



REPUBLIC OF KENYA



KENYA LAW
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**Barclays Bank of Kenya v Ndegwa (Civil Appeal 49 of 2018)
[2024] KECA 1852 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1852 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 49 OF 2018
SG KAIRU, MA WARSAME & FA OCHIENG, JJA
DECEMBER 20, 2024**

BETWEEN

BARCLAYS BANK OF KENYA APPELLANT

AND

TERESIAH WANJIRU NDEGWA RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nakuru (Radido, J.) dated 28th October, 2016 in ELRC Cause No. 107 of 2014)

JUDGMENT

1. The appellant, Barclays Bank of Kenya (the Bank), appeals against the judgment delivered on 28th October 2018 in which the Employment and Labour Relations Court (ELRC) (Radido, J) found that the termination of the respondent’s employment was substantially unfair and awarded her Kshs. 1,008,000.00 being the equivalent of eight months gross wages as compensation.
2. In support of her claim for wrongful termination of employment, the respondent, Teresiah Wanjiru Ndegwa, who said that she is an Accountant by profession, testified before the ELRC that she joined the Bank in 2005 and by the time she was terminated on 12th July 2012, she held the position of Customer Advisor. She stated that in March 2012, some clients of the Bank went to the Gilgil Branch of the Bank and applied for a loan; that one of such client was arrested for presenting fake documents; that on 27th June 2012, the Bank invited her to attend a disciplinary hearing in connection with “a fraudulent loan application of Kshs. 500,000.00 at Gilgil Branch and generation of forged audit” of which she knew nothing about; that she was questioned about a transfer or deposit of Kshs. 18,000.00 into a joint account she held with her husband and was accused of owning an audit firm, which she denied. She stated that thereafter, on 12th July 2012, she received a letter from the Bank terminating her employment “for her alleged participation in a fraud case at the Gilgil Branch of the...Bank.”; that



her appeal was unsuccessful. Thereafter she instituted her claim against the Bank asserting that her termination of employment was both unfair and unlawful.

3. In its defence, the Bank called Ibrahim Kosgey, a forensic investigator, as its witness. He testified that in March 2012, he carried out investigations at Gilgil and Nakuru branches of the Bank on fraudulent loan applications submitted to the Bank. His investigations revealed that fake audit reports were submitted to the Bank in support of loan facilities and that the respondent was the source of the fake report; that a suspicious transfer of Kshs.18,000 from a business customer of the Bank, Shani Enterprises, into the respondent's bank account relating to "audited accounts fee-Telian Ads" was picked and the respondent admitted to the investigator owning the consultancy firm, Telians Ads. It was his testimony that the said Shani Enterprises was one of the customers which had applied for a loan through Nakuru Branch using "suspicious audit report" and the payment of the stated Kshs.18,000 "was a payment for a transaction between Shani Engineering and Mr. Ngunjiri" the latter being the respondent's husband.
4. Having considered the evidence, the learned Judge of the ELRC found that the termination of the respondent's employment with the Bank was procedurally fair having been undertaken "in compliance with the procedural fairness requirements of Section 41 of the *Employment Act*, 2007." That determination has not been challenged in this appeal, and we need not dwell on it.
5. However, regarding substantive fairness, the Judge noted that the reason given by the Bank for terminating the respondent's employment was involvement in generation of forged audited accounts and proceeded to examine whether the Bank established or proved the role played by the respondent in that regard. The Judge stated that according to the investigation report "an examination of an account the [respondent] held jointly with her husband revealed a suspicious deposit of Kshs. 18,000 with narration of audited account fees-Telian Ads, an entity which the [respondent] admitted to owning" and that the investigations report further revealed that the beneficiary of the audit report, a director of Shani Engineering, did not know either the respondent or her husband.
6. The Judge then concluded that based on the narrative given by the Bank's witness, the investigator, "the court finds at most a tenuous link between the [respondent] and the forged audit report. That link appears to be the [respondent's] husband" and that "in the court's view, there is a real probability of one joint account holder not knowing about the transactions in a joint account" and that the Bank had failed to discharge the burden placed on it by Sections 43 and 45 of the *Employment Act*. Hence, the present appeal.
7. On behalf of the Bank, learned counsel Peter Waiyaki assisted by I. Makena and F. Gatwiri in highlighting written submissions urged that the learned Judge failed to heed the evidence and to appreciate the gravity of the uncontested fact that the Kshs. 18,000 paid into a joint bank account held by the respondent and her husband related to 'audit account fees'; that there was evidence that the husband was not an accountant and the payment could not therefore have been to the husband; that a joint account holder cannot in any event be exonerated or excused on the basis of a probability that she had no knowledge of the payment.
8. Counsel submitted that under Section 43 of the *Employment Act*, the applicable test is whether the Bank at the time of terminating the respondent's services genuinely believed that there existed reasons justifying the termination; and that it was not open to the trial court to substitute its opinion with that of the employer. In support, counsel referred to decisions in Kenya Power & Lighting Company Limited vs. Aggrey Wasike [2017] eKLR and Lawrence Nyamichaba Ondari vs. National Hospital Insurance Fund [2018] eKLR.



