



**Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)
(Civil Appeal 240 of 2018) [2021] KECA 173 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 173 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 240 OF 2018
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA
NOVEMBER 5, 2021**

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

BANKING INSURANCE & FINANCE UNION (KENYA) RESPONDENT

(An Appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Nduma, J) dated 9th November, 2015 in Employment & Labour Relations Cause No. 213 of 2015))

JUDGMENT

- 1 Co-operative Bank of Kenya Limited, the appellant prefer this appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Nduma, J) delivered on the 9th November, 2015 in the Employment & Labour Relations Court Cause No. 213 of 2015.
2. The respondent, a trade union which represents unionisable employees in the Finance Sector filed the claim in the Superior Court on behalf of the grievant, Doreen W. Muvrethi, who was employed by the appellant as a graduate clerk on 1st October, 2010 and confirmed as permanent and pensionable status on 4th April, 2011.

She worked in the Cash Department in the Respondent's Enterprise Road Branch. On 2nd April, 2014 she was served with a show cause letter on allegations of fraudulently en-cashing cheques at Enterprise Road Branch.
3. The grievant in her reply to the show cause explained the circumstances that lead to the encashment of the cheques, that she acted on the instructions of her Operating Manager who had signed for the transactions. The appellant then invited the grievant for a disciplinary hearing on 29th May, 2014 with instruction to be accompanied by a staff member during the hearing. She was ultimately summarily



dismissed on 11th June, 2014 and given 21 days to appeal. The grievant then appealed on 20th June, 2014 which appeal was rejected vide letter dated 17th July, 2014. She then reported the matter to the Claimant who then reported the existence of a trade dispute under Section 65 of the *Labour Relations Act* 2007.

4. The Minister under Section 62 of the *Labour Relations Act* appointed Mr. G.A. Omondi to resolve the matter by conciliation where parties were not able to reach an agreement, hence the suit.

The Claimant's prayers were as follows;

- i. the dismissal from employment was substantively un-procedural and unfair,
- ii. orders that the grievant be re-instated back to her former position without loss of any benefits and/or break of service,
- iii. that the grievant be paid all salaries and allowances lost by the wrongful dismissal from the date of the cause of action,
- iv. that the grievant be paid twelve months gross salary as compensation.

OR

- v. twelve months gross salary at time of dismissal,
- vi. twelve months' salary as compensation for wrongful dismissal,
- v. exemplary damages of Kshs.3,000,000/=.

5. The appellant filed its statement of response confirming that the grievant was employed as aforesaid by the appellant at a basic salary of Kshs.48,338/= as a teller at the respondent's Enterprise Road Branch and had on various dates undergone introduction to telling as well as training for teller evaluation. The grievant's duties included account opening, teller and cash officer.
6. The appellant confirmed issuing a verbal letter on 15th December, 2011 to the grievant for failing to properly identify a customer as a result of which fraudulent withdrawals of Kshs.295,000/= were made from account No.011xxxxxxxxxx.
7. That in addition, the grievant absented herself from work without lawful cause or leave on 8th - 13th January, 2011, prior to handing over cash contrary to laid down procedure. That the grievant was given a show cause letter to explain the circumstances leading to the encashment of the cheques, which explanation was not satisfactory.
8. The appellant then conducted an audit on February 2014 at the branch and prepared an audit report dated 27th March, 2014 which recommended disciplinary action against the grievant for gross misconduct under the staff manual.
9. The appellant invited the grievant for a disciplinary meeting on 29th May, 2014 and allowed her to tender documentary evidence as well as have a staff member in the meeting in line with the terms of the binding recognition agreement.
10. Following the findings of the disciplinary committee in the meeting of 29th May, 2014, the grievant was summarily dismissed pursuant to Clause A5 (a) of the CBA for the following reasons:
 - i. Between 20th May, 2013 – 3rd July, 2013 the grievant carried out irregular transactions as she posted dummy cash deposits totaling to Kshs.2.9 million in account No.011xxxxxxxxxx in contravention of the staff manual.



