



**Kenya Union of Commercial, Food and Allied Workers v Wanandegge Sacco Ltd
(Cause 1061 of 2018) [2025] KEELRC 258 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 258 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1061 OF 2018
K OCHARO, J
JANUARY 30, 2025**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**
AND
WANANDEGE SACCO LTD RESPONDENT

JUDGMENT

Introduction

1. By Statement of Claim dated 15th May 2018, the Claimant, a trade union on behalf of two of its members [Catherine Wangui Ndegwa, 1st Grievant and Mary Jeroitich Koros, 2nd Grievant] sued the Respondent seeking the following reliefs;
 - a. 1st Grievant
 - i. Notice=Kshs.76,539/=
 - ii. 4 months' pay during suspension =Kshs.4 x 76,539.00 = Kshs.302,156.00
 - iii. Full compensation =12 x Kshs.76,539 =Kshs.906,468Total= Kshs.1,285,163.00
 - b. 2nd Grievant
 - i. Notice =Kshs.124,600.00
 - ii. 4 months during suspension =Kshs.249,200.00
 - iii. Full compensation =Kshs.489,540.00



Total=kshs.863,350.00

- c. Cost of the suit to be provided by the Respondent
2. The Respondent resisted the Claimant's Claim through a Response to the Statement of Claim dated 3rd September 2018, stating that the Grievants were lawfully summarily dismissed from employment due to fraudulent activities committed through their accounts. As such, they are not entitled to the reliefs sought.
3. At the hearing, the two grievants testified as CW 1 And CW2. They adopted their witness statements filed herein as their evidence in chief. The Respondent presented one witness, who equally adopted his witness statement as his evidence in chief.

Claimants' case

4. Catherine Wangui Ndegwa, the 1st grievant, was employed by the Respondent in November 2010 as a loans clerk at a starting salary of Kshs 21,374/=, and a house allowance of Kshs. 13,295/=. Later in or about November 2011, she was verbally instructed to carry out the cashier duties. Despite the change in her role, her remuneration didn't change.
5. Subsequently, she was promoted to the position of Chief Cashier in August 2011 and her salary increased to Kshs.34,627/= with a house allowance of Kshs.18,079. At the time of unfair dismissal, the grievant was earning Kshs.52,158/= and a house allowance of Kshs.24,381/=
6. Between November and December 2015, she was the acting FOSA Supervisor, stepping in for her Manager, who was on leave. As the acting Supervisor, she had a user identity. Her user credentials had only two rights, approval of mobile banking and advances to the system.
7. Approval of Mobile banking into the system was an elaborate process. Her role in this process was limited. The Customer seeking mobile banking could first pass through the Customer care desk for verification of his or her documents and status in the Respondent's system before he or she gets to her for approval of the transaction into the system. She would only approve after reverifying the customer's documents.
8. On 23rd December 2015 the Respondent issued her with a letter putting her under compulsory leave. The compulsory leave was an investigatory one, intended to give way to investigations of an alleged fraud.
9. On 4th January 2016, the Respondent served her with a show-cause letter. She was accused of posting a fraudulent transaction into the System. Further, she fraudulently changed customers' telephone numbers in the system, replaced them with new ones and linked the new numbers to customers' accounts.
10. She contended that one can't link a new number to a dormant account, due to the elaborate process of activating dormant accounts including that the customer must in person present himself to the Customer Care Desk for a verification process and filling of the requisite forms.
11. Referring to the alleged fraudulent transaction of 28th November 2015, she stated that the details thereof show that the Mpesa Mobile number was input into the system by Mr Mburu [the Manager] yet on this material day he was on leave and she was holding the fort for him.
12. She further stated that on Saturdays the Respondent closed at 1:00 Pm. Surprisingly, transaction 5 which she was accused of, appears to have been inputted at 17: 30 Pm. She removed the numbers from the system at 19: 31 hours when her credentials were used.



