



**Muli v ABSA Bank Kenya PLC (Cause 536 of 2019)
[2025] KEELRC 1514 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1514 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 536 OF 2019**

**JW KELI, J
MAY 23, 2025**

BETWEEN

KISSINGER MUSYOKA MULI CLAIMANT

AND

ABSA BANK KENYA PLC RESPONDENT

JUDGMENT

1. The claimant was a former employee of the respondent with last posting at Diani Branch of the Bank and upon termination of his employment with the Respondent filed a memorandum of claim dated 13th August 2019 and amended on the 17th May 2022 seeking for the following reliefs:-
 - (a) A declaration that respondent's decision to summarily dismiss the Claimant from its employment was unreasonable, unfair and unlawful.
 - (b) An order do issue revoking or annulling the claimant's termination and reinstating him as the Respondent's employee forthwith without loss of any salary and benefits thereof.
 - (c) In the alternative to (b) above, the Claimant prays for remedies for wrongful dismissal and unfair termination as follows:
 - a. Maximum Compensation for unfair termination
 - b. Exemplary Damages.
 - c. General Damages. Damages for discrimination and harassment.
 - d. Damages for Constitutional Violations
 - e. Interest on (a) to (c) above from the date of termination to the date of payment in full.
 - f. Certificate of Service.



- g. Notice pay Kshs, 206, 382.00
 - h. Disturbance allowance Kshs. 412,764.00
 - i. Untaken leave days Kshs. 127,956.00.
 - j. Unpaid salary for August 2016 Kshs. 158, 226,00,
 - (d) Costs of this suit.
 - (e) Any other relief that the court may deem appropriate to grant.
2. In support of the claim, the claimant filed his witness statement dated 17th may 2022, consolidated list of documents of even date and the bundle of documents. The claimant further filed supplementary list of documents dated 10th November 2023.
 3. The claim was opposed. The respondent entered appearance through the Federation of Kenya Employers and filed a memorandum of defence and list of documents dated 28th January 2020, together with the bundle of documents. The respondent filed a supplementary list of documents dated 10th November 2023, which was missing pages of the forensic investigation report.
 4. The claimant's case was heard on the 18th October 2023 and 14th February 2023 before Justice Ocharo Kebira where the claimant testified on oath, adopted his witness statement dated 17th May 2022 and as his evidence in chief together with filed documents under consolidated as exhibits 1-15. He was cross-examined by Ms. Achieng, Advocate for the respondent and re-examined by his advocate, Mr. Kamotho.
 5. The Respondent's case was heard before me on the 5th February 2025, where Michael Ngobo testified on oath as RW1. He was the investigation officer and produced the investigation report as D-exh 1. He was cross-examined by counsel for the claimant Mr. Kamotho, and re-examined by the respondent's counsel, Mr. Okeche. The respondent's 2nd witness was Vashas Odhiambo (RW2) who testified on oath on even date , adopted their witness statement dated 28th January 2020 as respondent's evidence in chief and produced the respondent's documents under list dated 28th January 2020 and a further list dated 13th February 2020 being missing pages of the investigation report dated 10th November 2023. RW2 corrected at page 33 of the claimant's documents the termination letter, 2nd paragraph to refer to clause 5(a)(viii) of the CBA and not vii. RW2 was cross-examined by Mr. Kamotho advocate for the claimant and re-examined by Mr.Okeche.
 6. On close of the respondent's case, the parties took directions on filing of the written submissions . Both parties complied.

Determination

Issues for determination

7. The claimant addressed the following issues:-
 - a. Whether there was substantive justification to summarily dismiss the claimant
 - b. Whether the claimant is guilty of fraudulent transactiobs,
 - c. Whether the claimant was subjected to procedural fairness prior to dismissal.
 - d. Remedies.



8. The respondent addressed the same issues as the claimant.
9. The court found that the parties were in agreement on the issues to be addressed by the court in the dispute to be as follows:-
 - i. Whether there was substantive justification to summarily dismiss the claimant
 - ii. Whether the claimant is guilty of fraudulent transactions,
 - iii. Whether the claimant was subjected to procedural fairness prior to dismissal.
 - iv. Whether the claimant was entitled to the reliefs sought.