- ii. The grievant paid cheque No. 310 for Kshs.1.8 million which had not been signed by the customer from account No. 011xxxxxxxxxx contrary to the staff manual.
 - iii. The grievant on several occasions made dummy deposits in the customer's accounts contrary to the staff manual as well as the bank procedures and policies.
 - iv. The grievant implemented unethical instructions contrary to the terms of the express provisions of bank procedure and policies leading to fraud.
 - v. The grievant failed to raise an alarm over the irregular transactions and facilitated the posting of the dummy deposits that aided the customer to irregularly access funds which were non-existent as the same had not been physically deposited into the account.
 - vi. The grievant failed to prevent fraud as provided for in the Fraud Prevention Policy.
20. All in all it was the appellant's case that the grievant violated the Bank's Fraud Prevention Policy, instruction for tellers and teller services and Bank's Business Code by implementing unethical instructions leading to fraud. That it was an unequivocal provision of the Bank's Operating Manual that cheques referred by such a teller such as the grievant would not be paid until the cheque is received back by the teller and fully authenticated for payment. That there were justifiable or lawful grounds for dismissal of the grievant since she wilfully neglected or carelessly and improperly performed her duties under contract.
21. The appellant on reasonable and sufficient grounds suspected the grievant to have committed a criminal offence against it or to the substantial detriment of the respondent or its property. That the grievant wilfully or negligently allowed or facilitated the loss of the respondent's cash or property.
22. Vide a judgment dated 9th November, 2016, the Superior Court having carefully considered the parties' pleadings, testimony, and evidence of record, found that on a balance of probabilities it had been proved that the conduct by the grievant in the circumstances of the case did not constitute dismissible offences, and found that this was a proper case to award the grievant maximum compensation equivalent to twelve months salary as compensation for the unlawful summary dismissal pursuant to Section 49 of the *Employment Act*, 2007.
23. The appellant challenges the judgment of the Environment and Labour Relations Court on 10 grounds of appeal which can be condensed to the following:
- i. That the trial court erred in holding that there was no valid reason for the summary dismissal of the grievant, the question of undue influence was neither pleaded nor submitted upon by the parties, so it should not have been introduced by the court in its judgment, the court erred in awarding damages to the grievant;
 - ii. As regards the summary dismissal, the appellant submits that the Operating Manual provided for summary dismissal and indicated that any of these acts that would justify instant dismissal- including failure to obey any lawful and proper instructions issued by the Managing Director or his duly authorized



representatives and signing or facilitating approval for any payments without following the established procedure.

- iii. In justifying the dismissal, the appellant contends that the grievant's duties included making sure that payments made are properly authenticated and approved before payment is made as set out under clause 3.1 of the Operating Manual. Further that at the disciplinary hearing the grievant confirmed that she had forgotten to collect the unsigned cheque from the Operations Manager, and it had never occurred to her that there were any irregularities regarding the dummy cheque deposits.
 - iv. It is the appellant's submission that the grievant having worked as a teller for two years was expected to know the procedure for authentication and approval before encashment, and that the grievant by conducting dummy deposits and paying cheque belonging to Landmark Freight Services despite the same not being signed was in contravention of clauses 2.3 and 3.1 of the instructions for teller and teller services operating manual.
 - v. As regards the second issue on undue influence, the appellant refers to the case of *National Westminster Bank Plc v Morgan* (1985) 1 ALL ER 821 to submit that the same cannot be established by inference, and must be specifically pleaded and proved. It is argued that the respondent did not specifically plead nor prove undue influence, but that was an issue introduced by the learned judge in his judgment.
 - vi. The appellant submits that the award for damages to the grievant was wrong, as the learned Judge failed to consider his own finding that the grievant was subjected to a proper disciplinary process, and that the grievant confirmed that she had breached the operations manual which provisions she knew or ought to have known.
 - vii. It is also argued that the Judge's reasons in awarding the maximum compensation to the grievant were not valid reasons nor based on evidence. We were referred to the case of *United States International University v Eric Rading Outa* Civil Appeal No. 146 of 2013 for this proposition. Further that the award of one month's salary in lieu of notice was baseless as the dismissal was not wrongful or unlawful and also that the same was not pleaded by the respondent. The appellant thus prays that the appeal be allowed with costs to it.
24. On the first issue, the respondent submits that the *Employment Act* places a burden on the Appellant to justify the grounds for dismissal under Section 47 (5), which burden the Appellant has failed to discharge.
 25. The respondent further submits that the grievant was acting on instructions of her boss, the Appellant's Operations Manager as was required by the appellant's Human Resource Policy 2.2 on the duties of a teller and Clause 4 on procedures relating to cheques presented for encashment.
 26. On the issue of undue influence, the respondent submits that the Operations Manager being the direct superior was in an authoritative position over the grievant who trusted the Operation Manager to make sound decisions without repercussions to the grievant.