13. She asserted that she could only access the system when she was at work and within the Respondent's premises. On weekdays, she worked from 8:00 a.m. to 5 p.m., and on Saturdays, 8:00 a.m. to 1 p.m. Outside of these working hours, one couldn't access the system without authorization by the Manager. After these hours, the system automatically logs out the user.
14. She testified that her credentials couldn't allow her access to the AGL account to transfer money to another account.
15. The Grievant stated that the IT manager was able to use her credentials at any time and access the system.
16. The Respondent reported the matter to the Banking Fraud Unit for investigation.
17. She responded to the same on 8th January 2016. After her response, she was served with an interdiction letter. She was questioned on several occasions by Officers from the Unit and recorded statements with them. Eventually, they concluded that there was nothing to link her with the alleged fraud.
18. She further stated that on 23rd February 2016, the Respondent invited her for a disciplinary hearing, however, the same didn't proceed as the Claimant protested the unilateral decision taken by the Respondent and the exclusion of its representatives during such hearings.
19. The hearing was re-slated for 23rd March 2016 when it proceeded. On 21st April 2016, she received a dismissal letter from the Respondent.
20. After the dismissal, the Secretary General of the Claimant reported a trade dispute to the Cabinet Secretary of East Africa, Labour & Social Protection. The matter was subsequently and resultantly subjected to a reconciliation process, with the conciliator making a favourable recommendation for her, recommending that she and the 2nd Grievant be reinstated to employment.
21. Cross-examined the witness testified that for her to discharge her duties, the Respondent gave her logging-in credentials. The credentials were not supposed to be shared with anyone. However, the IT manager could access the same.
22. For her to do the approval, the first person should have done the application on the System.
23. Approval for the activation of dormant documents could only be done with the approval of the Chief Executive Officer. She clarified that the roles of the FOSSA supervisor [the role in which she served in the acting capacity] and the FOSSA manager were different and independent.
24. Clause 18 of the Collective Bargaining Agreement provided for investigatory suspension and disciplinary hearing. The Respondent issued her with a show cause letter, and her right to be accompanied by a fellow employee or trade union representative was expressed to her. She was informed of the reasons for her dismissal. Due process was followed.
25. Mary Jerotich Koros, the 2nd grievant, stated that she was employed by the Respondent on 1st October 2008 as a Microfinance clerk at a starting salary of Kshs.18,496/= and house allowance of Kshs.11,505/= . She served in the position up to 2011. Between 2011 and 2012, she was verbally assigned the role of a cashier.
26. Later, in 2013 she was verbally re-deployed back to Microfinance, and in 2015, she was reappointed to the role of cashier. At the time of her dismissal from employment, she was earning Kshs.40,795/= and a house allowance of Kshs.19,702/=



27. On 29th December 2015, the Respondent's CEO summoned her to her office and accused her that she had made a fraudulent transaction as such, it had been decided that she be sent on compulsory leave. According to her, this is an action that didn't have any foundation in Labour statutes. The Respondent didn't give her any reasons for the compulsory leave.
28. She asserted that at all material times, she carefully carried out due verification before she paid out any money from customers' accounts. No customer ever complained that she had debited her or his account irregularly, improperly and or fraudulently.
29. The matter was reported to the Banking Fraud Unit. Investigations were conducted and it was concluded that she wasn't culpable.
30. On 4th January 2016 the Respondent served her with a show cause letter, to which she responded on 8th January 2016.
31. On 23rd February 2016, the Respondent invited the Grievants to a disciplinary hearing, however, following the Claimant's complaint that they had been excluded from the hearing, the hearing didn't take off. A new invitation was issued on 18th March 2016. The hearing concluded on 23rd March 2016, but the Disciplinary Panel failed or refused to share the meeting minutes with the Claimant. On 21st April 2016, the Grievants were dismissed from their positions.
32. On 4th May 2016 the Secretary General of the Claimant reported the existence of a Trade dispute to the Cabinet Secretary Ministry of Labour, & Social Services, and the conciliator issued a recommendation favouring their reinstatement.
33. During the four months under compulsory leave, the Respondent withheld their salaries.
34. Cross-examined by Counsel for the Respondent, she stated that the Respondent gave her a user password which she only could use to access the system to enable transactions.
35. She asserted that she was not in charge of account opening. This was a responsibility under customer care.
36. Before undertaking any withdrawal transaction, she had to confirm the customer's signature, and details. The alleged fraudulent transactions related to withdrawals. However, she was never shown any of the withdrawal documents in relation to the alleged transactions.
37. The Respondent's System had challenges. Sometimes customers' signatures and photos could disappear suddenly. When such could happen, the customer will be sent to the Supervisor. Such customers could only be allowed to transact upon restoration of the signature and photos on the System. The existence of this challenge was raised with the Respondent severally.
38. She was accorded an opportunity to defend herself before the Respondent's disciplinary Committee. During the disciplinary hearing, the Respondent allowed her to be accompanied by a union representative.

