



**Kimaile v Co-operative Bank Kenya Limited (Cause 202 of 2017)
[2025] KEELRC 1072 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1072 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 202 OF 2017
CN BAARI, J
APRIL 4, 2025**

BETWEEN

ELIUD KIMAILE CLAIMANT

AND

CO-OPERATIVE BANK KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. In a Memorandum of Claim dated 31st January, 2017, and filed on 6th February, 2017, the Claimant seeks the following reliefs as against the Respondent: -
 - a. A declaration that the Respondent’s termination of the Claimant was illegal, unlawful, unfair and inhumane
 - b. Spent
 - c. Payment of the Claimant’s 12 months’ gross salary
 - d. General damages for unlawful and wrongful termination of employment
 - e. Costs of the suit and interest thereon
2. The Respondent filed a memorandum of defence dated 21st February, 2017, denying that the Claimant was unfairly terminated, and further seeking that this court upholds its decision to terminate the Claimant.
3. The Claimant’s case was heard on 15th March, 2023, with the Claimant testifying in support of his case, adopting his witness statement and producing the list and bundle of documents filed in the matter.



4. The Respondent's case was partly heard on 5th October, 2023. Ms. Beatrice Muthuri testified in support of the Respondent's case and Ms. Brenda Mwendu Munyoki the Respondent's second witness, tendered her testimony on 14th October, 2024.
5. Thereafter, parties filed written submissions.

The Claimant's Case

6. The Claimant's case is that at all material time, he was an employee of the Respondent herein, employed since the year 2007. That in June 2015, the Respondent promoted him and was subsequently transferred to Money Transfer Centre, Hilton Branch to work as an Operations Manager.
7. He states that his promotion came by as a result of his good performance and good relationship with bank staff. He further states that on 2nd April, 2016, on a Saturday, it was his duty as the operations manager to check tellers' cash at the end of the day to ensure the systems balances matched with the physical cash. He avers that after a hard day's work, he cracked jokes with other colleagues including one MN as he checked the cash, and states that he remembers patting the back of MN as he checked her cash, and that when he confirmed that her cash was okay, they locked the box and she left the office.
8. The Claimant states that on 4th April, 2016 after checking the cash of another colleague, named WO, she requested him to open the man trap door for her to leave, and that as they were conversing, he jokingly told her that she really needed to leave to go and nurse her young baby of 3 months, and jokingly told her to hurry up as she appears not to have expressed enough milk for her.
9. It is the Claimant's position that on her way home, W sent him an sms stating that his words were not friendly, and that he said sorry for hurting her unknowingly when he joked earlier. He avers that he understood that the issue was conclusively solved since W and him had worked closely together, and that he had been supportive and respectful during her pregnancy.
10. The Claimant states that a week after, he got an email from the Human Resource manager requesting him to visit the Human Resource Offices for a matter they intended to discuss with him. He states further that he visited the HR office not knowing the reasons why he was summoned.
11. The Claimant further states that he was asked how he related with his staff and that he responded that they relate with putting God first, praying together, holding daily meetings and socializing as a team. He states that thereafter, accusations were read to him and he was asked to respond to them even without him recalling the encounter with one complainant, MN.
12. The Claimant avers that he read mischief because the two emails sent to the Human Resource Manager were sent on the same day at almost the same time. He states that his no-nonsense nature during working hours probably made the two ladies angry therefore, prompting them to send such emails to the Human Resource Manager.
13. It is his case that during the meeting with the Human Resource, he highlighted that a survey on the month of March 2016 rated their customer service at the Respondent's branch where he served as poor, and for that reason, he conducted a meeting during the week of 4th April, 2016 and stated that he will deal strictly if he found a teller failing to observe the bank's charter on customer service.
14. It is his case that the two tellers colluded to brand him as an irresponsible team leader which is not true, as he had worked elsewhere before with staff of both genders, and had never had an issue of this magnitude.



