi. dismissing the appellant's claim.
 9. In support of his appeal the appellant filed written submissions that were duly prepared by his advocate, Ms. Mukisu, who also appeared for him during the plenary hearing, and fully relied on the written submissions. The appellant submitted that the respondent, in summarily terminating his employment on account of misconduct, did not comply with the mandatory procedural requirements of Section 41 of the *Employment Act*. That section provides that before an employer can summarily dismiss an employee, the employer must inform the employee of the reasons for which the employer is considering termination, and the employee or a person appointed on his behalf must be given a chance to make presentations on those grounds. The appellant relied on Janet Nyandiko -vs- Kenya Commercial Bank Limited [2017] eKLR, in which the Court of Appeal summarized the mandatory procedure of terminating an employee's employment.
 10. The appellant contended that he was not given a proper notice, nor was he accorded sufficient time to prepare for the disciplinary proceedings. The first notice was issued on 26th January, summoning him for disciplinary proceedings on 27th January. And the second notice was issued via email on



16th February, summoning him to attend the disciplinary proceedings on the following day at the respondent's Nairobi headquarters.

11. In addition, the notice did not explain in sufficient detail, the grounds upon which the appellant was being summoned for disciplinary proceedings, nor was the appellant informed of his right to be accompanied by another employee or a shop floor union representative. The appellant argued that there were serious flaws in the procedure undertaken by the respondent, which flaws were overlooked by the learned Judge.
12. On whether the termination by the respondent was lawful and fair, the appellant maintained that the respondent failed to follow due process as it did not serve him with sufficient notice, nor did it accord him a fair opportunity to defend himself or respond to the allegations levelled against him. The appellant submitted that the burden was upon the employer to establish that the termination was justified, and this was not done as there was failure to prove that the reasons for the termination were valid or that the reasons were fair or that fair procedure was adopted as provided under Section 47(5) and Section 45(1) of the *Employment Act*. The appellant maintained that the termination of his employment was unlawful and unfair, and in contravention of the law.
13. On exemplary damages, the appellant submitted that exemplary damages are damages which are punitive in nature, and generally intended to teach the defendant that tort does not pay, and that these damages are awarded in addition to compensatory damages. The appellant cited Halsbury's Laws of England at paragraph 243, where it is indicated that:

“Exemplary damages should be awarded only in cases within the following categories:

- i. oppressive, arbitrary or unconstitutional action by servants of government;
- ii. conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- iii. cases in which the payment of exemplary damages is authorized by statute.”

14. The respondent argued that based on the claim and report made by the respondents' servants, he was arrested, arraigned in court, and tried without proper investigations having been carried out, and this exposed him to ridicule, emotional torture and embarrassment. He also suffered unwarranted harassment and inhumane treatment by being charged on trumped up criminal charges, so as to push him out of employment, and this called for exemplary damages. The appellant relied on Patrick Njuguna Kariuki -vs- Del Monte (K) Ltd, Nairobi Industrial Cause No. 953 of 2011, where a Judge of the Employment and Labour Relations Court, awarded Kshs.5 million in similar circumstances. The appellant reiterated that his termination was unfair and unlawful as due procedure was not followed. He therefore urged the Court to allow his appeal, set aside the judgment of the ELRC and make appropriate orders in regard to his claim.
15. This being a first appeal, this Court is mandated under Rule 31(1)(a) of the Court of Appeal Rules, 2022, to reappraise the evidence and draw inferences of fact. In Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212, this Court explained that mandate as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”



16. Having considered the record of appeal, the rival submissions by the parties, the authorities relied on and the law, the main issue that we discern for our determination is whether the trial court was justified in finding that the appellant's termination of employment was substantively lawful and procedurally fair; and whether the appellant is entitled to exemplary damages.
17. In regard to substantive justification for termination of employment, Section 44 of the *Employment Act* provides that an employee may be dismissed summarily where he has fundamentally breached his obligations arising under the contract of service. That section states as follows:
 1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.
 2. Subject to the provisions of this section no employer has a right to terminate contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
 3. Subject to provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.
 4. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
 - a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
 - b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
 - c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
 - d. an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
 - e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
 - f. On the lawful 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 days either released on bail or on bond or otherwise lawfully set at liberty; or
 - g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.