Respondent's case

39. It was the Respondent's case through the evidence of Joanne Cheruto that the 1st Grievant was employed by the Respondent as a loans clerk in 2010 while the 2nd Grievant was employed as a micro-finance clerk in 2008. Their salaries and house allowances were KShs. 21, 374, and 12, 295, and KShs. 18 496, and KShs. 11,055, respectively.



40. They worked for the Respondent until 23rd December 2015, and 29th December 2015, respectively, when they were summarily dismissed in connection with fraudulent activities committed through their accounts.
41. At the time of the dismissal the 1st Grievant was earning a basic salary of Kshs.52,158/-and a house allowance of Kshs.24,381/- while the 2nd Grievant was a earning a basic salary of Kshs.40,795/-and a house allowance of Kshs.19,702/-.
42. Preliminary investigations by the Respondent revealed that they were involved in fraudulent transactions, resulting in financial losses. Their responses to the accusations were unsatisfactory.
43. The Grievants were taken through an internal disciplinary procedure and union representatives were invited, before the decision to dismiss them was taken on 21st April 2016.
44. The Grievants' dismissal was under section 44 (4) (c) of the *Employment Act* and Clause 18 and 29 (a) of the CBA.
45. The Respondent was not in agreement with the Conciliator's recommendation particularly because it did not take the Grievants' culpability into account and went ahead to recommend compensation at the Respondent's expense.
46. Cross-examined by Counsel for the Claimant, the witness testified that exclusive rights to access the Respondent's system reside in the IT Manager. He allocates user rights to other employees of the Respondent.
47. She further testified that a cashier can access a customer's view it, and initiate a funds transfer or withdrawal, upon confirmation of the confidential credentials of the account holder.
48. A cashier or Chief cashier can access the System after work, however, this has to be with the knowledge and authority of the manager.
49. Activation of a dormant account takes an elaborate process. The Applicant must fill out a form requesting the activation. He or she must annex the requisite documents to it. Then the form is presented to the FOSA supervisor for approval. Only after the approval that the account would be operationalized.
50. The witness admitted, that the Respondent often suffered system instability. This forced the Respondent to approach the system vendor's intervention. The problem was fixed.
51. The Audit report indicated that there was a need to safeguard the system from external interference. The vendor recommended a forensic audit. However, she couldn't tell why they were calling for a forensic audit.
52. The Respondent reported the matter to the Banking Fraud Unit for investigation. The Grievants were not charged with any criminal offence after the investigation.
53. The interdiction letter expressly stated that their interdiction was to be without pay. The Collective Bargaining Agreement which applied to them didn't provide for interdiction but suspension on half pay. They weren't paid during the interdiction period.
54. The Conciliator's recommendations were in favour of the Grievants. However, the same aggrieved the Respondent as they didn't consider the loss that it suffered as a result of their negligence.



55. In her evidence under re-examination, the witness stated that once the user has been given the credentials, she or he is supposed to keep the credentials confidential. The user can change the password without the intervention of a 3rd party.
56. She further testified that if a cashier wanted to work overtime, he or she must seek authority and approval for him or her to continue using her credentials.

Analysis and Determination

57. I have carefully considered the pleadings by the parties herein, their evidence and submissions, and the following issues emerge for determination, thus;
 - i. Whether the summary dismissal against the Grievants was unfair.
 - ii. Can the reliefs sought can be availed to the Grievants?