15. The Claimant states that he wrote a show cause letter to the Human Resource Manager indicating that he did not intend to hurt or disappoint anyone. He further states that he wrote emails to the two complainants further indicating that he did not intend to hurt them and that he was only joking, and which jokes were taken too far.
16. He states that the Human Resource Manager felt that his show cause letter was not sufficient to end the claim and was summoned to a disciplinary committee where he expressed his innocence and apologized to the complainants in an effort to quickly resolve the misunderstanding. He further states that on 25th May, 2016, his branch manager called him after work, and issued him a termination letter.
17. It is his case that on 30th May, 2016 he appealed against the decision of the Respondent to terminate his employment as the operations manager, and that to date, no decision has been rendered on the Appeal.
18. He states that the decision to terminate his employment by the Respondent was a very stringent disciplinary measure, and that the Respondent could have at least transferred him to any region and in any capacity instead of terminating his employment as a mode of disciplinary action.
19. The Claimant states that he was neither cautioned, advised nor given a written reprimand by the Respondent before his employment was terminated and therefore, deserves compensation from the Respondent for termination of his employment.

The Respondent's Case

20. The Respondent states that the Claimant was employed as a Graduate Clerk on 13th March 2007 earning a basic salary of Kshs. 37,826/- and house allowance of Kshs. 2,785/-. It states further that at the time of his termination on 25th May 2016, the Claimant was working at the Respondent's Money Transfer Centre as the Operations Manager, and was earning a gross salary of Kshs. 199,763/-.
21. It states that on or about 7th April 2016, the Respondent received complaints from two members of staff alleging sexual harassment by the Claimant.
22. It avers further that the Claimant was taken through a disciplinary process and admitted having committed the said offences to one staff and denied allegations in respect of the other staff.
23. The Respondent states that it reviewed the CCTV footages and confirmed that the allegations made by both staff were indeed legitimate and upon meeting the Claimant on 12th April 2016, it confirmed that he contravened the provisions of the Bank's Sexual Harassment Policy and Staff Manual, thereby casting doubt on his character as a Bank employee.
24. The Respondent states that it interviewed the affected staff and witnesses and instituted a disciplinary process by issuing a Show Cause Letter to the Claimant dated 13th April 2016. It states further that the Claimant on 14th April 2016 responded to the Show Cause Letter and admitted the allegations set out therein.
25. The Respondent states that not being satisfied with the Claimant's response, it invited him for a disciplinary hearing meeting scheduled for 3rd May 2016. It states further that the Claimant was advised that he was entitled to have another staff member present during the hearing vide the invitation letter dated 26th April 2016.
26. It is the Respondent's case that the Claimant attended the disciplinary hearing meeting unaccompanied, despite having been accorded that opportunity to invite a fellow colleague and responded to the charges. The Claimant was issued with copies of the disciplinary hearing minutes and which he confirmed by signing thereon.



27. That the Claimant's actions of sexual harassment constituted gross misconduct warranting summary dismissal as provided under Clause 10.9 of the Respondent's Staff Manual. That the Claimant also acted against the provisions of clause 25.2 of the Staff Manual and the Respondent's Sexual Harassment Policy.
28. The Respondent avers that the Claimant's employment was terminated vide a termination letter dated 25th May 2016, in which he was given an opportunity to appeal the decision. The Respondent further states that on 25th May 2016, the same date of his termination, the Claimant also tendered a resignation letter and later on 18th July 2016, sent a request to be allowed to resign.
29. The Respondent avers the Claimant lodged an appeal on 30th May 2016, which was declined as he did not provide any new information to warrant review of the Respondent's decision, and further because the Respondent had followed due process and fair procedure while terminating the Claimant's employment.
30. The Respondent states that at the time of separation, the Claimant owed the Respondent a sum of Kshs.4,857,193/- comprising of personal loan, car loan, house and a furniture loan.
31. That the Claimant was paid his terminal dues less deductions amounting to Kshs.183,543.90. That the Claimant further received Pension benefits amounting to Kshs.1,251,370.28 and thereafter signed a discharge form on 19th August 2016.
32. The Respondent states that the Claimant was issued with a certificate of service in accordance with provisions of Section 51 of the Employment Act, 2007 which he collected on 10th August 2016.
33. It is the Respondent's prayer that the Claimant's case be dismissed with costs.

