



REPUBLIC OF KENYA



Maina v ABSA Bank Kenya PLC (Employment and Labour Relations Cause E1059 of 2021) [2025] KEELRC 1125 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1125 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1059 OF 2021**

DKN MARETE, J

MARCH 26, 2025

BETWEEN

FRANCIS MWANGI MAINA CLAIMANT

AND

ABSA BANK KENYA PLC RESPONDENT

JUDGMENT

1. The Claimant instituted this suit through a Memorandum of Claim dated 20th December 2021, challenging his termination by the Respondent (Absa Bank Kenya) on 8th May 2021. He was employed as a Bancassurance Sales Officer (BSO) from 1st August 2018 on a commission-based contract.
2. The termination followed an investigation into alleged misconduct, including claims that he paid Kshs.8,000 to a colleague, Augustine King'oku, for referrals, deleted a fellow BSO's sales code, and improperly solicited leads from unauthorized branches.
3. The Claimant denies the allegations, stating the Kshs.8,000 was a medical fundraiser contribution and that Winnie Dabani, not him, altered the sales records. He argues the disciplinary process violated his rights under Articles 10, 27, 47, and 50 of *the Constitution*, the *Fair Administrative Action Act* (No. 4 of 2015), and Sections 41, 45, and 47(5) of the *Employment Act*, 2007.
4. He was denied witness cross-examination, access to full investigation reports, and a fair hearing, rendering the termination unlawful. Despite appealing on 12th May 2021, the Appeal Panel upheld the termination on 18th June 2021 without proper justification.
5. He prays as follows;
 1. Declarations that the termination violated constitutional and statutory rights (Articles 10, 27, 47, 50; *Fair Administrative Action Act*; *Employment Act*).



2. months' salary in lieu of notice (Kshs.600,000).
 3. Compensation for unfair termination (Kshs.900,000).
 4. Salary underpayments (Kshs.510,117.60) for 2018–2021 (calculated at Kshs.127,529.40 annually).
 5. Leave pay (Kshs.92,893.50) for 21 days.
 6. House allowance (Kshs.220,517.64) at Kshs.4,594.12 monthly.
 7. Bonus (Kshs.500,000) for 2021.
 8. Service pay (Kshs.88,470) under Section 35(5) of the *Employment Act*.
 9. General and exemplary damages for reputational harm and lost opportunities.
 10. Costs and interest.
6. The Claimant asserted the Respondent's actions were discriminatory, as others received warnings while he was dismissed. He cited violations of natural justice, fair labour practices, and due process, urging the court to nullify the termination and award the sought reliefs.
 7. The Claimant filed a witness statement dated 29th July 2022 stating that he was employed by the Respondent on 7th October 2002 as a Bancassurance Officer, serving diligently for four (4) years with performance appraisals and incentives. On 8th May 2021, his employment was unfairly terminated based on unsubstantiated allegations that he solicited commissions from Bank Assurance Sales Officers (BSOs) and channelled business to himself—claims he denied, insisting no evidence was provided.
 8. An internal investigation on 16th March 2021 preceded a disciplinary hearing on 5th May 2021 via Microsoft Teams, where he was denied a fair hearing as his representative was barred from cross-examining witnesses, and no witness statements or investigation reports were availed. Despite explaining that a Kshs.8,000 payment to Augustine King'oku was for a medical bill, the panel upheld his termination.
 9. His appeal on 12th May 2021 was similarly dismissed on 2nd June 2021 without proper scrutiny of evidence, violating his rights under Articles 10, 25, 27, 28, 41(1), 47, 50(1), and 50(2) of *the Constitution* of Kenya, 2010, Section 4 of the *Fair Administrative Action Act*, 2015, and Sections 4, 5, 43, and 45 of the *Employment Act*, 2007. He suffered loss of income, reputational harm, and missed job opportunities due to the unlawful termination and seeks compensation for unfair dismissal, unpaid dues, and damages for breach of fair labour practices.
 10. The Claimant, through Augustine Ndemange King'oku, filed a witness statement dated 29th July 2022 stating that he worked with the Claimant at the Respondent's firm before their employment was unfairly terminated. In October 2020, he created a WhatsApp group to raise funds for his mother-in-law's medical bills after she suffered an accident, and the Claimant contributed Kshs.8,000.
 11. During disciplinary hearings on 5th May 2021, he explained that the payment was a personal donation, providing medical bills and M-Pesa records as proof, but the WhatsApp chat history was lost after the group disbanded. Despite clarifying that other colleagues also contributed and no evidence linked the payment to solicitation, the Respondent wrongfully concluded that the amount was a commission.
 12. The Appeal hearing upheld this flawed decision, ignoring his defence and violating fair hearing principles under Article 50 of *the Constitution* of Kenya, 2010 and Sections 41 and 45 of the



