



REPUBLIC OF KENYA



**Miringu v Family Bank Limited (Cause E482 of 2023)
[2025] KEELRC 850 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 850 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E482 OF 2023
SC RUTTO, J
MARCH 14, 2025**

BETWEEN

AUGUSTINE KINYUA MIRINGU CLAIMANT

AND

FAMILY BANK LIMITED RESPONDENT

JUDGMENT

1. It is common cause that the Claimant was employed by the Respondent with effect from 8th April 2008 and that at the material time, he was serving in the position of Operations Manager. According to the Claimant, he duly and satisfactorily executed his duties and performed his obligations which were inter alia dealing with the Bank's operations without fail.
2. It is the Claimant's case that he had done nothing wrong to warrant termination of his employment and was castigated for being a whistle blower. In the Claimant's view, his termination was not for a proper reason making it unlawful, unfair and wrongful. As such, he has claimed the following reliefs against the Respondent:
 - i. A declaration that the Respondent's actions of terminating the Claimant from employment vide the Respondent's letter dated the 8th of November, 2021 was wrongful, unfair and unlawful.
 - ii. A declaration that the Respondent violated the Claimant's rights to fair administrative action under Article 47, right to fair labour practices under Article 41, freedom from discrimination under Article 27 of *the Constitution* of Kenya, 2010 as well as rules of natural justice.
 - iii. Compensation from the Respondent for the unlawful termination as set out hereunder:
 - a. Compensation for unfair termination as at 12 month's Salary Kshs.1,944,000.00
 - b. Six months' salary in lieu of notice Kshs.972,000.00



- c. Gratuity Kshs.2,106,000.00
 - d. Compensation till the attainment of retirement age Kshs.36,936,000.00
 - iv. General damages for violation of fundamental rights and freedoms.
 - v. Cost of this suit be borne by the Respondent.
 - vi. Any other relief that the court may deem fit to grant.
3. The Respondent opposed the Claim through its Statement of Response dated 2nd August 2023. Denying the Claimant's assertions that he satisfactorily executed his duties, the Respondent avers that the Claimant was negligent in conducting his duties as a result of which it (Respondent) was exposed to a loss of Kshs 200,000,000/=.
 4. It is the Respondent's assertion that the decision to terminate the Claimant from employment was for a valid reason, fair and procedural. Consequently, the Respondent has asked the Court to dismiss the Claimant's Statement of Claim with costs.
 5. The matter proceeded for hearing on 31st October 2024, during which both sides called oral evidence.

Claimant's Case

6. The Claimant, who testified in support of his case, started by adopting his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed alongside the Statement of Claim as exhibits before Court.
7. It was the Claimant's evidence that in the year 2015, the Respondent engaged the services of Ceven Limited which agreed to be appointed as a vendor for the sale and distribution of pre-paid electricity tokens in Kenya. He (Claimant) would foresee the entire project.
8. The Claimant further averred that sometime in May 2020, he reported a mismatch from the Respondent's vending company's statement of account as he had noted some discrepancies between the amounts deposited with the Respondent and credited on the vending company and the amounts that the Respondent accounted for upon the sale of the product.
9. That upon running the reconciliation for the account, he discovered that there was a lot of manipulation of the data they sent, as the same did not correspond with their statements and even made a report of the fraud to the person in charge, and immediately investigations were conducted.
10. That upon investigations, the vending company was found to be in breach of their agreement with the Respondent Company.
11. The Claimant further averred that on 6th of August, 2021, he received a letter to show cause in which he was to respond and give reasons why he should not face disciplinary action for the events that had occurred between the Respondent and the vending company.
12. On 20th September 2021, he was invited to a disciplinary hearing in which he explained his side of the story to the committee. He (Claimant) also informed them that he did his due diligence trying to reconcile the accounts and statements and it was in that process that he discovered fraud on the vending platform.
13. That he had on several occasions requested for statements to allow him reconcile statements from both ends, but the same had been met with adamancy. That upon reconciling, he realized that the company was fraudulent.



14. On 8th November 2021, he received a letter terminating his employment and directing him not to report to work.
15. In the Claimant's view, the manner in which he was dismissed from work was unfair, malicious, and wrongful.