27. As regards the award, the respondent submits that the award was well founded as the learned judge had made a sound finding in law that the grievant's termination was unlawful and unfair.
28. This being a first appeal it is this court's primary duty to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 29 (1)(a) of the *Court of Appeal Rules*. The main issues for determination in this appeal are; whether the summary dismissal was justified, whether there was undue influence and whether the damages awarded were justified.
29. With regard to the first issue, the trial court held that the evidence presented showed that the grievant was under immense undue influence from the operations manager, who doubled up as the branch manager, and that a reasonable person in her position would have obeyed the irregular instructions coming from one who was the final authority in the branch.
30. The appellant contends in its submission that the grievant's summary dismissal was valid as the grievant had performed irregular transactions in contravention of the appellant's Operations Manual which irregular transactions the grievant admitted to performing as evidenced by an excerpt of the disciplinary hearing proceedings. That further, the said irregular transactions amounted to gross misconduct as per clause 10.5 of the appellant's operating manuals. The appellant further contends that the grievant had worked with the appellant for two years and had undergone training to equip her for her job, and that the grievant conceded that the irregular transactions were contrary to her trainings.
31. The appellant relies on Section 45(2) of the *Employment Act* and submits that the appellant had a fair and valid reason for termination of the respondent's employment. That the appellant genuinely believed that the grievant had breached the Operations Manual. The respondent on the other hand submits that the summary dismissal was unfair/unlawful. In its submissions the respondent does indeed admit that the grievant did perform the irregular transactions, so that fact is not in contention.
32. However, in defence of the said irregular transactions, it is argued that the said irregular transactions were performed on the instructions of her immediate boss at the time, the Operations Manager.
33. In the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, this Court stated that Section 41 of the *Employment Act* provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.

Four elements must be discernible for the procedure to pass:

- a. an explanation of the grounds of termination in a language understood by the employee,
 - b. the reason for which the employer is considering termination,
 - c. entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made,
 - d. hearing and considering any representation by the employee and the person chosen by the employee.
- 34 Under Section 47 (5) of the *Employment Act* for any complaint of unfair termination or wrongful dismissal, the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.



35. This Court in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR had the following to say on the burden of proof:

"There can be no doubt that the Act 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, prove the reasons are valid and fair, prove that the grounds are justified. A mandatory and elaborate process under Section 41 requiring notification and hearing before determination. The appellant (employee) in this case had the burden to prove, not only were his services terminated but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon to prove the reason for termination, and where the employer fails to do so, the termination will be deemed to have been unfair."

36. *Halsbury's Laws of England 4th Edition*, Vol. 16 (1B) para 642,

"...in adjudicating the reasonableness of the employer's conduct...a wider inquiry must be made to determine whether a reasonable employer could have decided to dismiss on those facts. The function of a tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses to which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band it is unfair."

37. Whereas fair procedure was followed in the process adapted by the appellant, and the disciplinary process did pass the test in the *Postal Corporation case* (Supra), we nonetheless agree with the trial court that the explanation made by the grievant as well as her conduct did not constitute dismissible offences. We note that in her demonstrated desperate attempt not to pay the cheques, and in every instance the manager presented a solution to her to ensure payment, coupled with her signature to authenticate each of the irregular transactions. In our view, the employer had not shown that there were reasonable and sufficient grounds for dismissal.

38. With regard to the 2nd issue, it is the appellant's submission that for the defence of undue influence to succeed, the respondent must prove the existence of manifest disadvantage and further that the allegations of undue influence must be specifically pleaded and proved. The appellant further submits that the respondent did not specifically plead and prove undue influence. See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR.