- Employment Act*, 2007. He affirmed that the termination was unjust, as no proof of misconduct existed, and supported the Claimant's case for unfair dismissal.
13. The Claimant, through Rachael Wanjiru Njeri, filed a witness statement dated 4th August 2022 stating that she worked for the Respondent from November 2017 until her unlawful termination in July 2022. She was based at the Mombasa branch and witnessed discriminatory treatment when the Respondent, in May 2021, terminated some employees—mostly from Nairobi—based on unsubstantiated allegations of soliciting commissions, while Mombasa staff received only warnings.
 14. She affirmed that no justification was provided for this disparity, violating Article 27 of *the Constitution* of Kenya (2010) on equality and Section 5 of the *Employment Act* (2007) prohibiting unfair discrimination. She attested to the arbitrary nature of the terminations, confirming the Claimant's allegations of unfair labour practices.
 15. The Claimant filed written submissions dated 28th March 2024, arguing that his termination by the Respondent on 8th May 2021 was both procedurally and substantively unfair under Sections 41, 43, 45, and 47(5) of the *Employment Act*, 2007, as well as in violation of Article 50 of *the Constitution* of Kenya (2010) on fair hearing rights.
 16. The Claimant, employed as a Bancassurance Sales Officer (BSO) since 1st August 2018, faced three unsubstantiated allegations: (a) paying Kshs.8,000 to a colleague (Augustine King'oku) as a purported commission, which was actually a medical fundraiser contribution; (b) engaging Relationship Managers outside his branch in breach of policy; and (c) deleting an aide-mémoire, despite no evidence linking him to the act.
 17. The disciplinary and appeal hearings denied him procedural fairness by refusing to allow cross-examination of witnesses (e.g., Winnie Dabani) or providing full investigation records, contrary to Section 4 of the Fair Administrative Actions Act, 2015 and the Respondent's own Disciplinary, Capability & Grievance Policy.
 18. The Claimant highlighted discriminatory enforcement, as other employees involved in similar conduct (e.g., Esther Nampaso and Eva Nyota) faced no disciplinary action. Citing the authority of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, and *Kenya Revenue Authority v Reuwel Waithaka Gitahi* [2019] eKLR, he argued that the Respondent failed to prove valid or fair reasons for termination, rendering the dismissal unjustified.
 19. The Claimant sought reinstatement, compensation for unfair termination, unpaid salaries, and costs, asserting that the Respondent's actions were biased, inconsistent, and lacked substantive merit.
 20. The Claimant further submitted that his termination violated the "range of reasonable responses test" (as outlined in *Halsbury's Laws of England*) and was substantively unfair under Sections 43, 44, 45(2)(a)(b), and 47(5) of the *Employment Act*, 2007, citing as authority *Wilson Khasakhala Maganga v Menengai Oil Refineries Ltd* [2015] eKLR.
 21. He argued discrimination under Article 27 of *the Constitution* and Section 5 of the *Employment Act*, referencing *Barclays Bank of Kenya v Gladys Muthoni* [2018] eKLR and *OI Pejeta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR, where similar misconduct by colleagues (e.g., Winnie Dabani, Esther Nampaso) went unpunished.
 22. He prays thus;