9. Learned counsel Lawrence Karanja for the respondent on the other hand submitted that the appeal is moot, as the decretal amount which had been deposited with the court, was released to the respondent's advocates in the year 2020. The decision in *Evans Kidero vs. Speaker of Nairobi City County Assembly & Another* [2018] eKLR was cited for the argument that courts are loathe making academic pronouncements.
10. On the merits of the appeal, counsel urged that, the learned Judge of the ELRC was right in concluding that substantive justice was not done at the time of dismissing the respondent; that contrary to claims by the Bank, the Judge carefully and analytically scrutinized the evidence; that while the respondent's husband owned up to knowing about the audit report and payment of Kshs. 18,000 into the joint account, nothing implicated the respondent; and that "the investigator only establishes a link between the forged audit report with the [respondent's] husband and not the respondent/claimant." It was urged that based on the evidence, the conclusion by the Judge that there was a real possibility of one joint account holder not knowing about the transactions in a joint account was well founded.
11. It was submitted on the strength of the Ugandan case of *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor vs. Adam Vassiliadis* [1986] UG, CA 6 that the court is bound by the pleadings and evidence adduced by the parties, and it is not the work of the trial court to conduct independent investigations to establish occurrence of an alleged fact.
12. We have considered the appeal and re-appraised the evidence in keeping with our mandate under Rule 31(1)(a) of the Court of Appeal Rules with a view to drawing our own conclusions. See *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates*, Civil Appeal No. 161 of 1999.
13. The only issue for determination is whether the learned Judge erred in concluding that the Bank had failed to discharge its burden to establish that the termination of the respondent's employment was substantively fair as required under Sections 43 and 45 of the *Employment Act*.
14. In addressing that issue, we are mindful that we can only interfere with the decision of the learned Judge if it is demonstrated that the judge misdirected himself in law; or that he misapprehended the facts; or that he took account of considerations of which he should not have taken account; or that he failed to take account of considerations of which he should have taken account, or that his decision is plainly wrong. See *United India Insurance Company Limited & 2 Others vs. East African Underwriters (Kenya) Limited* [1985] eKLR.
15. With that in mind Section 43 of the *Employment Act* provides that:

“(1)In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45(2)The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.” [Emphasis added]
16. In interpreting Section 43(2), this Court in the case of *Kenya Power & Lighting Company Limited vs. Aggrey Wasike* [2017] eKLR stated as follows:

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is,



however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services.”

17. The question therefore is whether, in the present case, the Bank had a reasonable basis for believing and acting in the manner that it did and in terminating the respondent’s employment. As already indicated, the evidence presented by the Bank was that of its forensic investigator, Ibrahim Kosgey who carried out an investigation at Gilgil and Nakuru branches of the Bank following what he referred to as fraudulent loan applications submitted to the Bank based on fake or forged audit reports. He testified that one such transaction related to a customer Shani Engineering in respect to which an amount of Kshs. 18,000 in respect of “audited account fees” was paid into a joint account held by the respondent and her husband, one Mr. Ngunjiri, who admitted having a transaction with the owner of Shani Engineering. He produced his investigation report as an exhibit.
18. The respondent on the other hand stated in her evidence that she was surprised to hear of a fraudulent loan application that incriminated her and that “being linked to the case is totally unjustified as the said transaction was between [her] husband and...Fred Mwhia who trades as Shanin Engineering Works” who she learnt was a friend of her husband who had sought a loan from the Bank which loan “could only be advanced on the strength of audited accounts.”
19. Based on our evaluation of the evidence, we are persuaded that given that the respondent was a joint account holder with her husband to which ‘audit fees’ was paid for audit reports that formed the basis of a loan application, the Bank had reasonable basis for believing that the respondent was complicit based on which her employment was procedurally terminated. As the Court stated in Kenya Revenue Authority vs. Reuwel Waithaka Gitahi & 2 others [2019]eKLR:

“ 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.”
20. We hold that in concluding that “there is a real probability of one joint account holder not knowing about the transactions in a joint account” the learned Judge of the ELRC applied a standard of proof on the part of the Bank beyond the applicable standard of balance of probabilities and thereby acted on a wrong principle and arrived at wrong decision.
21. In our view, the Bank established to the required standard that it genuinely believed that the respondent was privy to the audit report submitted to the Bank in support of the loan application by Shani Engineering. We are therefore entitled to interfere with the decision of the learned Judge.
22. We accordingly allow the appeal and hereby set aside the judgment of the ELRC and substitute therefor an order dismissing the respondent’s claim with costs to the appellant. The appellant shall also have the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

