



REPUBLIC OF KENYA



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**Consolidated Bank of Kenya Limited v Makathimo (Civil Appeal
114 of 2021) [2025] KECA 356 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 356 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 114 OF 2021
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED APPELLANT

AND

LYDIA KAGURI MAKATHIMO RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Meru (Nzioki Wa Makau, J.) delivered on 6th February, 2019 in E.L.R.C Cause No.24 of 2017)

JUDGMENT

1. The respondent, Lydia Kaguri Makathimo, was employed by the appellant, Consolidated Bank of Kenya Limited, by letter of employment dated 29th October, 2007 as a clerk on terms and conditions set out in that letter. One of those terms and conditions, which we set out here because of the central role it will play in this judgment was to the effect:
 - “5. You will be expected to live on your salary, and if it becomes known that you are borrowing from unauthorised sources or lending money, you will be liable for dismissal from the Bank’s service.”
2. The respondent worked for the appellant at its Maua Branch and by the time issues arose regarding her performance of duties she had risen to the position of Customer Service Officer whose duties included being one of the two custodians of the banks vaults in the strong room. She held one key to the vault and the other key was held by her colleague in a system where the vault could only be operated by the two of them working simultaneously together. By a letter dated 5th May, 2017 headed “Show Cause” the appellant informed the respondent that a sum of Kshs.641,500 had been found missing at the said



branch on diverse dates between 6th April, 2017 and 13th April, 2017. She had been questioned about the missing cash and had denied responsibility. The letter stated in part:

“... you denied responsibility of the missing money yet you are a joint vault custodian with the Service Quality Manager. As a vault custodian, you are required to count the cash being deposited into the vault in due presence of the other vault custodian and resolve discrepancies of any with the concerned teller promptly. However, in your case, you did not count the cash being deposited into the vault by the tellers but rather you just signed the cash register without confirming the amount deposited to the vault, which is in breach of cash management procedures...”

3. As a result of loss of that cash the respondent was required as the vault custodian to explain how the loss happened and show cause why disciplinary action should not be taken against her for “negligence of your duties leading to the breaching of the cash deposit to vault procedures...” She responded by her letter of 10th May, 2017 stating that Maua Branch had only three graduate clerks and she had to relieve when any of them were off duty; that between 13th March, 2017 to 22nd March, 2017 she was manning the customer service desk as the relevant officer was on leave.

4. During that period when she took charge of the customer service desk:

“I held the vault keys as the second custodian...”

5. She explained that during that period counting of cash paid in to the vault by tellers was done solely by the Service Control Manager, Moses Ngelel. She regretted that cash management procedures had been flouted stating that it was beyond her control as she was in charge of customer service desk during that period. She felt that she did not deserve disciplinary action to be taken against her in those circumstances.

6. The matter did not end there.

7. By letter dated 10th May, 2017 the respondent was informed that her explanation on the missing cash had been found unacceptable. She was suspended from duty with effect from 12th May, 2017 to allow for investigations and she was to be informed of the way forward once investigations were completed.

8. Events took a further turn when on 6th July, 2017 the respondent was informed in another “Show Cause” letter that the appellant had received a letter from Joseph Koome, a customer at the said branch, to the effect that the respondent had on 1st March, 2016 debited that customer’s account No. 10101301000514 with Kshs.20,000 without authority “... in breach of the Bank’s operations procedures and is tantamount to stealing from a customer.” The customer (Koome) had further complained that the respondent had him arrested and charged with the offence of obtaining money by false pretense arising from an agreement made by the respondent with one Geoffrey Kimathi Mbiti dated 5th October, 2015 where the respondent had lent the said person Kshs.300,000 and that, by so lending money:

“...You acted in conflict of the Bank’s interest which is in contravention of the Bank’s code of business conduct...”

9. She was required to show cause why disciplinary action should not be taken against her for contravening the appellant’s code of business conduct by engaging in business which was in direct competition with the appellant and for unprocedurally debiting a customer’s account.