1. 12 months' salary compensation (Kshs.1,440,000) under Section 49(1)(c) (Postal Corporation of Kenya v Andrew Tanui [2019] eKLR).
 2. Unpaid commissions (Kshs.510,117.60).
 3. Accrued leave pay (Kshs. 93,893.50).
 4. House allowance arrears (Kshs.220,517.64) per Section 31(1) (Trevar Marambe v For You Chinese Restaurant [2021] eKLR).
 5. Bonus (Kshs.500,000) and service pay (Kshs.88,470).
 6. General damages for discrimination (Kshs.3,000,000), citing VMK v Catholic University [2013] eKLR.
23. He urged the court to award costs, relying on the authority of Little Africa Kenya Ltd v Andrew Mwiti [2011], asserting the termination was procedurally and substantively flawed.

Respondent's Case

24. The Respondent filed a Memorandum of Response dated 21st February 2022, denying the Claimant's allegations and asserting that his termination was lawful under the *Employment Act*, 2007. The Respondent admitted the employment relationship but clarified that the Claimant was engaged under a one-year fixed-term contract (1st August 2020 – 31st July 2021) with a Kshs.20,000 monthly retainer plus commissions, as per his appointment letter dated 20th July 2020.
25. The Respondent refuted claims of unfair dismissal, stating the Claimant was terminated for gross misconduct following an investigation into allegations that he:Paid Kshs.8,000 to a colleague (Augustine King'oku) as a kickback for sales referrals, which he claimed was a medical fundraiser contribution but failed to substantiate.Engaged Relationship Managers outside his assigned branch, luring them with commission-sharing promises.Deleted a colleague's (Winnie Dabani) sales code from an onboarding aide-memoire to fraudulently claim commissions.
26. The Respondent argued it followed due process under Section 41 of the *Employment Act*, issuing a suspension letter (28th April 2021), notice to show cause (28th April 2021), and conducting a disciplinary hearing (5th May 2021) where the Claimant was represented but declined to challenge evidence. The termination letter (8th May 2021) cited gross misconduct but offered one month's retainer in lieu of notice and accrued leave pay.
27. The Claimant's appeal (heard on 2nd June 2021) was dismissed (18th June 2021), upholding the termination. The Respondent denied discrimination, noting other employees faced similar disciplinary actions, and rejected claims for unpaid commissions, house allowance, or damages, citing Section 45(3) of the Act as barring unfair dismissal claims for sub-13-month service. It prayed for the suit's dismissal with costs.
28. The Respondent, through Vaslas Odhiambo, filed a witness statement dated 1st December 2023, stating that the Claimant was employed under three successive one-year fixed-term contracts (2018–2021) as a Bancassurance Sales Officer (BSO) with a Kshs.20,000 monthly retainer plus commissions, per his contract dated 20th July 2020. The Respondent terminated his employment on 8th May 2021 for gross misconduct following a whistle-blower report alleging unethical practices, including: Paying Kshs.8,000 to a colleague (Augustine King'oku) as a kickback for referrals, which the Claimant claimed was a medical fundraiser but failed to substantiate.Soliciting commissions from Relationship Managers



