



**Mwanyolo v SBM Bank Limited [Formerly Fidelity Commercial Bank Limited] & 2 others (Cause 132A of 2023) [2025] KEELRC 1178 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1178 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 132A OF 2023**

**M MBARŪ, J  
APRIL 24, 2025**

**BETWEEN**

**CECILIA WANJALA MWANYOLO ..... CLAIMANT**

**AND**

**SBM BANK LIMITED [FORMERLY FIDELITY COMMERCIAL BANK LIMITED] ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant is an adult. The 1<sup>st</sup> respondent is a limited liability company registered under the [Companies Act](#) and operating under the [Banking Act](#). The 2<sup>nd</sup> respondent is the constitutional body under the [National Police Service Act](#) entrusted with maintaining law and order. The 3<sup>rd</sup> respondent is the chief government legal advisor.
2. The 1<sup>st</sup> respondent employed the claimant as an assistant operations manager at the Changamwe Branch in Mombasa. On 4 May 2017, after working for 8 years, the claimant was notified of summary dismissal without prior notice or being called to a disciplinary hearing. This was contrary to sections 41, 43, and 45 of the [Employment Act](#) and Article 51(2) of the [Constitution](#).
3. The claim is that the 1<sup>st</sup> respondent maliciously and without reasonable cause complained against the claimant to the 2<sup>nd</sup> respondent, Mombasa Criminal Case No.729 of 2017. The complaint was heard and dismissed by the Mombasa Magistrates Court under section 210 of the [Penal Code](#) on 18 September 2019, as a result of which the claimant suffered mental anguish, defamation, loss, and damage.



4. The claim is that the respondents' actions amount to wrongful termination of employment and violation of the right to fair hearing and administrative action under Article 52(1) of the Constitution.
5. The claim is to pay general, punitive, and exemplary damages for wrongful arrest and malicious prosecution. It is a claim for interests from 4 May 2017.

The claimant is further seeking the following;

6.
  - a. Ksh.960,000 being 12 months' compensation for wrongful dismissal;
  - b. Compensation for wrongful arrest and malicious prosecution;
  - c. Costs of the suit and interests.
7. The claimant relies on her witness statement and avers that on 1 August 2009, she was employed by the 1st respondent as a marketing officer, corporate, and issued with an appointment letter. On 21 August 2015, she was promoted to an assistant operations manager at the Changamwe Branch. On 3 May 2017, the claimant was arrested by police officers of the 2nd response at the instigation of the 1st response. She was released on bond without charge. On 8 May 2017, the claimant was charged and remanded at Shimo la Tewa prison and released on bail on 12 May 2017.
8. The claimant avers that upon release from custody, she received notice from the 1<sup>st</sup> respondent dated 4 May 2017 terminating her employment by summary dismissal for gross misconduct and invoking the provisions of Section 44(3) of the Employment Act. There was no exhaustion of Section 41(2) of the Employment Act or Article 51 of the Constitution before the termination of employment. The claimant was not presumed innocent until proven guilty.
9. On 7 June 2017, the claimant wrote to the 1<sup>st</sup> respondent about her unpaid May salary. She was issued a cheque for Ksh. 196,354, stated to be payment of terminal dues.
10. In this case, the 1<sup>st</sup> respondent acted in haste to have her arrested and prosecuted without carrying out any investigations over alleged stolen funds at the branch. Such action was not in good faith, and the criminal case in Mombasa Case No. 729 of 2017 resulted in an acquittal on 18 September 2019. This confirmed that the termination of employment was with malice and was unlawful.
11. The claimant avers that she has suffered loss and damage, and the respondent should pay general, punitive and exemplary damages and compensation for unfair termination of employment.
12. In response, the 1<sup>st</sup> respondent admitted the employment relationship and that the claimant was an employee of Fidelity Commercial Bank Limited, which it acquired. On 11 May 2017, the claimant's employment was terminated on 4 May 2017 following allegations of gross misconduct.
13. In November 2016, Fidelity Commercial Bank's Changamwe branch was closed, and all accounts were taken over as per its head officer's instructions (Mombasa Branch). When a branch is taken over, the managers must submit all pending item reconciliations to the head office. This information was communicated to the Changamwe branch, where the claimant was an official.
14. It came to the attention of the 1<sup>st</sup> respondent's management that the finance department was not getting adequate management responses about some outstanding items on the inter-branch cash transfer ledger of its Changamwe branch. The head of internal audit was sent to carry out investigations, and he reported the following;