18. Section 43 of the *Employment Act* places an obligation on the employer to prove the reason or reasons for the termination of an employee's employment, and where the employer fails to do so, the termination is deemed to be unfair within the meaning of Section 45 of the *Employment Act* subsection (2) of which, states inter alia:

“45

- (1) ...
 1. A termination of employment by an employer is unfair if the employer fails to prove-
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility or;
 - ii. based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.
- (3) ...
 4. A termination of employment shall be unfair for the purposes of this part where-
 - a. The termination is one of the reasons specified in Section 46; or
 - b. It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

19. In determining the procedural fairness in the dismissal process, the Court should consider whether Section 41 of the *Employment Act* which provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee has been complied with. The said section provides for notification and hearing before termination, on grounds of misconduct in the following way:

“41

- (1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee



under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

20. The effect of all these provisions, is that the respondent could only lawfully summarily terminate the appellant’s employment, if it was established that the appellant was guilty of gross misconduct as defined under section 44 of the *Employment Act*; and the respondent had followed due process in taking the action. The proper procedure includes the respondent explaining to the appellant the reasons for which it is considering his termination; giving the appellant an opportunity to have another employee or a shop floor union representative present during the explanation; and hearing and considering any representations made by the appellant.
21. In *Pius Machafu Isindu -vs- Lavington Security Guard Ltd* [2017] eKLR, this Court (differently constituted) had this to say on the responsibility of an employer in cases of summary dismissal:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules.”
22. From the letter of dismissal dated 6th March, 2014, which was addressed to the appellant by the respondent’s Human Resource Director, the appellant was summarily dismissed by the respondent for carrying out five fraudulent Mpesa transfers, which occasioned the respondent’s loss of Kshs.845,922/- contrary to the respondent’s operating manual. The burden of proof being upon the appellant to prove that the summary dismissal was lawful, the question is whether the bank established that the appellant made fraudulent Mpesa transfers of Kshs.845,922/-, and whether in dealing with this matter, the respondent followed the procedure provided under the *Employment Act*.
23. Our perusal of the record of proceedings reveals that the appellant was the Mpesa teller, manning the counter at the material time. He concedes that he received a call from head office instructing him to put off the Mpesa phone line but contends that he did not do so. Although he denied that there were any fraudulent Mpesa transactions, the respondent testified through its security manager, one Duncan Macharia who explained that on the material day there were five Mpesa transactions which resulted in a loss of Kshs.845,922/-. The loss arose because although the money was given by the Mpesa cashier to various agents as float, the agents did not deposit any money with the bank. The appellant simply denied that there were any fraudulent Mpesa transactions. But this cannot hold in light of the clear evidence from the respondent.
24. The respondent also called its Employees Relations Manager, Simon Mureithi Maina, who explained that the appellant was suspended in accordance with the collective bargaining agreement (CBA), and that subsequently a show cause letter was issued to him.

In his response to the show cause letter, the appellant confirmed having been the Mpesa teller on the material day, though he denied that there were any fraudulent transactions. The appellant was called for a disciplinary hearing on 27th January, 2014, during which it was found that the fraudulent transfers were done on the material day between 14:41 and 14:52 from a phone which was being kept by the appellant alone. It was also noted that the appellant deleted messages on the phone, relating to the



fraudulent transactions, and that he misled the person who was acting for the operations manager to balance his cash. It was therefore recommended that the appellant be summarily dismissed from employment. The appellant was again summoned for a further disciplinary hearing on 27th February, 2014, during which he confirmed being aware of an email that had been earlier sent to all tellers cautioning them against taking instructions from persons alleging to be calling from Safaricom or head office. The panel therefore confirmed the recommendation that the appellant be summarily dismissed. Consequently, the respondent dismissed the appellant through the letter dated 6th March, 2014.

25. We are satisfied that the respondent established that there was a valid reason for the dismissal of the appellant. Although he was unsuccessfully tried in a criminal case for the fraudulent transactions, we are in agreement with the trial Judge that the standard of proof in a criminal trial is much higher than that in a civil trial, and the acquittal of the appellant in the criminal trial does not therefore, exonerate, him in a civil trial.
26. In regard to the disciplinary process, the appellant's complaint appears to be that he was not given sufficient notice of the disciplinary hearing nor was he told the reason for the hearing or given an opportunity to have someone accompany him. The evidence is clear that communication was sent to the appellant regarding the disciplinary hearings. The appellant had received a notice to show cause as to why he should not be dismissed because of fraudulent Mpesa transfers of Kshs.845,922/-. He had been suspended pending investigations into the loss. He cannot therefore be heard to say that he did not know the subject of the disciplinary hearing. During the disciplinary hearing the charges specifically related to the fraudulent Mpesa transfers. The appellant does not appear to have made any requests to be given more time for the disciplinary hearing, or to have someone attend with him. In the circumstances, we are satisfied that the process undertaken by the respondent was procedurally fair.
27. We find that the appellant's summary dismissal was lawful; and that there was procedural fairness in the process leading to his dismissal. Therefore, the appellant's claims regarding exemplary damages was properly dismissed.
28. The upshot of the above is that we uphold the judgment of the learned Judge on both the main claim and the counter claim, and dismiss this appeal in its entirety. Given the nature of the dispute we do not find it appropriate to award any costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