The Claimant's Submissions

34. It is the Claimant's submission that the allegations levelled against him lack merit and therefore do not justify the termination of his employment. He submits further that his conduct does not fit the definition of sexual harassment as defined under the Respondent Sexual Harassment Policy.
35. The Claimant submits that the Respondent did not produce the requisite certificate of electronic evidence to the authenticity of the CCTV images. As such, he submits that the same is inadmissible as proof before this Honourable Court. He sought to rely in the case of Republic v Public Service Commission another Kirinyaga County Public Service Board (Exparte Applicant) (Judicial Review E003of2023) 2025KEELRC70(KLR) (23January2025) (Ruling) to support this position.
36. It is his submission that the allegations of sexual harassment made against him lack merit, and is a deliberate set-up by the Respondent. He submits that this is demonstrated by the way the complaints were filed and the manner in which the investigations were handled.
37. It is submitted that the decision to terminate the Claimant's employment, based on the two incidents, is entirely unfounded. That the sexual conduct was neither persistent nor of a sexual nature, and it did not create an intimidating or hostile environment.
38. The Claimant submits that the allegations against him had no merit, and the termination of his employment was both unlawful and unjustified.
39. It is the Claimant's submission that the Respondent did not adhere to fair procedure, specifically its staff manual which stipulates that Summary dismissal is justified in a case of sexual harassment after



due investigations are conducted, and an employee is found to be guilty as it did not conduct proper investigations into the allegations levelled against the Claimant before resorting to dismissal.

40. The Claimant submits that the punishment subjected to him of termination was excessively punitive, disproportionate to the nature of the alleged misconduct, and therefore unjustifiable.
41. The Claimant submits that the Respondent's Sexual Harassment Policy does provide a framework for handling such claims, but it also emphasizes the need for proportionality in the disciplinary process. That termination should not be the default response, especially when the alleged misconduct is minor, isolated, and unintentional, as in this case.
42. The Claimant finally submits that he is entitled to 12 months' salary as compensation for unlawful and unfair termination, amounting to Kshs. 358,333 x 12 = Kshs. 4,299,996.

The Respondent's Submissions

43. The Respondent had reliance in the case of Reed v Stedman (1999) IRLR 299 for the holding that the words or conduct complained of must be unwelcome to the victim, and it is for her or him to decide what is acceptable and offensive. Therefore, the question as to what constitutes unwanted conduct is not what the court or tribunal would or would not find offensive, but whether the individual victim has made it clear that he or she finds the conduct unacceptable.
44. It is the Respondent's submission that the Claimant's conduct fell short of the required standard, and further that the said conduct created an offensive working environment where other colleagues' felt uncomfortable with his conduct as exhibited in their complaints.
45. It submits that it indeed had a valid and fair reason to initiate disciplinary action and terminate the Claimant's employment.
46. It is its submission that the process undertaken in terminating the Claimant was fair and lawful, and pray that the Honourable Court finds that the process adopted as so.
47. It is its final submission that the Claimant has not demonstrated any fault by the Respondent in handling his appeal.

Analysis and Determination

48. Upon careful consideration of the pleadings, the witnesses' oral testimonies, and the rival submission, the issues that present for my determination are:-
 - i. Whether the Claimant was unfairly terminated
 - ii. Whether he is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated

49. The question of fair termination has largely been settled to depend on the employer's adherence or lack thereof to the tenets of fair procedure and the substantive justification of the termination. Fair hearing is both a Constitutional and statutory obligation demanded of an employer in a termination/ dismissal process.
50. Section 41 of the *Employment Act*, provides thus on fair process:-

“ 41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain



to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

51. The Claimant’s assertion is that he was summoned to the Respondent’s Human Resources offices via email, ostensibly to discuss a matter the said office had with him, and that he visited without knowing the reason why he was summoned. He avers that he was told of the sexual harassment complaints made against him by two of his colleagues and later on 13th March, 2016, issued with a show cause letter on the same allegations.
52. It is his case that he responded to the show cause letter vide his letter of 14th April, 2016, where he admitted having tapped one of the complainants out of excitement for having ended the day without hitches, but denied harassing her. The Claimant further admitted having jokingly used unpleasant words against the second complainant and that he did apologize to her.
53. It is not disputed that the Claimant was notified of the charges against him through the show cause letter, allowed an opportunity to respond to the show cause and which he did, and further invited to a disciplinary hearing and again advised to attend with a representative.
54. The Claimant’s evidence is that he attended the hearing though unaccompanied, out of his own choice, and his only issue on procedural fairness is that his appeal was not heard and a decision communicated to him.
55. The Court of Appeal spelt out what has come to be known as the minimum standards of a fair procedure in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, where it held thus:-
 - 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.”
56. This court notes that the Claimant tendered his resignation on the same day he received the termination letter, but proceeded to lodge his appeal even after tendering a resignation.
57. The Respondent contends that it reviewed the appeal and did not find any reason to overturn its earlier decision against the Claimant, and further that it did inform the Claimant the outcome of his appeal vide their letter of 20th June, 2016.
58. The Claimant did not deny receiving the aforementioned letter conveying the outcome of his appeal. Further, having tendered his resignation just when he received the termination letter, goes to confirm that the appeal was of no consequences having already resigned, and could not therefore have rendered the Claimant’s termination unfair.
59. In the end, I hold that the Claimant’s termination was procedurally lawful and fair.



