



**Co-operative Bank of Kenya Limited v Muchiri (Civil Appeal  
27 of 2020) [2022] KECA 805 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 805 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 27 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JULY 29, 2022**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**DAVID GACHEHU MUCHIRI ..... RESPONDENT**

**JUDGMENT**

1. The appellant, Cooperative Bank of Kenya Limited, is aggrieved by the judgment delivered on 29th January 2020 by which the Employment and Labour Relations Court (ELRC) (Rika, J.) declared that the termination of the employment of David Gachehu Muchiri, the respondent, though based on fair procedure, was without a valid reason and therefore unfair. Accordingly, the court ordered the appellant (the bank) to pay the respondent Kshs. 1,409,135 made up of: the equivalent of seven and a half months' salary in the amount of Kshs. 1,112,475.00 as compensation for unfair termination; notice at of Kshs. 148,330; and salary arrears of Kshs. 148,330.00. Interest on that amount was awarded at the rate of 16% per annum from the date of judgment until payment in full. The court also ordered the bank to forward to the respondent a certificate of service forthwith.
2. The bank has faulted that judgment on grounds that the learned Judge: erred in his interpretation and application of Section 43 of the *Employment Act*, 2007; failed to properly evaluate the evidence; wrongly exercised his discretion in awarding compensation equivalent of seven and a half months' salary and in awarding interest at the rate of 16% per annum contrary to Rule 29 of the *Employment & Labour Relations Court Rules*, 2016.
3. Learned counsel Mr. Solomon Opole holding brief for Mr. Kongere for the bank in urging the appeal before us faulted the Judge for finding that the respondent's employment with the appellant was terminated without valid reason; that the Judge misapprehended the correct test under Section 43 of the *Employment Act*, 2007 and analysed the evidence in a skewed manner and reached the wrong conclusion. Counsel cited the case of *Reuben Ikatwa & 17 others vs. Commanding Officer British Army*



- Training Unit Kenya & another* [2017] eKLR and *Cooperative Bank of Kenya Limited vs. Banking Insurance & Finance Union (K)* [2017] eKLR for the argument that in adjudging the reasonableness of the employer’s conduct, the court must not simply substitute its own views for those of the employer but rather must determine whether a reasonable employer could have decided to dismiss an employee on those facts. It was urged that had the Judge correctly applied that test, he would have reached the conclusion that the termination of the respondent’s employment was based on valid reasons.
4. Regarding the award for compensation, reference was made to the judgment of the Court in *Kiambaa Dairy Farmers Co-operative Society Limited vs. Rhoda Njeri & 3 others* [2018] eKLR for the argument that a proper basis was not laid for the award of compensation equivalent to seven and half months’ salary and that in the circumstances of this case, an award of two or three months’ salary would have been sufficient.
  5. As for the award of interest it was submitted that under Rule 29 of the *Employment & Labour Relations Court Rules, 2016*, award of interest should be “at court rates” and the award of interest at 16% per annum was a wrong exercise of judicial discretion. The case of *Mini Bakeries (MSA) Limited vs. Ali Omar Faraj* [2019] eKLR was cited.
  6. Opposing the appeal, learned counsel for the respondent Miss. Nyambura Kamau submitted that based on the facts, the finding by learned Judge that the termination of the respondent’s employment was not based of valid reason and therefore unfair is well supported by the evidence; that the learned Judge applied the proper test under Section 43 of the *Employment Act, 2007*; that the proper test is “the band of reasonableness test” as stated in the decision of this Court in *Judicial Service Commission & another vs. Lucy Muthoni Njora* [2021] eKLR, where the Court expressed that in determining whether an employer acted reasonably and fairly, the circumstances of the case must be examined and measured against the action taken to determine whether such action “was within or outside the band or range of reasonable responses”. In the same vein, reference was also made to the English case of *Robert Newbound vs. Thames Water Utilities Limited* [2015] EWCA Civ 677 where it was stated that an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer.
  7. As regards the award of the equivalent of seven and half month’s salary compensation, it was submitted that the court properly exercised its discretion in making that award and that this Court should not interfere with exercise of discretion unless there was misdirection on some matter leading to a wrong decision, or it is shown that the decision is clearly wrong. The case of *Parliamentary Service Commission vs. Martin Nyaga Wambora & others* [2018] eKLR and the case *Mbogo and another vs. Shab* [1968] EA 93 was cited. It was submitted that the Judge justified the award in accordance with Section 49(4) of the *Employment Act* and gave reasons for the same.
  8. On the award of interest at 16%, the case of *Devcon Group Limited vs. Timsale Limited* [2016] eKLR and the Supreme Court of Kenya case of *Albert Chaurembo Mumba & 7 others vs. Maurice Munyao & 148 others* [2019] eKLR were cited for the argument that the court has wide discretion to award and fix the rate of interest.
  9. We have considered the appeal and submissions. There are two main issues for determination. The first is whether the judge erred in concluding that the bank failed to establish that the reason for termination of the respondent’s employment was valid and therefore fair. The second is whether the Judge properly exercised his discretion in awarding compensation the equivalent of seven and half months’ salary and in awarding interest at the rate of 16% per annum.
  10. The facts, as established before the trial court, are not in dispute. The respondent began his banking career with the bank as a graduate clerk in November 2010. In July 2013 he was promoted to the