Whether the Summary dismissal against the Grievants was unfair.

58. It is trite that where the employer asserts that the summary dismissal against an employee was not wrongful, it behoves them to demonstrate to the requisite standards that the dismissal was procedurally and substantively fair. It is, therefore, imperative to state that the provisions of Section and Sections 43, 45, and 47[5] of the *Employment Act* come into play.
59. Section 41 of the *Employment Act* provides a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee from employment must adhere to. I have carefully considered the Claimant's pleadings, and the Grievant's evidence, and it appears that they didn't, intend to make the aspect of procedural fairness a contested issue. They didn't. In any event, in their evidence under cross-examination, they admitted that due process was followed leading up to the Respondent's decision to dismiss them summarily.
60. In the upshot, I conclude that the summary dismissal was procedurally fair.
61. I now turn to consider the aspect of substantive justification. There is no dispute that the Grievants were summarily dismissed from their employment.
62. Inarguably, the employer is entitled to dispense with the contractual notice, or with the minimum notice prescribed by statute, Section 44[3] of the *Employment Act*], and summarily dismiss an employee who has committed a repudiatory breach of contract. This is an application of the general rule of contract of law that as a result of a repudiatory breach, the innocent party has the option to terminate or affirm the contract. See, *White and Carter [Councils] v McGregor* [1962]AC 413.
63. However, it is trite that, the conduct which is considered to constitute repudiation by the employee has not to be an isolated and minor act of disobedience or negligence. For an isolated breach to suffice it must be such as to show the employee to have disregarded the essential conditions of the contract of employment. In *Laws v London Chronicle Limited* [1959] 2 ALL L.R 285 the English Court of Appeal stated the following;

“Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable the question must be whether the conduct complained is such as to show the servant to have disregarded the essential conditions of service.”



Or to be inconsistent with the continuance of confidence between the employer and employee. See *Sinclair v Neighbour* [1967]2 QB.

64. Section 44[4] of the Act sets out acts of commission or omission that may amount to gross misconduct and that can justify an employer's decision to hand down a summary dismissal against an employee. However, it is imperative to state the list is not exhaustive. An employer can summarily dismiss an employee on account of a matter not on the list for as long as it is in character as described hereinabove [paragraph 63].
65. It was the Respondent's case that the infractions that the Grievants were accused of having committed amounted to gross misconduct and were fit grounds for summary dismissal.
66. It isn't sufficient, therefore, for the employer to state that an employee committed one or more of those actions listed in the provision, or its Human Resource Policy. Whether an employee's misconduct warrants dismissal requires an assessment of the degree and surrounding circumstances. In addressing this approach, the Court in *McKinley v BC Tel* [2001] 2SCR 161,2001 SCC 38 [Can LII] observed: -
- “When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of the alleged in subordination within this analysis a finding of misconduct doesn't not by itself give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such the employment relationship could no longer viably subsist.”
67. Thus, this Court is enjoined to consider the real existence of the Grievants' alleged acts of omission and commission, the context within which they occurred, and the gravity of the same.
68. I agree with the Respondent's Counsel's submissions that conduct such as the Grievants were accused of, in the sector that they were employed in, could certainly be good ground[s] for summary dismissal of an employee from employment, if proved. The case of *Violate Kasada Shitsuka v Kenya Post Savings Bank* [2020] eKLR, cited by Counsel, is relevant on this point. However, this authority is distinguishable from the instant matter. The Grievants raised pivotal points against the Respondent's assertion, points which the Respondent didn't address sufficiently or at all, and as will come out shortly hereinafter, leading this Court to believe their version and hold that the Respondent didn't discharge duly, its legal burden under section 45[2] Of the Act.
69. The Respondent accused the 1ST Grievant that she allowed her User ID to be used to enable fraudulent withdrawal of money from customers' accounts on various dates. She vehemently resisted the accusation. I have carefully considered the audit report by Coretic Systems & Solutions Limited, the Respondent's external Auditors and take a clear view that the report was not conclusive as to whether or not the 1st Grievant deliberately or through negligence allowed her User ID to be improperly used. The report is in my view, speculative.
70. This Court notes that the Auditors recommended further investigations on “suspicion of fraudulent activity.” The Respondent didn't place any material before this Court from which it can be discerned whether or not further investigations were done and if they were, what the outcome was.
71. It was the 1st Grievant's testimony that the system might have been manipulated fraudulently not because she revealed her credentials, but because of systemic weaknesses. For instance, she pointed out that although Mr Mburu was on leave during the material time, and therefore couldn't access the system without attending the premises of the Respondent, the Internal Audit Report shows that at various times, his credentials were used to enable some of the alleged fraudulent transactions. The