- a. The claimant had on several occasions instructed a cashier, one Abdikadir Hido, to raise cash vouchers of Ksh 4,500,000 (19 April 2016 Ksh 1,500,000/-, 1<sup>st</sup> July 2016 Ksh. 800,000/-, 14 October 2016 Ksh. 500,000/-, 19 October 2016 Ksh. 700,000/- and 8 November 2016 Ksh. 500,000/-);
  - b. The Changamwe branch never acknowledged receipt of Ksh. 1,500,000 moved from Mombasa, though the same had been properly recorded and accounted for in the Mombasa branch.
  - c. The other sums were transferred from the Changamwe branch as per the 19 April and 14 August 2016 vouchers. Fidelity Commercial Bank Limited, with its head office in Mombasa, did not receive them.
15. Following the audit report, the 1<sup>st</sup> respondent terminated the claimant's employment through a summary dismissal notice dated 4 May 2017, per the policy and section 44(3) of the Employment Act. The 1<sup>st</sup> respondent reported the matter to the police for investigations, and the claimant was charged in Mombasa Criminal Case No.729 of 2017. The 1<sup>st</sup> respondent was within their rights to make a report to the police, and the allegations made are without merit.
16. The response is that the claimant was paid her full terminal dues and issued with a cheque dated 29 June 2017 for Ksh.196,354 for;
- a. 3 months' notice pay Ksh.80,000 x 3 = Ksh.240,000;
  - b. Salary for 4 days worked in May Ksh.10,323;
  - c. 8 annual leave days Ksh.20,645;
- Total Ksh.270,968  
Less PAYE Ksh.74,614  
Net Ksh.196,354.
- The claim is without merit and should be dismissed with costs.
17. The 1<sup>st</sup> respondent filed the witness statement of Simon Muriithi Maina, the head of employee relations and human resource service centre. He avers that the 1<sup>st</sup> respondent acquired the Fidelity Commercial Bank Ltd on 11 May 2017. The claimant was employed because she had vast experience working in a banking institution. The claimant was issued a letter of appointment, and employment was regulated under the law, the 1st respondent's policy, and internal memos and circulars.
- Various cases of misconduct marred the claimant's employment.
- On 4 April 2011, the claimant was issued with a 1<sup>st</sup> warning for occasioning the loss of Ksh. 200,000 due to failure to follow the procedures of cheque confirmations and clearing;
- On 11 February 2015, the claimant applied for the operations officer position and indicated she had extensive experience.
- The claimant was promoted to assistant operations manager on 21 August 2015 and transferred to the Nyali Branch from 16 to 22 November 2015.
- In April 2017, the 1<sup>st</sup> respondent discovered suspected fraudulent transactions authorised by the claimant, occasioning a loss of Ksh. 5.5 million. This was discovered after an internal audit on 25 April 2017.



18. The claimant was arrested and charged in court. The 2nd respondent charged the claimant with fraud.
19. Following the claimant's charge, the 1<sup>st</sup> respondent terminated the claimant's employment on 4 May 2017, which was justified under section 43 of the [Employment Act](#) and the policy allowing for summary dismissal for fraud. The claimant has since been paid her terminal dues, and the claims made are without merit.
20. In response, the 3<sup>rd</sup> respondent filed a response and Notice of Preliminary Objections.
21. The response is that the court lacks jurisdiction over the matter filed out of time in contravention of Section 3(1) of the [Public Authorities Limitation Act](#), and the reliefs sought should not be issued. The suit is dismissed with costs.
22. At the close of the hearing, parties filed submissions. The pleadings and submissions are analysed, and the issues which emerge for determination are;  
Whether there were rights violations to justify the damages claimed.  
Whether there was wrongful and unlawful termination of employment, and  
Whether the remedies sought should be issued.
23. It is a common cause that the claimant was an employee of the 1<sup>st</sup> respondent, which acquired Fidelity Commercial Bank Limited on 11 February 2015. Upon acquiring a business, the claimant retained her role until termination of employment through notice dated 4 May 2017. Employment from one employer to the next became protected under Section 12(6) and (7) of the [Employment Act](#).
24. It is also not challenged that on 3 May 2017, the claimant was arrested by the 2<sup>nd</sup> respondent officers and charged under Mombasa Magistrates Court Criminal Case No.729 of 2017. Upon release on bail, on 4 May 2017, the 1st respondent terminated the claimant's employment by summary dismissal. The 1st respondents justified the summary dismissal under the provisions of Section 44(3) of the [Employment Act](#) and its policy, which allowed summary dismissal upon committing fraud classified as gross misconduct.
25. Indeed, Section 44 of the [Employment Act](#) allows an employer to terminate employment by summary dismissal. However, the employee also has her rights. Before termination of employment, whether for misconduct or gross misconduct, the employee is entitled to a notice and hearing under the provisions of Section 41(2) of the [Employment Act](#) that;
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may, on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
26. In the case of *Kenya Revenue Authority v Mwongela* [2025] KECA 262 (KLR), the court held that Section 41 (2) of the [Employment Act](#) provides for notification and a hearing before termination on the grounds of misconduct or gross misconduct. A policy of the employer cannot negate the law by removing the mandatory provisions of the law. The protections given to the employee must be secured. See *Ahmed Shee Mukhtar v Interiors Electrical & Medical Solutions Limited* [2015] KECA 672 (KLR), where the court held that the provisions of Section 41 of the [Employment Act](#) are mandatory.