39. The appellant submits that the defence of undue influence was introduced by the learned judge at paragraph 43 of the impugned judgment and places reliance on the cases of *Global Vehicles Kenya Limited v Lenana Road Motors* [2015] eKLR and *David Sirongo Ole Tukai v Francis Arap Muge & Others* Civil Appeal No. 76 of 2014, where in both cases this Court held that a judge, being a neutral umpire will only determine the issues that the parties have placed before the court. It is the respondent's submission in response that the statement of claim raised the issue of undue influence, and that undue influence was triggered from the facts of the case.

40. In Civil Appeal 66A of 2017 *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others*, this Court in considering a similar issue where it was contended that an issue was not pleaded and was improperly raised and decided on by the trial court *suo moto*, stated that:

"...we however take the view that it was an issue of law which featured in the submissions of counsel and therefore attracted the decision of the trial court."



41. We concur with the respondent that the issue of undue influence was raised in the statement of claims as well as the submissions. The learned judge noted that, the grievant had just been employed, and her actions were influenced by the Operations Manager (who was a duly authorized representative of the Managing Director), and the grievant was manifestly disadvantaged (see *National Westminster Bank PLC v Morgan* [1985] AC 686). We do not detect any error by the trial court in its finding of undue influence.
42. Turning to damages awarded upon dismissal, the grievant was paid terminal benefits, and only sought maximum compensation equivalent to 12 months' salary, and payment of exemplary damages in the sum of Kshs. 3,000,000/-. The appellant submits on this head that the learned judge erred in awarding remedies for unlawful termination to the grievant. The appellant further contends that the factors to be considered in awarding damages though discretionary under Section 49(1) of the *Employment Act* can only be granted where the summary dismissal is unjustified, or the employer is found guilty of unfair labour practices (See *Nicholas Otinyu Miruka Equity Bank Ltd* [2013] eKLR). That in any event due consideration ought to be given to the circumstances in which termination took place, the conduct of the employee that caused contributed to the termination and the length of service of the employee.
43. It is the appellant's submission that the learned judge failed to consider his own findings that the grievant was subjected to a proper disciplinary process, and that the grievant had admitted that she performed the irregular transactions, admitting that she breached the Operations Manual which provisions the grievant knew or ought to have known.
44. The contested issue is what was the rationale for the 12 month's salary awarded as compensation for wrongful dismissal? The reasons given by the learned judge in awarding maximum compensation to the grievant are faulted as not being valid, on grounds that employment was terminable by one (1) months' notice or by either party paying sum equal to one (1) months' salary in lieu of notice. That even if this court were to find that the dismissal was wrongful or unlawful (which is denied), we should instead award the grievant one (1) month gross salary subject to statutory deductions as damages. In support of this argument, reference is made to the case of *United States International University v Eric Rading Outa* Civil Appeal 146 of 2012 where this Court set aside the award for 12 months' salary as compensation and substituted it with an award of 3 months' salary on the ground that the trial court did not assign any reason(s) for awarding the 12 months compensation.
45. Reference is also made to the case of *CMC Aviation Limited v Mohammed Noor* Civil Appeal 199 of 2013 the court held that there was no fair procedure in terminating the Respondents services and awarded one months' salary in lieu of notice as reasonable compensation as the contract of employment was terminable by one month's notice.
46. The appellant further submits that the award of one months' salary in lieu was wrong as the respondent did not plead the same in the claim as parties are bound by their pleadings. (See *Express Connections Limited v Ezekiel Kiarie Kamande* [2016] eKLR)
47. We have also been urged to take into consideration the fact that 50% of the grievant's dues have already been paid by the appellant, and to draw from previous decisions by this Court which have asserted that damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice (see *Alfred Gitthinji v Mumias Sugar Company Limited* Civil Appeal 194 of 1991).
48. The appellant also refers to the case of *Central Bank of Kenya v Julius Nkonge* [2002] eKLR where this Court held that the learned judge erred by computing damages beyond the notice period, and the court's view was that on the assumption that the respondent's dismissal was wrong, he was only entitled to damages equivalent to the salary he would have earned for the period of notice.



49. Similarly, reference is made to the holding in *CMC Aviation Limited v Mohammed Noor* [2015] eKLR that despite a finding of unfair termination of employment the fact that the employment contract was terminable by one month's notice meant that an award of one month's salary in lieu of notice was reasonable.