- (RMs) outside his assigned branch. Deleting a colleague's (Winnie Dabani) sales code to fraudulently claim commissions.
29. The Respondent conducted an investigation (Forensic Report dated 19th April 2021), issued a suspension (28th April 2021), and held a disciplinary hearing (5th May 2021) where the Claimant admitted some facts but declined to provide phone records. The termination letter (8th May 2021) cited violations of the Anti-Bribery Policy and Bank values, offering one month's retainer in lieu of notice.
 30. The Claimant's appeal (heard on 2nd June 2021) was dismissed (18th June 2021). The Respondent denied procedural unfairness, noting the Claimant never requested to cross-examine the whistleblower, per the Whistleblowing Policy. It refuted discrimination claims, citing similar disciplinary actions against other employees (e.g., ELRC Nos. 647, 663, 674, 675 of 2021).
 31. The Respondent argued the Claimant was not entitled to bonuses, house allowance, or underpayment claims, as his commission-based contract excluded such benefits. It prayed for the suit's dismissal with costs, asserting compliance with the *Employment Act*, 2007, and internal policies.
 32. The Respondent, through Michael Kioko, filed a witness statement dated 1st December 2023, stating that as the Senior Forensic Manager, he led the investigation into allegations of unethical insurance sales practices reported on 16th March 2021 and reiterated what the Claimant was accused of.
 33. During the interview on 24th March 2021, the Claimant admitted transferring the funds but maintained it was for medical aid. The Forensic Team reviewed evidence, including staff accounts and correspondence, concluding the Claimant: deleted and altered sales records to unjustly benefit from colleague's deals.
 34. The Claimant had received leads from unauthorized branches, violating internal policies and the findings were compiled in the Investigation Report (page 29 of Respondent's Bundle), supporting the disciplinary action. No statutory or case law was cited, as the statement focused on factual findings.

Respondent's Written Submissions

35. The Respondent filed written submissions dated 17th September 2024, opposing the Claimant's case. The Claimant, employed on a one-year fixed-term commission-based contract from July 2018, was terminated on 8th May 2021 for gross misconduct. The Respondent received a whistle-blower report alleging the Claimant paid Kshs.8,000 to a colleague, Augustine King'oku, for referrals, deleted a fellow Bancassurance Sales Officer's sales code, and solicited leads from unauthorized branches.
36. A forensic investigation confirmed these violations, leading to a show-cause letter dated 28th April 2021, suspension, and a disciplinary hearing on 5th May 2021, where the Claimant admitted some facts but offered explanations. The termination was upheld on appeal on 18th June 2021.
37. The Respondent argues the termination was justified under Section 44(3) of the *Employment Act* and Clause 5.2.2 of its Disciplinary Policy, citing dishonesty and breach of contract. The procedure complied with Section 41 of the *Employment Act*, as affirmed in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR, which outlines fair hearing requirements.
38. The Claimant's request to cross-examine the whistle-blower was denied per policy, as held in *Charles Munuve v Safaricom PLC* [2021] eKLR, where partial disclosure sufficed. The Respondent cites *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR and *Naima Khamis v Oxford University Press* [2017] eKLR to stress that procedural fairness was met.



39. The Respondent disputes the Claimant's reliefs. The parties partially settled via mediation on 12th May 2023, resolving notice pay (1 month) and leave days (6 days). The Claimant sought Kshs.5,911,997, including 12 months' compensation, house allowance, bonus (Kshs.500,000), service pay (Kshs.88,470), underpayment (Kshs.510,117.60), and general damages (Kshs.3,000,000).
40. The Respondent contended house allowance and bonus are excluded per the contract, as held in *Kenya Chemical Workers Union v Bamburi Cement* [2013] eKLR, and service pay is barred under Section 35(5) of the *Employment Act* (*Next Generation Communication Ltd v George Kirungaru* [2019] eKLR). General damages are inapplicable (*Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR), and exemplary damages lack basis (*DK Njagi Marete v TSC* [2020] eKLR).
41. The Respondent urges dismissal, citing fair termination under Sections 43, 45, and 47(5) of the *Employment Act*, or alternatively, a 1-month salary award per *OI Pejeta Ranching Ltd v David Muhoro* [2017] eKLR. Costs are sought under Section 12(4) of the *Employment and Labour Relations Court Act*.
42. The Respondent's case overwhelms that of the claimant. The claimant was involved in internal work place misconduct for which he was taken through appropriate disciplinary proceedings and found culpable. This culpability was upheld on appeal. I therefore find a case of lawful termination of employment and hold as such.
43. I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF MARCH 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Dingi instructed by Obae and Dingi & Company Advocates for the Claimant.

Mr. Nino Adeni instructed by Muhamed Muigai LLP Advocates for the Respondent.