27. In the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR), the court held that;

There can be no doubt that the Act, which was enacted in 2007, 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 (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is set up under section 41, requiring notification and a hearing before termination. The Act also provides for most procedures to be followed, thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. ...

28. The court further held that four elements must thus be discernible for the procedure to pass.

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) the entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.

29. In this case, the arrest of the claimant by the 2nd respondent and being charged in court in Mombasa criminal Case No.729 of 2017 was not sufficient. Such a report and being charged is regulated under a different and separate regime of law as against employment relations, which must adhere to the mandatory provisions of Sections 41, 43 and 45 of the *Employment Act*. Before the termination of the employment notice was issued, the claimant was entitled to a disciplinary hearing.

30. No effort was made to invite the claimant to a disciplinary hearing in this case. Despite the 1<sup>st</sup> respondent possessing the internal audit report, any misconduct or gross misconduct that the 1<sup>st</sup> respondent noted led to a report to the police. Due process under Section 41(2) of the *Employment Act* was mandatory. The terminal dues payment did not prevent the 1<sup>st</sup> respondent from adhering to the law.

31. The failure to adhere to the provisions of the *Employment Act* resulted in the unlawful termination of employment. The lapse in giving the claimant a hearing rendered the decision to terminate employment devoid of due process and, hence, unfair, contrary to Section 45 of the *Employment Act*.

32. The claimant was paid 3 months in lieu of notice, which is acknowledged through a cheque dated 29 June 2017.

33. The claimant is entitled to compensation for the unfair termination of employment. In assessing compensation, the court must examine the employee's work record under Section 45(5) of the *Employment Act*. The claimant received a warning on 4 April 2011 for a loss of Ksh. 200,000. This is not denied.

34. The claimant's conduct was addressed, and she served in her employment for 8 years. The termination of employment was devoid of procedural and substantive fairness. An award of 8 months' gross salary



is justified in compensation, at the gross salary of Ksh. 80,000 per month, the claimant is awarded Ksh. 80,000 x 8 = 640,000.

35. On the claim for general, punitive, and exemplary damages, the claimant argues that her arrest and arraignment in court in criminal case No. 729 of 2017 were motivated by malice. As a result, she lost her employment and suffered defamation, loss, and damage. For such conduct, the respondents should pay damages.
36. The claimant's arrest arose from a report lodged by the 1<sup>st</sup> respondent. This was instigated by an internal audit report in which the respondent established a loss of Ksh. 4.5 million. The claimant does not justify the loss under her supervision.
37. The 1<sup>st</sup> respondent is responsible for reporting any criminal matter brought to its attention, including cases of real or suspected fraud. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are under a constitutional and legal duty to investigate or cause to be investigated any matter of alleged fraud. Such duty does not cease where such fraud arises from an employment relationship.
38. The claimant was charged in Mombasa Criminal Case No.729 of 2017 and acquitted under Section 210 of the *Criminal Procedure Code*, which does not infer a violation of the law or constitution by the respondents, including the 2<sup>nd</sup> respondent. Under Section 210 of the *Criminal Procedure Code*, an acquittal applies where the prosecution has presented witnesses and closed its case. The trial court has to rule on whether a prima facie case has been established. Under such acquittal, the respondents cannot be found to have commenced the arrest, investigations and criminal charges with malice. The trial court analysed the evidence and issued an acquittal in the claimant's prosecution.

**Damages are not due.**

39. On costs, parties opted to rely on the filed records. No orders on costs.
40. Accordingly, judgment is hereby entered for the claimant against the respondent with an award of compensation at Ksh. 640,000. Each party is to bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 24<sup>TH</sup> DAY OF APRIL 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Marion

..... and .....