10. In her response by letter dated 11th July, 2017 the respondent explained that the debit from the customer's account had been done by the customer himself; that the customer (Koome) was her long standing family friend who had approached her to repair a motor vehicle owned by Geoffrey Kimathi Mbiti; that she was not in the business of lending money. She accused Koome of being a malicious person out to defraud her.
11. That explanation did not satisfy the appellant. The appellant by letter dated 14th July, 2017 invited the respondent to a disciplinary hearing to be held on 18th July, 2017 following the show cause letter dated 8th July, 2017 where she was informed that she had contravened the appellant's code of business conduct by engaging in business in competition with the appellant and for unprocedurally debiting a customer's account. She was informed that she had a right to be accompanied at the hearing by a work colleague of her choice.
12. A disciplinary hearing was held as scheduled on 18th July, 2017 where the respondent was asked to explain circumstances where the customer's account had been debited Kshs.20,000 and why she had lent money at interest. After the hearing the Committee found that the respondent had lent money at interest to Geoffrey Kimathi Mbiti and had withdrawn Kshs.20,000 from a customer's account unprocedurally. The Committee recommended that the respondent be dismissed from employment.
13. An earlier disciplinary hearing had been held on 9th June, 2017, in respect of the missing cash from the vault where Kshs.641,500 had been found missing. This meeting was attended by the respondent and her colleague Moses Ngelei. The Committee considered the operations of Maua branch where the respondent and Moses Ngelei were the joint holders of the keys to the vault. It was found that both had been negligent in performance of their duties. The Committee recommended that Moses Ngelei be dismissed from service. In respect of the respondent the Committee found that it could not make a decision in view of the complaint where after disciplinary hearing on 18th July, 2017 it was recommended that the respondent's services be terminated. The respondent's services were terminated by letter dated 7th August, 2017.
14. Those are the events that led to the suit at the Employment and Labour Relations Court (ELRC) at Meru. It was contended that the respondent had been employed by the appellant and rose through the ranks to the position of Customer Service Officer earning a salary of Kshs.153,536 as at 7th August, 2017 when her services were terminated; the show cause letters we have summarized were referred to. It was stated that the respondent had attended disciplinary hearings; that termination of employment by the appellant was malicious and that as a result the respondent had suffered loss and damage – salary for years shortfall to retirement Kshs.36,848,640; 12 months' salary as compensation Kshs.1,842,432; unpaid ½ salary during the period under suspension Kshs.230,304. The respondent prayed that it be declared that she had suffered unfair dismissal; that reinstatement to the previous position be ordered; maximum compensation for 12 months' salary be awarded; the court give general damages for wrongful and/or unlawful dismissal and the respondent be awarded costs of the suit.
15. The appellant delivered a Response to the Claim where it denied that the termination of the respondent from employment was unlawful; the show cause letters and disciplinary process was admitted.
16. In Reply to the Response to the Claim the respondent denied the averments in Response to Claim.
17. The suit was heard by Nzioki wa Makau, J. who in a judgment delivered on 6th February, 2019 entered judgment for the respondent for compensation in terms of section 49(1) of the Employment Act or maximum 12 months Kshs.1,842,432 and unpaid half salary for 3 months on suspension Kshs.230,904 and costs of the suit.