Whether there was substantive justification to summarily dismiss the claimant

10. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- ‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.’” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]e KLR).
11. The burden of proof in employment case is as stated in section 47(5) of the *Employment Act* as follows:-‘47 (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’”

The claimant’s submissions

12. The Claimant lost his employment pursuant to a termination letter dated 23rd August 2016, appearing on page 33 of the Claimant’s bundle of documents. According to the said termination letter, the Claimant was sacked after being found guilty of acting contrary to ‘your terms and conditions of employment, information Risk Management (IRM) polices and the Banks Value of integrity.’” As pleaded in Paragraph 16 of the Amended Memorandum of Claim, the Respondent neither stated the specific conditions of employment and the IRM policy that the Claimant allegedly breached nor demonstrated how he violated his said terms of employment and/or the said IRM Policies. During the cross-examination, the DW2 was unable to specifically tell your ladyship the clauses that the Claimant breached.
13. During cross-examination, DW2 testified that the Claimant was found guilty of leaking a customer’s information with the imposter. This is the first time that the Claimant heard the reasons for his dismissal. The reasons for termination must be specifically stated in the termination letter as a matter of fair labour practices. We rely on the case of *Rotich v Jirani Cultural Organisation (Employment and Labour Relations Cause 407 of 2016)* [2023] KEELRC 2468 (KLR) where the Judge stated as follows:-



‘The Court notes that the Respondent all through maintained that one of the reasons for the termination of the Claimant’s employment was ‘gross misconduct’. In my view, gross misconduct comes in many shades and styles. It is too omnibus for an employer to state that the ground of termination was ‘gross misconduct’ without specifics. In such a situation the Court can only find that that couldn’t be a valid ground for dismissal.’ Similarly, in this case, the termination letter alluded to gross misconduct but the particulars of gross misconduct have not been outlined in the termination letter. The reasons for termination to which this court is required to investigate to consider whether they are proved or not have not been outlined. The claimant submitted that the same is fatal as no actual reasons have been advanced for termination of the Claimant’s contract of employment.

14. This court will recall that DW2 struggled to explain the reasons for termination. It is noteworthy that no cross-examination of the Claimant was done by the Respondent on this issue and the same must have been an afterthought considering the following:
 - a. The Bank filed a Memorandum of Defence and stated that a photo was found in the Claimant’s phone which contained the customer details of the account statement. Further, the Claimant was found to have extensively interrogated the customer’s account without any justifiable cause or reason. However, there is no allegation in the Memorandum of Response that the Claimant leaked or shared the customer’s details with the imposter. These particulars of the offence were neither disclosed to the Claimant in the termination letter nor when he appeared before the Disciplinary Committee. It is not fair for the respondent to be allowed to provide the reasons for termination in court.
 - b. In its defence to the Claimant’s case, the Bank heavily relied on an investigation report titled AFRICA FORENSIC INVESTIGATIONS & WHISTLEBLOWING dated 3rd august, 2016 but the said Report did not make any finding that the Claimant leaked or shared the customer’s account details with the imposter. The report concluded that the Respondent’s bank officials evidently paid funds to an imposter and noted tremendous leakages of customer information to fraudsters.
15. Prior to considering whether the Claimant leaked the information to the imposter, the court should be satisfied that a photo, inform of WhatsApp image, was indeed found in the Claimant’s phone for the reasons that the Claimant has denied having such photo in his phone. In this regard, the court record will reflect that both DW1 and DW2 were cross-examined on the alleged photo but none of them had it before the court to confirm if indeed such photo existed and whether it originated from the Claimant’s phone. As a matter of fact, DW2 confirmed to the court that he had never seen the said photo that was extracted from the Claimant’s phone. That no reasonable employer can terminate an employee without seeing the alleged WhatsApp photo containing the customer’s details enough to facilitate the fraud and further evidence the same was shared with the imposter to facilitate the fraud.
16. On the question of whether the Claimant was shown the image during the Disciplinary hearing in light of paragraph 18 of the Memorandum of Response, DW 2 casually stated that he must have been shown the same by the panel. His answer was a guesswork. He could however not point out the exact place in the Minutes where the issue came up considering the Minutes were being taken verbatim. This is despite the Claimant testifying during cross-examination that, “During the hearing I was not shown any images by the Respondent. I was not availed any laptop.” Section 112 of the *Evidence Act* provides that: “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It was incumbent upon the Bank to exhibit the alleged image before this court for the court to confirm that such image indeed exists.