position of Section head and in May 2016 he was promoted to supervisory position and appointed an Executive Relationship Manager at the bank's Nkrumah Road Branch Mombasa. His appointment to that position was confirmed by the bank in November 2016. He held that position until 19<sup>th</sup> September 2017 when he received the bank's letter dated 14<sup>th</sup> September 2017 titled "Summary Dismissal-Fraudulent Loan of Kshs. 10 million at Nkrumah Road Branch" by which the bank summarily dismissed him from employment on grounds that his actions "amounted to gross misconduct and contravened provisions of the Bank's Operating Manual, Staff Manual and Bank's business code of conduct & ethics thereby casting doubt on [his] integrity as a Bank employee." The actions the bank complained of related to a bank facility extended to the bank's customer, one Ahmed Mohamed Hussein (the customer).

11. According to the bank, the respondent: facilitated approval of payment to the borrower without following established bank procedures; failed to carry out a proper know your customer (KYC) while appraising the customer's loan of Kshs. 10 million, which according to the bank, was established to have been fraudulent; indicated that the facility was for financing working capital for importation of household products yet the customer indicated that the loan was to finance working capital for his clearing and forwarding business and which the customer decided to invest in other concerns like road construction in Mandera County, an indication that the lending was not to an existing business contrary to the bank's operating manual; indicated having made a call visit to the customer's office branded Neon Freighters and Forwarders Ltd but not to the offices of the business to which the bank was lending for household items; indicating in the loan appraisal form that the customer sold goods at the open air markets in Nairobi which the bank subsequently established that such business was not in existence at the time of lending; exaggerating the customer's financials by using bank statements of the customer's clearing and forwarding business thereby misleading the bank to grant a fraudulent loan; and that the customer questionably closed his offices after the loan was disbursed and subsequently defaulted in repaying the loan.
12. Testifying for the bank, Vera Nyangada Omondi, an Employee Relationship Manager gave the respondent's employment history with the bank from the time he was employed as a graduate clerk in November 2010; how he rose to the position of Business Development Officer in July 2013, then promoted to Section Head; then promoted to Supervisory Grade 02 in May 2016 and confirmed as an Executive Relationship Manager in November 2016; that part of his duties included sourcing for new customers; that the bank has a credit management division whose role includes analysing and flagging loans; that a loan extended to the customer was suspected to have been fraudulent and a preliminary investigation report by the security department of the bank confirmed that it had been processed by the respondent and recommended suspension of the respondent pending completion of the investigation following which the respondent was suspended from work by letter dated 23<sup>rd</sup> June 2017; that after conclusion of investigations, an investigation report concluded that the respondent had breached various terms of his employment contract and standard operating procedures resulting in the disbursement of the loan to the customer in the amount of Kshs. 10 million; that the respondent was then issued with a notice to show cause requiring him to explain "certain wilful or negligent acts he was accused of"; he appeared before a disciplinary committee before being summarily dismissed from employment.
13. Under cross examination, she stated that the respondent was hardworking; that he was alleged to have facilitated payment without approval; that the loan was not used for the purpose intended; that it was the respondent's fault "but there were other issues."
14. Next witness for the bank was Duncan Wambugu Macharia, the Investigations Manager of the bank who stated that the Credit Management Division of the bank suspected a fraudulent loan granted