18. The appellant filed a notice of appeal against the whole of that judgment.
19. There are 4 grounds of appeal in Memorandum of Appeal drawn for the appellant by its lawyers M/ s C.B. Mwongela & Company Advocates. The appellant states in the first ground of appeal that the Judge erred in law by failing to take cognizance that the appellant had a right to a fair hearing and a right to adduce evidence where substantial injustice was likely to occur; next that the Judge erred in law in finding that the respondent's employment with the appellant was unfairly terminated; that the Judge erred in law in failing to appreciate that the respondent's employment was substantially terminated "... in that the reasons for termination were within the purview of section 41 of the [Employment Act 2007](#)." The appellant states in the final ground of appeal that the Judge erred in law in finding and entering judgment in favour of the respondent as prayed in Statement of Claim. We are asked to allow the appeal, set aside the judgment of ELRC, make an order that the respondent's employment was substantially and procedurally terminated hence the respondent is not entitled to any award in terms of compensation or dismissal.
20. When the appeal came up for hearing before us on 5th November, 2024 the appellant was represented by learned counsel Mr. Mwongela while the respondent was represented by learnedcounsel Mrs. Kariuki. Both sides had filed written submissionswhich they fully adopted without finding it necessary to highlight any part of them.
21. In written submissions the appellant states that its Article 50 (2)(K) of the [Constitution of Kenya, 2010](#) rights were violated when the trial court proceeded with a hearing on 8th November, 2018 without considering the appellant's application seeking leave to file witness statements and documents in compliance with Order 11 Civil Procedure Rules, that the documents to be produced were crucial to the case; that there was delay in filing those documents even after leave had been granted due to an oversight in the lawyers chambers; that mistake of counsel should not be visited on the client. The case of [Martha Wangari Karua vs. Independent and Boundaries Commission & 3 Others \[2018\] eKLR](#) is cited for the proposition:
- “The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
22. The appellant refers to sections 43 and 45 of the [Employment Act](#) and submits that termination of the respondent's employment was not wrongful or unfair. The case of [Package Insurance Brokers Limited vs. Simon Gitau Gichuru \[2019\] eKLR](#) is cited in support of the submission that there was substantive and procedural fairness in the way the respondent's services were terminated as she was given sufficient reasons for termination.
23. The respondent does not agree. She submits on alleged breach of the appellant's constitutional rights that the appellant was granted various opportunities to comply with Order 11 Civil Procedure Rules but failed to do so; that the appellant did not file documents and witness statements with Response to Claim as required in law. It is submitted that Article 159 of [the Constitution](#) and sections 1A and 1B of the [Civil Procedure Act](#) are not meant to aid parties to bend, overthrow and/or destruct rules of procedure and the case of [Nicholas Kiptoo Arap Salat vs. Independent Electoral and Boundaries Commission & 7 Others \[2017\] eKLR](#) is cited in support of that proposition. It is submitted on the issue of termination that the same was not only procedurally unfair but that it was also substantially and unlawful. It is submitted that there was breach of rights donated by sections 43 and 45 of the [Employment Act](#); that the reasons given by the appellant for termination of the respondent's employment did not meet the threshold of those sections of the [Employment Act](#). We are asked to dismiss the appeal.



24. We have considered the whole record, submissions made by both sides, cases cited and the law and this is how we determine this appeal.
25. On the complaint by the appellant that its Article 50 of *the Constitution* rights and other rights were violated we agree with the respondent that this complaint has no merit. Firstly, the appellant was required by provisions of Civil Procedure Rules to attach witness statement(s) and documents to its Response to Claim which it did not do. Secondly the suit before ELRC went through a case management process where the appellant was given adequate opportunity to file witness statements and other supporting documents which it failed to do. Thirdly, the record of appeal shows that the appellant was given various opportunities, upon application, to file those documents which it failed to do. Fourthly, there is a ruling on page 274 of the record of appeal where the trial Judge gave reasons why he would not allow any other opportunity to the appellant to file documents or witness statements. That ruling was not appealed at all and the issue cannot be re-visited in this appeal. That ground of appeal fails and is dismissed.
26. The other grounds of appeal are related and can be taken together. They relate to whether the termination of the respondent's employment was justified and whether the judgment of the ELRC should be upheld.
27. Section 41 of the *Employment Act*, 2007 provides as follows on "notification and hearing before termination on grounds of misconduct.":
- “(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.”
28. The appellant's case was that the respondent abdicated her duties as a joint operator of the vault where cash was stored in the strong room. The operating procedure was that the vault could only be operated by two employees of the appellant each of who held a key to the vault. The two were required to both be present and use their keys to open and operate the vault which could not be operated by one without the other. The respondent with her colleague Moses Ngelei were the two officers assigned that role and each held a key for operating the vault. When asked in "show Cause" to explain why she had not performed her duties as required by the appellant's operating procedures in regard to the strong room and the vault this is what the respondent stated in her letter dated 10th March, 2017:
- “... I would like to state that on the 13.3.2017 to 22.03.2017 I was manning the customer care desk and I also held the vault keys as the second custodian.
- During that period counting of cash paid in to vault by tellers was done solely by the Service Quality Manager, Moses Ngelei as it wouldn't be practically possible to count the cash in dual presence and manage the customer service desk at the same time. In the branch there



is high liquidity and recounting the cash collected daily would not be possible and close the vault within the stipulated timelines.