That the failure by the Bank to exhibit the alleged photo before your ladyship is fatal to the Defence considering the following:

- a. On paragraph 24 of his Witness Statement, the Claimant testified that: ‘At this point and for the first time, one of the panelists asked me about an image that was allegedly found in my phone that contained the customer’s bank details. I answered that I was not aware of any such image that was seen/retrieved and forensically collected from my phone.’”
 - b. On paragraph 10 of his witness statement, the Claimant: ‘After about an hour, the said Ibrahim Kosgei called me to his desk, handed over the phone to me and released me to proceed back to Mombasa to resume my duties after informing me that nothing incriminating was retrieved from my phone.’”
 - c. The Claimant was charged with a criminal offence of conspiracy to defraud contrary to Section 37 of the Penal Code in Milimani Criminal Case No. 1178 of 2016, Republic -vs-Kissinger Musyoka Muli. (page 151 of the Claimant’s bundle being the testimony of PW4 who informed the court that he received the Claimant’s phone with instructions to extract messages and concluded that images bearing bank account information were not retrieved).
 - d. On page 68 of the Claimant’s Bundle is a Mobile Forensic Examiner’s Report prepared by PW4 and on page 70, the report states that, he retrieved 532 messages from the Claimant’s phone but there was no image found bearing account information.
 - e. In acquitting the Claimant, the Criminal Court on page 162 held as follows, ‘The investigators highly relied on an image that was allegedly seen on accused’s phone but the same was never produced as evidence. In fact, the cybercrime officer did not manage to recover it.’”
17. The claimant submitted that he had put the Respondent on notice that he was not aware of the alleged image that was only seen by DW1 who declined/refused to supply him with a copy of the image as stated in paragraph 15 of the Claimant’s witness statement. That having been seen the proceedings and the judgment from the criminal court (which were produced before without any objection) the Respondent was required to table before this court the alleged photo only if it desired the court to believe the same existed. During the re-examination, the DW1 stated that he had superior tools/equipment to see the image unlike the Cyber Crime Department of DCI which cannot be true. But even if it was true, the question remains why didn’t the Respondent bother to table the same before the court for verification. In light of the foregoing, the claimant submitted that the Respondent has failed to justify the grounds for termination given in court that the Claimant took a photo of the customer’s details on his phone and shared the same with an imposter who accessed the customer’s account and walked away with Kshs. 1780,000.00 as required by the provisions of Section 47(5) of the Employment Act, 2007.
18. Regarding the accusation made by DW1, that according to the Audit Trail Report he picked suspicious interrogations done by a staff called Muli on 8.6.2016 who was there doing nothing for the customer, the Claimant responded to the same during cross-examination by the counsel for the Respondent as follows:-
- a. On the 8th June, 2016, I conducted a BOC interrogation on the account. He disclosed that he had done it before on 31st May, 2016 when the customer well known to her wanted to register for mobile banking. It was not possible to do it on the said date and he and his colleague agreed to check the system on 8th June, 2016. He is captured on page 12 of the proceedings stating that they checked with his colleague following the dual system control and that was the basis of accessing the system on that date. He states, “Upon checking the system, we discovered that



the mobile number had not been updated from our end in Nairobi. I escalated the matter to the personal banker Mr. Maingi to do a follow up on email with the Nairobi Office.