Respondent's Case

16. The Respondent called oral evidence through Mr. Stephen Ng'ang'a who testified as RW1. Mr. Ng'ang'a identified himself as the Respondent's Talent and Welfare Manager.
17. Similarly, RW1 adopted his witness statement to constitute his evidence in chief. He further produced all the documents filed on behalf of the Respondent as exhibits before Court.
18. It was RW1's evidence that the Claimant's job as Operations Manager entailed managing the Bank's Digital Financial Services (DFS) Operations Team.
19. That one of the Claimant's key responsibilities as the person managing the Bank's DFS Operations Team was reconciliation of the DFS operations accounts.
20. RW1 further stated that with a view of providing more Digital Financial Services, the Respondent Bank engaged a company known as Ceven Limited which is a vendor/distributor of pre-paid electricity tokens.
21. That the Respondent would fund the vendor's account and the company would in turn supply electricity tokens to the Respondent's customers. That this was one of the many digital financial services offered by the Respondent Bank.
22. RW1 further averred that as the person in charge of the DFS Operations Team, the Claimant was required to carry out reconciliations to ensure that the amounts being credited to Ceven Limited's account were commensurate to the tokens distributed by the vendor.
23. That during a routine internal audit in January 2020, the Respondent discovered discrepancies in the vendor's statement of account between the amount credited to the vendor's account and the tokens allegedly distributed by the vendor.
24. The Respondent also discovered that no reconciliations were being made on the vendor's account, a responsibility which fell squarely on the Claimant as the Operations Manager.
25. Due to the failure to reconcile the accounts, the Respondent was left exposed to a loss of about Kshs 200,000,000/=.
26. He (RW1) is aware that the Bank first took time to remedy the crisis and thereafter elected to subject the Claimant to disciplinary action as he was negligent in carrying out his responsibilities.
27. Consequently, the Claimant was issued with a show cause letter on 6th August 2021 which he responded to in writing on 8th September 2021.
28. The Claimant was thereafter subjected to a disciplinary hearing on 28th September 2021 whereupon he made his representations at the hearing.
29. During the proceedings, it was clear that the Claimant had negligently conducted his duties as he had not been reconciling the account prior to the audit that was done in January 2020.



30. That it is only after the audit unveiled the discrepancies that the Claimant began reconciling the account.
31. RW1 further averred that in view of the findings, the disciplinary committee recommended that the Claimant be terminated from employment which was done with effect from 9th November 2021.
32. That upon termination, the Claimant was paid his final dues which included two months' salary in lieu of notice, leave days earned and not taken and salary for the days worked in November 2021.
33. RW1 opined that the Claimant was accorded a fair hearing and that the Respondent had legitimate reasons for terminating his employment.

Submissions

34. It is worth mentioning that the Claimant did not file written submissions despite being granted a further extension of seven days on 19th December 2024.
35. On its part, the Respondent submitted that it has met the test for substantial justification and the Claimant cannot state that he was terminated for being a whistleblower and that he had done nothing wrong to warrant termination. In support of its submissions, the Respondent placed reliance on the cases of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR and *Joseph Mwaniki Nanga v United Millers Limited* [2022] eKLR.
36. Referencing the cases of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR, the Respondent urged the Court to consider the evidence placed before it and hold that there was adherence to the procedural fairness contemplated under Section 41 of the *Employment Act*.
37. In conclusion, the Respondent posited that it had satisfied the twin limbs of substantive and procedural fairness and consequently the Claimant's termination was valid, just, fair and adhered to the relevant provisions of the law.

Analysis and Determination

38. Flowing from the pleadings by both parties, the evidentiary material on record, as well as the Respondent's submissions, the following issues stand out for determination: -
 - i. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant was taken through a fair process prior to being terminated from employment; and
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason for termination?

39. As can be discerned from the record, the Claimant was terminated from employment on grounds of professional negligence in carrying out his duties. It was alleged in the letter of termination that the Claimant's actions and inactions exposed the Respondent Bank to both financial and reputational risks hence the Bank had lost confidence in him.
40. Refuting the allegations levelled against him, the Claimant has averred that he was castigated for being a whistle blower. According to the Claimant, sometimes in May 2020, he had reported a mismatch



from the Respondent's vending company (Ceven Limited) statement of account as he had noted discrepancies between the amounts deposited with the Respondent and credited on the vending company and the amounts accounted for upon the sale of the product. The Claimant hastened to add that this was not part of his job description.

41. The Claimant has further averred that when he was instructed to reconcile the account and statements with respect to the dealings of the Respondent and Ceven Limited, he discovered fraud. The Claimant added that on several occasions, he had requested for statements to allow him reconcile the account, but the same had been met with adamancy from Ceven Limited.
42. On the other hand, the Respondent has averred that the Claimant was the Operations Manager hence in charge of the DFS Operations Team. That as such, one of his key responsibilities was monitoring and reconciling transactions in DFS operations accounts including the account by Ceven Limited.
43. According to the Respondent, the discrepancies were discovered during an internal audit and it was apparent that no reconciliations were being made on the Vendor's account, a mandate that belonged to the Claimant.
44. Revisiting the Claimant's job description, it is clear that his key responsibilities included undertaking reconciliations for DFS operations accounts. This therefore discounts the Claimant's position that the reconciliation of DFS operations accounts was not part of his job description.
45. It is common ground that the Respondent Bank was exposed to a financial loss which was approximately Kshs 193 million, as a result of the discrepancies in the funds disbursed to Ceven Limited and the tokens availed.
46. In support of its case, the Respondent exhibited a copy of an investigation report dated 31st August 2021. As per the said investigation report, in an ideal situation, the Bank should have been able to check if it was receiving tokens equivalent to the amount availed to Ceven Limited.
47. It was further noted in the investigation report that the Bank lost funds due to failure to check if all the tokens paid for were being delivered. That further, all that was required was to check if the funds disbursed to Ceven Limited were being credited back to the Bank through tokens sales, which could credit the GL accounts. It was further observed that this could have been done through a reconciliation.
48. According to the Claimant, he is the one who flagged the fraud as he discovered that there was manipulation of the data sent by Ceven Limited. In support of his case, the Claimant exhibited copies of email correspondence exchanged with various parties over the issue.
49. In an email dated 23rd January 2019, the Claimant requested for the consolidated statements for the month of June to December 2018 on the basis that the same were required by external auditors. It is worth pointing out that from the record, this was the first email raised by the Claimant requesting for the statements from Ceven Limited. It is also evident that the Claimant was requesting the same for audit purposes as opposed to reconciliation.
50. From the record, Claimant once again requested for statements for the months of March, April, May, June, July and August 2019 vide an email dated 3rd September 2019. Between January to September 2019, there is no evidence that the Claimant followed up for the statements from Ceven Limited to allow him undertake reconciliation of the account.
51. It was only in an email dated 28th May 2020, that the Claimant informed Belinda that the company (Ceven Limited) had manipulated the data they had sent.