I would also like to state that it's regretful that the cash management procedures were floated (sic) and the same could have amounted the vault cash shortages. It was beyond my control and ability that cash received from tellers to vault was not counted in dual presence while I was manning the customer service desk. ...”

29. The respondent admitted in the said letter that she was the custodian of the second key to the vault; that she gave that key to her colleague who held the other key and the said colleague became the sole operator of the vault which was against the appellant's standard operating procedure where the vault would be operated by two employees solely assigned that duty to open and operate the vault together. As a result of her conduct the appellant lost Kshs.641,500 during the period 6th April, 2017 and 13th April, 2017 when the respondent did not perform her duties as required. This amounted to misconduct within the provisions of the Employment Act.

30. The other issue relates to the respondent lending money to earn interest which was prohibited as set out in the letter of employment and withdrawal of Kshs.20,000 from a customer's account without authority. The appellant received a complaint from its customer, Joseph Koome, who alleged that the respondent had debited his account at Maua branch with a sum of Kshs.20,000. The customer also alleged that he was neither a witness nor a guarantor to an agreement where the respondent had advanced a sum of Kshs.300,000 with interest. The respondent was asked to explain these events in the “Show Cause” dated 6th July, 2017. She denied having withdrawn the said sum of money and stated that she had advanced a sum of Kshs.300,000 to either Joseph Koome or one Geoffrey Kimathi Mbithi to repair a motor vehicle, the advance being on a friendly basis:

“... This incident happened out of friendship and this was friendly arrangement that was documented through an agreement drawn by Kaume Akwalu to avert loss of money. I wish to state clearly that am not in any lending business thus am not in direct competition with my employer. I believe I have not contravened any bank policy by helping a friend in need. ...”

31. The complains by the appellant's customer, Joseph Koome dated 27th June, 2017 was placed before the trial court where he alleged that the respondent had debited his account on 1st March, 2017 Kshs.20,000 without his authority. Evidence was placed before the court that there had indeed been a debit of the said sum on the said day and there was a corresponding credit on the same day of the said sum into the respondent's account.

32. Evidence was also placed before the court of an agreement made in writing on 5th October, 2015 by the respondent (described as “financier”) and Geoffrey Kimathi Mbithi where the respondent advanced to Mbithi Kshs.300,000 which was to be repaid over a stated period by the end of which the respondent would earn an extra Kshs.102,000. This was conduct which contravened the terms and conditions of employment and amounted to misconduct within the provisions of section 44 of the Employment Act.

33. This is what the Judge stated in the impugned judgment:

“... The Claimant's dismissal though procedural, was not justified. The Claimant was not guilty of any of the reasons advanced by the respondent to justify the termination thus disentitling the respondent to the protection of section 43 and 45 as the dismissal was not for a valid reason ...”

With respect, we disagree.



34. The respondent flouted the appellant's standard operating procedures where she abdicated her role and duty as the second custodian of the vault. This misconduct led to loss of money. It was also established that the respondent had engaged in the business of lending money where she earned interest contrary to the terms and conditions of her employment. It was also established that the respondent had withdrawn money from a customer's account Revenue Authority vs. Reuwel Waitaha Gitahi & 2 Others [2019] eKLR where it was stated:

“It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.

The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test. In the case of Bamburi Cement Limited vs. William Kilonzi [2016] eKLR this Court expressed itself on the nature of proof required as follows:

“The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing ... The test to be applied is now settled. In the case of the Judicial Service Commission vs. Gladys Boss Shollei, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161

Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”

36. The respondent was given proper opportunity to explain her conduct through the disciplinary hearings held on 9th June, 2017 and 18th July, 2017. She was given notices for those hearings and was informed that she was entitled to be accompanied by her colleague if she so chose. She was heard as required in law. Her explanations were found to be unsatisfactory which led to dismissal from employment. The appellant did not flout any provision of law in the way it processed the disciplinary issues that faced the respondent. There were sufficient reasons for terminating the respondent's employment and we think, again with respect, that the Judge reached the wrong conclusions in the said judgment which cannot be sustained and is hereby set aside.
37. We allow the appeal by setting aside the whole of the said judgment and substitute the same with an order that the suit before ELRC is hereby dismissed with costs. As one ground of appeal failed we award $\frac{3}{4}$ costs of the appeal to the appellant.



DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