60. On substantive fairness, Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer must prove the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified.
61. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee. It is now settled that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. (See *Mwanajuma Juma Kunde v KAPS Municipal Parking Services Limited Cause No. 57 of 2012.*)
62. The reason for the Claimant's termination is sexual harassment of two of his colleagues at their/ Respondent's place of work.
63. Section 6 of the *Employment Act* prohibits sexual harassment in the workplace, and Section 6 (2) and (3) proceed to require employers with more than 20 employees to develop a sexual harassment policy.
64. The Respondent herein, has a Sexual Harassment Policy in place which it relied upon in terminating the Claimant's services.
65. Clause 25.2 of the Respondent's Sexual Harassment Policy, defines sexual harassment as;

“unwelcome conduct of a sexual nature that is sufficiently persistent or offensive to unreasonably interfere with an employee's job performance or create an intimidating, hostile or offensive working environment.”
66. Clause 25.3 of the same policy states;

“sexual harassment does not refer to the normal conversational ‘give and take’ that frequently occurs in the work environment, as long as both parties involved and affected find such conduct acceptable.”
67. The Claimant's submission is that his conduct does not fit this definition. He states that in respect of the first incident, where the Claimant allegedly patted MN on the back, there was no indication at the time that the gesture was unwelcome and that MN did not express any discomfort, and that there is no evidence that the act created a hostile or offensive environment. That the gesture was simply a friendly interaction, which is commonplace in a social work environment.
68. In his response to the show cause letter, the Claimant stated that after a hard day's work, he cracked jokes with colleagues including one MN as he checked the cash, and that he remembers patting the back of MN. He further confirmed that the second complainant named WO requested him to open the man trap door for her to leave, and that as they were conversing, he jokingly told her that she really needed to leave to go and nurse her young baby of 3 months, and jokingly told her to hurry up as she appears not to have expressed enough milk for her.
69. In evidence before this court, the Respondent produced still pictures from the CCTV footages showing the Claimant touching the complainant named MN from her neck down to her butt. The Claimant also admitted that using unpleasant words against WO on 4th April, 2016 and only stating that he apologized to her.
70. In the case of *Reed v Stedman* (1999) IRLR 299 also cited by the Respondent, Morrison J held that the words or conduct complained of must be unwelcome to the victim, and it is for her or him to decide what is acceptable and offensive. The court proceeded to hold that the question as to what constitutes



unwanted conduct is not what the court or tribunal would or would not find offensive, but whether the individual victim has made it clear that he or she finds the conduct unacceptable.

71. The Claimant acknowledged that his conduct was unwelcomed by the complainants, and which therefore, constituted breach of the express provisions of the Respondent's Sexual Harassment Policy.
72. It is also not lost on the court that the Claimant was the complainants' superior at the workplace, and hence had some level of control over how they discharge their duty.
73. In the case of EDK v KU (Cause 1715 of 2011) – it was held that it is the duty of the party who faces sexual harassment to make a report and give sufficient detail. It could be a single incident, it could be repeated and cannot be raised casually.
74. By the Claimant's conduct and his own admission of improper conduct against the complainants herein, I find and hold that the Respondent had fair and justified reasons to terminate the Claimant.
75. In whole, I find the Claimant's termination both procedurally and substantively fair and lawful.

Whether the Claimant is entitled to the remedies sought

76. The reliefs that the Claimant sought under this claim, are all only tenable upon a finding of an unfair termination. Having found the termination fair and justified, the reliefs sought must fail.
77. I conclude by dismissing the Claimant's claim in its entirety with costs to the Respondent.
78. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 4TH DAY OF APRIL, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Amutabi h/b for Mr. Okatch for the Claimant

Ms. Okelloh h/b for Mr. Okeche for the Respondent

Ms. Esther S-C/A