- b. He confirmed to the court that BOC system is very secure and has dual control. The Claimant had user rights to the system as authorizer or checker for mobile banking operations.
- c. That the Claimant had a reasonable explanation for accessing the customer's account on 8th June, 2016. He did not do it alone in light of dual control system. At page 15 of the proceedings where the Claimant testified as follows, "The process failed to register due to system hitches. We diarized with my maker (Felix Omondi) to recheck after one week on 8th June, 2016. We so did both of this under dual control. I diarized so that we can check whether the system had accepted so that we can proceed to process the mobile banking registration. Further, I diarized to recheck on 8th June, 2016. I took down customer's details to enable me do this. I did not take down all the details..."
- d. In his handwritten statement dated 29.7.2016, appearing on page 46 of his Bundle, the Claimant disclosed that he took the customer's details down in his diary for follow up of the same issue so that he could update her. This court was not told that there is a policy that prevents the staff of the Bank from diarizing customer's details for purposes of follow up. In any case, how else can the staff follow up without taking down some details that belong to the customer?
- e. There is no suggestion by the Respondent that its customer did not want to register for mobile banking. In fact, the DW1 is captured on page 147 of the Claimant's bundle stating that: "I confirm there were such activities which were authorized by you. Input was G07162939." There is no suggestion that the Claimant was not in charge of mobile bank registration at the Branch. There is no evidence that the customer had not changed her mobile phone without informing the Bank and the same required to be updated which could only be done at the Nairobi Office for mobile banking to be done.
- f. Whereas DW1 admitted that the system must have a maker and checker, he could not explain why he did not give the summary of the interrogation done by FELIX OMONDI on 8.6.2016 whose USER ID was G07162939. He did not exhibit the Audit Trail itself which could have confirmed that FELIX OMONDI accessed the same account on the same day. On page 147, DW1 is captured telling the court that, "The other user had 12 and accused 10." Unfortunately, DW1 did not take down a statement from the maker known as FELIX OMONDI.

Respondent's submissions

19. The *Employment Act*, 2007 under Sections 43 and 45 requires the employer in an employment dispute to prove that the reason for the termination of employment was valid and fair. The validity and fairness of the reason for the termination of employment are as anchored under Section 43(2) which states that the reason for termination are those reasons that the employer, at the time of termination, believed to be true. The Court of Appeal in *Kenya Revenue Authority V Reuvel Waitthaka Gitahi & 2 others* (2019) eKLR stated as follows regarding the said provision:-

"The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant's services. That is a partly subjective test" Additionally, this Court in *Galgallo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR held as follows :-



"In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists."

20. The Respondent in this suit conducted investigations and found the claimant had conducted suspicious interrogations on the customer's account and had irregularly taken down the claimant's personal details in his personal diary and shared the details with an unknown person. The Claimant alleged that his mobile phone was interrogated by a Mr. Ibrahim Kosgei however the same was never proved. In fact, Mr. Michael Ngobo investigated the claimant's phone and thereafter drew the investigation report. It is noteworthy to state that the claimant blames Mr. Michael for "causing his prolonged arrest". In addition, the police report conducted by the DCI clearly states that the interrogations on his phone were done on text messages and that the interrogation by the bank involved a wholistic interrogation that retrieved the image the claimant had shared with an unknown person and deleted the message forwarding the image on the Whatsapp Application. Based on this evidence, the Respondent had a lawful, fair and valid reason to initiate disciplinary proceedings and sever the employment relationship with the claimant.
21. The Claimant could not justify the irregular interrogation of the customer's account outside of their presence and neither could he explain the image found on his phone of the customer's details which he sent to an unknown person. These set of circumstances establish a reasonable ground on a balance of probabilities that indeed the Claimant was in breach of his fiduciary obligations to the Respondent and the customer thus breaking the relationship of trust required of those in financial institutions. Therefore the Respondent had a valid and fair reason to terminate the employment of the Claimant.