52. As per the investigation report, the loss of funds occurred between March 2018 and December 2020. As such, the Claimant's discovery was coming quite late in the day.
53. Indeed, had the Claimant been undertaking reconciliation of the account regularly, it is more than probable that he would have been able to flag the fraud early enough and mitigate the Respondent's financial risk.
54. It is also worth pointing out that the Claimant did not demonstrate in whatever form or manner, that he had undertaken reconciliation of the accounts with respect to Ceven Limited prior to the fraud being flagged. If I may say, the Claimant's only defence was that he was not the one tasked with the reconciliation of DFS operations accounts.
55. Having established that one of the Claimant's key responsibilities was to undertake reconciliation of the DFS operations accounts including Ceven Limited, it follows that since there was fraud concerning the said account arising out of failure to undertake reconciliation as appropriate, the blame fell on the Claimant's doorstep.
56. Pursuant to Section 43(2) of the *Employment Act*, the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. In this respect, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt.
57. Considering the circumstances of the case herein, it can very well be said that by his own actions and omissions, the Claimant had led the Respondent to genuinely believe that he was not diligent and was imprudent in the performance of his duties as the DFS Operations Manager. This is further bearing in mind that the Respondent Bank was exposed to a financial risk amounting to approximately Kshs 193 million. By all means, this risk was of monumental proportions.
58. To this end, I am led to conclude that the Respondent has proved on a balance of probabilities that the Claimant was negligent in the performance of his duties. As such, there was a valid and fair reason for the Respondent to terminate the Claimant's employment within the meaning of Sections 43 and 45(2) (a) & (b) of the *Employment Act*.

Fair process?

59. With respect to procedural fairness, Section 45 (2) (c) of the *Employment Act* places the burden on the employer to prove that termination of employment was in line with a process that is fair. On this aspect, Section 41 makes specific requirements regarding the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of his or her choice.
60. The requirements of a fair process as envisaged under Section 41 aforesaid were reiterated by the Court of Appeal in the case of *National Bank of Kenya vs Anthony Njue John* [2019] eKLR, as follows:

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and



to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”

61. The record bears that the Claimant was issued with a Notice to Show Cause dated 6th August 2021, which set out in detail the allegations levelled against him and to which he was required to respond.
62. The Claimant responded to the allegations contained in the Notice to Show Cause through his letter dated 8th September 2021.
63. He was subsequently invited to a disciplinary hearing which was scheduled for 28th September 2021. Through the same letter, the Claimant was advised of his right to be accompanied to the disciplinary hearing, by a witness. He was further advised that the outcome of the disciplinary hearing had far-reaching effects on his contractual relationship with the Bank.
64. It is not contested that the Claimant appeared for the disciplinary hearing and that he was given an opportunity to articulate his case and give his side of the story. Indeed, the record of the disciplinary hearing indicates as much.
65. It was subsequent to the disciplinary hearing that the Claimant was terminated from employment.
66. Applying the provisions of Section 41 of the Employment Act to the case herein, I am persuaded that the Respondent applied a fair procedure prior to terminating the Claimant’s employment.
67. In sum, the Respondent has proved to the requisite standard that it had a valid and fair reason to terminate the Claimant’s employment and in so doing, observed the basic requirements of a fair hearing as envisaged under Section 41 of the Employment Act. It is thus this Court’s finding that the Claimant’s termination from employment was neither unfair nor unlawful.

Reliefs?

68. As the Court has found that the Respondent has proved to the required standard that the Claimant’s termination from employment was for a valid and fair reason and that the Respondent applied a fair procedure in effecting the said termination, the claim for notice pay and compensatory damages cannot be sustained. In the same measure, the claim for compensation until the attainment of retirement age fails.
69. With respect to the claim for gratuity, the record bears that there is no contractual provision for payment of gratuity. If anything, it is apparent that the Claimant was a member of the Respondent’s Staff Retirement Benefits Scheme. Indeed, he confirmed during cross examination that he was able to access his contributions from the pension fund. To this end, the claim for gratuity is declined.

Orders

70. In the final analysis, the Claim is dismissed in its entirety with an order that each party shall bear its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of March 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant No appearance



For the Respondent Ms. Ndoigo instructed by Mr. Mbaabu

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