- to the customer; that following preliminary investigations the Security Department of the bank recommended that the respondent be suspended pending completion of the investigations; that on conclusion of the investigations it was established that the respondent “misrepresented some material facts regarding the customer while processing the loan”; that he did not view, as he was required to do, the stock the customer mentioned in the appraisal for the loan; he did not confirm the existence of stalls where the customer allegedly sold his wares in open air market; indicated that the customer was an A-level graduate which was not true; said that the loan was for an existing business when in fact there was no registered business.
15. It was Macharia’s further testimony that the respondent failed to exercise due diligence in the vetting process; visited business other than the business to which the money was being lent; and that by reason of his lapses and misrepresentations, the respondent negligently or wilfully caused loss or damage to the bank to the extent of Kshs. 10 million.
  16. The respondent’s version of events was that his role as the Executive Relationship Manager was to ensure growth of high net worth assets and liability cross selling to existing clients and maintaining value adding customer relations within executive banking; that to effectively achieve that role he had one to one interactions with every customer visiting the executive lobby to assure them and offer them customer experience and any financial need customers may require; that during one such interaction, he met the customer who regularly visited the bank who approached him with a need for working capital of Kshs. 30 million for his importation of household items from Dubai; that he asked the customer to bring his books of account which the customer did and upon analysing them, he ascertained that the customer could only qualify for a loan of Kshs. 10 million; that he requested the customer to supply the required supporting documents, namely 12 months certified bank statement from any other bank where he was operating an account; and audited books of accounts for three years and certificate of registration of his business.
  17. The respondent stated further that the customer filled out the application form for the loan; that the customer having indicated that he operated two businesses of clearing business and importation of household goods, the respondent conducted a call visit at the customer’s offices at TSS Tower which was branded as Neon Freighters and Forwarders Limited from where the customer confirmed he operated his two businesses; that he prepared a call visit report which the bank’s branch manager reviewed and countersigned; that the branch manager was also required to visit the customer and review the call review report and could not have countersigned the call visit report if the respondent had given erroneous information.
  18. The respondent went on to say that in accordance with the bank procedures he prepared the credit limit application which was approved by the Branch Manager before being forwarded the bank headquarters for review and approval; that the loan was secured by a legal charge over a property known as Title Number Ngong/Ngong/21419 valued at Kshs. 18 million; that after the registration of the charge and other departmental processes, the loan was disbursed to the customer through his account at Nkrumah Road Branch; that three months after disbursement, the customer defaulted in servicing the loan after which the respondent followed the stipulated procedures on loan defaulters, issued demand letters before forwarding the file to Credit Collection Department for the recovery of the loan.
  19. The respondent stated that he was shocked to receive a letter from the bank on 23<sup>rd</sup> June 2017 suspending him from duty due to investigations conducted by the bank’s security department that revealed that he processed a loan of Kshs. 10 million to the customer which was suspected to be fraudulent; that he thereafter received a show cause letter why disciplinary action should not be taken against him; that he presented himself for a hearing before a disciplinary committee of the bank and explained himself and thereafter received a letter on 19<sup>th</sup> September 2017 dismissing him.