Decision

22. There was no dispute that the claimant had been an employee of the respondent from 1st April 2007 and his employment terminated on 23rd August 2016. The letter of termination was dated 23rd August 2016. The reason for termination disclosed in the letter was that the claimant acted contrary to terms and conditions of employment, information risk management policies and the banks value of integrity with reference to fraudulent transactions which were performed onto a customer account number 2027692349 INO Eunice Agengo on 13 June 2016 of KES 860000 and 14th June 2016 of Kes 920000 and a disciplinary hearing conducted on Tuesday 16 August 2016.
23. The claimant was of opinion that the reason was not valid. That he was charged of criminal offence of conspiracy to defraud relating to the transaction in Milimani Criminal Case No. 1178 of 2016 R v Kissinger Musyoka Muli and was acquitted of the charges. In judgment, the trial court found that the investigators relied on an image allegedly seen in the accused's phone but the same was not produced, the cybercrime officer did manage to recover it. The court took noted that the trial court held that the charge was not proved beyond reasonable doubt.
24. During cross-examination the claimant told this court he was the supervisor of Diani Branch from where he was arrested. That by virtue of his position he had access to customer details. He was familiar with the customer Eunice Iminza who had account domiciled in the branch. He interacted with her regularly, he was aware she made complaint of the fraudulent transactions. At the hearing the claimant explained the reason why he interacted with the account on the material dates was basically to assist the customer to be on boarded to the digital mobile banking platform for transactions online. Apparently he came in second as a checker. The marker was one Felix . They had tried 4 times to on-board the customer only to realise she had a new mobile number and opted to open a savings account. The claimant stated he accessed the system on 8th June 2016 under the dual system (marker and checker)



- and discovered the mobile number had not been updated from their end in Nairobi. The claimant said he told The foregoing to the investigator , Kosgey, who did not find his access of the account to be suspicious.
25. The claimant stated that when the customer came to the bank on the 31st may 2016 to register for mobile banking and it failed. He had diarised with the marker the date of 8th June 2016. He took down the customer's details to enable him do so. He did not take down all the details noting they could also be retrieved from the form completed by the customer. The claimant told the court that during the disciplinary hearing he was not shown any images by the respondent or availed any laptop. He admitted that in his statement he stated that the union representative interrogated the image but reiterated that he was not availed any laptop at the hearing. The claimant relied on the forensic report (pages 115 -116 of his trial bundle) where it was written, 'a total of 532 text messages were retrieved in regards to the dates specified on the exhibit memo as shown above from forensic analysis but no image was retrieved bearing bank account information . However WhatsApp chat messages could not be retrieved as they are encrypted thus the forensic tools could not decrypt them.'
26. RW1 was the investigator, Michel Ngobo. During cross examination, he told the court it was his evidence he found an image on the claimant's phone. He did not have the image before court. He did not recall whether he produced the image before the criminal court where the claimant has been charged. He handed over the claimant's phone to the police. RW1 told the court that the image was availed at the disciplinary hearing. RW1 told the court that he was the lead investigator and not Kosgey who the claimant alleged had told him he found nothing in his phone after spending 1 hour with it. RW1 told the court they had not produced the account audit trail and that it was possible Felix (as the marker) had also accessed the account between 31st May 2016 to date of the incident.
27. RW1 told the court that his evidence was that they had found image on claimant's phone shared on WhatsApp on a number they could not confirm. That he linked the claimant to the withdrawal of the customer money as he had taken down the customer's details thus it was reasonable he aided the withdraw. That at time he took the details the claimant had already completed the request by the customer for mobile banking and has no reason to view the bank balance of the customer as he was not making payment. RW1 denied the claimant could see the account details on opening the system. RW1 stated cashiers paid the imposter out of the account. He had not know whether other staff had been investigated over the incident. RW1 told the court the claimant denied the image was from his phone on being shown and grilled over the same at disciplinary hearing. RW1 agreed there was a possibility that Felix took the details and shared with the imposter. RW1 told the court the DCI only looked into the text. He could not speak for the police. He asserted that he had found a photo forwarded to person containing sensitive customer information and that he could not confirm the recipient as it was deleted. The DCI confirmed that they could not retrieve the Whatsapp messages as they were encrypted.
28. RW2 at cross-examination told the court he had not seen the image. RW2 told the court that the claimant was reported to the police before the investigation was complete as the police investigation is separate and can run concurrently. RW2 told the court the disciplinary committee relied on the investigation report, the letter inviting the claimant for hearing and the statements taken. On whether the image was given to the committee the RW2 referred to the minutes. RW2 confirmed the claimant was accused of having given out customer account details which were used to defraud the customer.
29. RW2 told the court the letter of invite of 8th August 2016 had the charges against the claimant. That at page 63 of their trial bundle, the claimant denied having recorded the customer's details, he was said he was not aware of the image on the phone. During re-exam RW2 told the court the claimant did not deny the charges. At page 67(of the respondent's bundle of trial) the disciplinary panel observed that when shown the image on laptop the claimant could not explain how it got to his phone and



that meant the image was shown at the disciplinary hearing. That at page 185 the claimant in own handwritten statement confirmed he took down the customer's details in his diary.