All these cases are cited to bolster the argument that the trial court erred in awarding damages pegged to 12 months' salary.

50. The respondent submits that the learned judge's findings were sound and well cushioned in law, pointing out that the grievant had sought reinstatement to her work, and in the alternative compensation for wrongful dismissal. In awarding damages pegged to 12 months' salary as compensation for unlawful dismissal, the learned judge pointed out that this was not a proper case for reinstatement as the appellant seemed to have lost confidence and trust in the grievant – we cannot fault that observation.

51. The parties in their submissions bring to the fore the question regarding what is the appropriate remedy for an employee upon unfair or wrongful termination of a contract of employment? We must focus on the provisions of Section 49 of the *Employment Act*, particularly to whom the remedy applies where the dismissal upon notice is found to be unfair or wrongful.

52. Section 49 (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following:

- a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
- b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract;
- c. or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

53. The trial court took into account relevant factors and circumstances leading to the termination, the conduct of the affected employee, and the length of service, and observed that she had suffered great loss of employment and income.

54. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR noted as follows:

[32] When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. The *Black's Law Dictionary 9th edition* at page 534 defines judicial discretion as follows:

“the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of



law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right"

[33] On an award on damages, the Act limits the award a court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the *Employment Act*."

55. The Supreme Court considered how the Court of Appeal addressed the issue of damages in *CMC Aviation Limited v Mohammed Noor*; Civil Appeal No.199 of 2013, [2015] eKLR and held that:

"...we have indeed noted no inconsistency but a mere variation of no substance at all in its determination on the issue of damages. In the CMC Aviation Case, having found the respondent's termination unfair, the Court of Appeal found to the effect that the Respondent was only entitled to an award of one month's salary, the equivalent of the notice period as per the employment contract, as compensation. However, in the instant case, the same Court (differently constituted) found that the trial Judge's award of 12 months gross salary as damages for unfair termination was a proper exercise of Judicial discretion.

56. The current *Employment Act* 2007 makes provisions for appropriate remedies for wrongful dismissal or unfair termination and allows for compensation for up to 12 months salary. We indeed take note that the grievant was a young graduate, and the outcome of the disciplinary process will negatively affect her career growth bearing in mind the sensitive nature of the banking industry, which is sensitive to a record of past misconduct. This resonates with the provision in Section. 49 (1) (g) of the *Employment Act* which requires consideration to be given on the opportunities available to the employee for securing comparable or suitable employment with another employer. We think there is a good reason the learned judge gave for pegging damages to the 12 months salary. We also note that the authorities *Central Bank of Kenya v Julius Nkonge* [2002] eKLR and *Central Bank of Kenya v Julius Nkonge* [2002] eKLR] the appellant adverted to, were decided long before the current *Employment Act* was enacted and therefore they may no longer represent good law.

57. We thus echo the Supreme Court's observation in *Kenfreight* (supra) that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.

58. There is need to balance the above stated positions, with the current approach that in the clearest of cases the court may order reinstatement without loss of back salary, benefits, and privileges (Section 49 & 50 of the *Employment Act*) and we refer to the decision in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR which pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a claimant is entitled to the maximum award. One of the factors is the impracticability of reinstatement due to time lapse since dismissal, the relationship between the employer and employee having been destroyed beyond repair, and the impact on the employee's career and reputation. The court also pointed out that one of the guiding principles for remedies under Section 49, is that they are awarded to compensate the claimant, not to punish the employer.

59. The trial court pointed out sound judicial principles and observations in support of the award given, and we echo the ratio decidendi by the court in the *Kenya Broadcasting case* (supra), to the effect that a reasonable and fair position would be based on the principle of restitutio in integrum (try and restore



the injured party to a position as nearly as possible as she would have been, had the injury not occurred, yet not appear to unduly punish the employer.

60. We adopt a similar approach that the trial court in considering her legal entitlement for unlawful termination of employment was fair and reasonable. Consequently, our finding is that the trial court properly exercised its discretion in the sum awarded as damages, and there is no reason to warrant interfering with the same.

61. The upshot is that the appeal fails, and is dismissed in its entirety. We award costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