20. Having reviewed the evidence, and having considered the submissions made before him, the learned Judge found that the process through which the respondent was summarily dismissed was fair and that there can be no compensation based on a flaw in the procedure. There is no challenge to that finding.
21. As to whether the termination was substantively fair, Section 43 of the *Employment Act* provides that in a claim arising out of termination of a contract, the employer is required to prove the reason or reasons for the termination and that where the employer fails to do so, the termination shall be deemed to have been unfair. Section 43(2) of that Act is to the effect that 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.
22. It was therefore incumbent upon the bank to demonstrate that the reasons for terminating the respondent's employment were valid. The reasons given by the bank for terminating the respondent employment evolved progressively and ranged from implicating him in fraud, to claims that he was in breach the standard operating procedures, to claims of gross misconduct and negligence. In the letter of 23<sup>rd</sup> June 2017 suspending the respondent from duty, the basis upon which the bank implicated the respondent in fraud was on account of the loan having been disbursed to the customer's account on 7<sup>th</sup> February 2017 "and all the money withdrawn from therein by the 10<sup>th</sup> of March 2017 when the 1<sup>st</sup> instalment was paid" and that the operational account of the customer had not been funded and the loan had not been serviced for the period from April, May and June 2017". It was on that basis that the bank "decided to suspend" the respondent from duty to facilitate further investigations. In the same letter the bank stated that it was reserving "the right to change or add to these allegations". On the face of that letter, customer's obligations to service the loan appear to have been heaped on the respondent.
23. A month later, in the show cause letter of 24<sup>th</sup> July 2017 the complaint made by the bank against the respondent was willful or negligent facilitation of loss to the bank by failure to carry out a proper know your customer. Ultimately in the bank's letter of 14<sup>th</sup> September 2017 by which the respondent was summarily dismissed, it was asserted that the respondent's actions amounted to gross misconduct and contravention of the bank's operating manual, and bank's business code and ethics.
24. The learned Judge reviewed at length the process that preceded the application and evaluation of the loan by the customer and in concluding that the reasons given by the bank were not valid, the learned Judge expressed:

"The reasons advanced by the respondent to justify termination were not valid. The court agrees with the claimant, that he acted honestly, and his actions were reviewable at the Branch and the Head Office. The Branch Manager reviewed the call visit report made by the claimant. The customer's financial records and creditworthiness were examined by the claimant, the Branch Manager and the Credit Management Department at the Head Office. The loan went through the relevant credit hierarchy authority of the respondent. The sum involved could not be advanced solely on the recommendation of a junior officer at a Branch Office. It was a collective undertaking involving the Branch and the Head Office. The loan was granted by the Bank, not a claimant. The decision to dismiss the claimant, simply because the customer defaulted in paying the loan installment on the 2<sup>nd</sup> month due, in a situation where the whole loan was repairable in 36 months, appears to the court to amount to very weak justification for termination of employment decision. The claimant exercised due diligence, good faith and acted within delegated authority in dealing with Ahmed. Termination was not based on valid reason under Section 43 and 45 of the *Employment Act*."



- 25. We respectfully agree with the learned Judge. There was evidence that the customer, was an existing customer of the bank prior to the respondent encountering him at the lobby; it was part of the respondent’s responsibility to grow the bank’s business; the customer’s loan application was first appraised by the respondent before being escalated to the Branch Manager and onto the Head Office of the Bank for review and approval. The debt was secured and debt recovery process was initiated after the customer defaulted. The learned Judge examined in detail the circumstances under which the respondent’s employment was terminated and rightly concluded that the bank did not act fairly.
- 26. 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 Co Ltd & 2 Others vs. East African Underwriters (Kenya) Ltd* [1985] eKLR. In the present case, the appellant has failed to demonstrate that there is any basis for interfering with the decision of the learned Judge. In our view, the Judge correctly applied the test of reasonableness in reaching the conclusion that he did. In this regard, it is instructive that the bank’s own witness, the Employee Relationship Manager appeared to suggest under cross examination that there was more to the dismissal when she alluded to “other issues.”
- 27. As for the award of seven and half months’ salary compensation, the learned took into account, among other things, that the respondent had worked for 7 years, that he had a good employment record as confirmed by the bank’s witness, that he had been promoted severally and had worked with dedication. Having considered the parameters under Section 49 of the *Employment Act* in arriving at that level of compensation, we are unable to fault the Judge in the manner in which he exercised his discretion in making the award. The only issue we have is the award of interest at 16 % per annum, which award does not appear to have had regard to Rule 29 of the Employment and Labour Relations Court Rules 2016 which provides for interest on liquidated amount awarded at court rates.
- 28. All in all, save for the interest rate of 16 % per annum which we set aside and substitute with an interest rate of 12% per annum, the appeal fails and is dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY 022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