- Respondent didn't place forth evidence to discount this position by the Grievant. In fact, the Audit Report by the External Auditor suggested auditing of the system, an indicator that it had challenges.
72. In her evidence under cross-examination, the Respondent's witness admitted that the auditors recommended a forensic examination of the Respondent's System. However, pressed further, she flatly asserted that she didn't know why the recommendation was made. The issue as to whether or not the alleged fraudulent transactions were by outsiders as a result of the Respondent's System's weaknesses and not as a result of the Grievants' actions, was a material fact that the Respondent needed to address sufficiently. In my view, the only reasonable impression that one can make is that the recommendation was anchored on the Auditors' realisation that there were weaknesses that needed to be addressed.
73. Therefore, the flat denial of knowledge by the Respondent's witness was deliberate, to avoid injury to the Respondent's case. However, having noted this, I make an adverse inference against the Respondent.
74. The Grievants asserted that the matter was reported to the Banking Fraud Unit, who after investigations exonerated them from any blame. The Respondent's witness admitted this fact in her evidence under cross-examination. However, it hasn't escaped my sight that the Respondent didn't present any evidence as to whether or not it considered the exoneration, and whether it had any impact on its decision.
75. It will be not an act of equity for an employer to dismiss an employee from employment on matters fuelled by its own systemic challenges.
76. In my view the evidence against the 2nd Grievant was so sketchy. Further, the external audit report doesn't mention her adversely.
77. In the circumstances of this matter, no reasonable employer could have dismissed an employee from employment as the Respondent did against the Grievants.

Whether the Claimant is entitled to the reliefs sought

78. The Respondent didn't challenge the Grievants' evidence that they were not paid their salaries during the four months they were under compulsory leave. The Respondent didn't cite any policy provision, CBA stipulation or legal basis, that could justify its action. It withheld their salaries unlawfully, it must compensate them.
79. Having found that the summary dismissal was unfair, I now turn to consider whether the Grievants are entitled to a compensatory relief under Section 49[1] [c] of the Act. It is pertinent to point out that the relief is discretionarily granted, depending on the circumstances of each case.
80. I have carefully considered the fact that the Grievants were summarily dismissed from employment based on an inconclusive and speculative Audit report, that they could have been condemned unfairly instead of the Respondent's systemic challenges, the industry in which they were serving and the negative impact of the dismissal on their prospects in getting jobs elsewhere within the same industry, and the length of service they had rendered the Respondent and conclude that they are entitled to the relief in the manner hereunder.
81. In the upshot, Judgment is hereby entered in favour of the Grievants in the following terms: -
- i. A declaration that the summary dismissal against the Grievants was substantively unfair.
 - ii. Compensation under section 49[1][c] of the *Employment Act*, 6 months gross salary for each thus;



- a. 1st Grievant..... KShs. 449, 234.
- b. 2nd Grievant.....KShs. 362, 982.
- iii. Unpaid salary during the period of interdiction:
 - a. 1ST Grievant..... KShs. 302,156.
 - b. 2nd Grievant.....KShs. 249, 200.
- iv. One month's salary in lieu of notice;
 - a. 1st Grievant.....KShs. 76, 539
 - b. 2nd Grievant.....KShs. 60, 497.
- v. Interest on the sums awarded in [i] and [iv] above, at court rates from the date of this Judgement till full payment.
- vi. Interest on [iii] above at court rates from the date the salaries fell due, till full payment,
- vii. Costs of this suit.

READ SIGNED AND DELIVERED THIS 30TH DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