30. The court noted that the claimant admitted he was shown a photo at the disciplinary hearing by the investigator on a laptop allegedly picked from his phone (page 78 of the respondent's documents being the appeal hearing). The appeal panel upheld the termination.
31. The test of validity of reasons is as stated in section 43 of the *employment act* and In recent decision of the Court of Appeal in *Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR)* the court on reasons for termination observed:- "The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court's duty was not to verify the truth of the reasons advanced for terminating employment. According to him, the trial court's reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed." The Court of Appeal in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) eKLR* stated as follows regarding the said provision:- "The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant's services. That is a partly subjective test" The court found that the claimant admitted having taken down details of the customer in her absence and post the transaction and recorded the customer information in a personal diary. This information he stated was also in a form earlier completed by the customer. At appeal before the employer the claimant admitted to having been shown an image by the investigator on a laptop allegedly from his phone of which he denied having come from his phone. The customer's bank details which he took and recorded in his diary were later used to defraud the customer. Indeed the investigation report(pages 44-45 of the response) indicated that the claimant viewed the account of the customer on 8th June 2016 in her absence for the balance, 360 overview, customer information view and mobile banking view. The DCI in its report stated it was not able to decrypt the WhatsApp messages where the image was alleged to have been seen by RW1. From the foregoing, the court found the acquittal of the claimant for the criminal case did not affect the validity of the termination. The DCI admitted challenge of limitation in forensic tools to decrypt WhatsApp message. The Court of Appeal in *Ondari* case stated that the court had no supervisory role over employers and cannot substitute its thoughts with that of the employer. The court having evaluated the evidence found that the reason to suspect the claimant's activities to be related to the fraudulent activity on the customer account had basis. The standard of proof of balance of probabilities applied which the court finds was met being a partially substantive test in the instant case (*Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) e KLR*) thus:- "The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant's services. That is a partly subjective test". In the upshot, the court held that the reason for the termination of the claimant's employment was justified on a balance of probabilities.

Whether the claimant is guilty of fraudulent transactions

32. The Claimant submitted that:- The termination letter made reference to fraud but it did not connect the same with the Claimant. Nevertheless, there is no evidence before this court to demonstrate that the Claimant was involved in fraudulent activities. In *Central Bank of Kenya Ltd v Trust Bank Ltd*



& 4 Others NAI Civil Appeal No. 215 of 1996(UR), where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated thus;

‘The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.’. Likewise, in *Rosemary Wanjiku Murithi v George Maina Ndinwa* NYR Civil Appeal No. 9 of 2014 [2014] eKLR, the Court of Appeal held that; ‘Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.’

33. It was therefore incumbent upon the Respondent to prove fraud on the required standard of proof for this court to uphold its very harsh decision to end the Claimant’s 9 years career in the Bank. Section 43 of the *Employment Act* clearly lays the burden of proof on the doorstep of the employer and not the employee who is being charged. The Section clearly provides that an employer is required on each ingredient of the charge to prove the reason. Where the employer fails to do so, the court is indeed required by law to return a finding that the termination on account of the unproved reason was unfair. Further, Section 45(2) of the *Employment Act* requires an employer to prove the validity and fairness of each and every reason. Mere suspicion or speculation is not evidence of fraud or wrong as was held by Justice Makau in the case of *Marvic LTD -VS-Britam General Insurance Company Ltd* as follows:

‘All what the Defendant advanced is mere speculation, and a mere speculation, however strong it is, cannot be taken to be the truth. The Defendant having asserted the fire had been started by Mr. Grey Mwenda with use of coal tar, it was upon them to prove the allegation by adducing evidence by calling witnesses or through cross-examination of PW2 and even producing the loss adjuster’s report which they choose not to do so. I find by their own conduct, it is safe to find, that the Defendant had no evidence connecting either the plaintiff or its employee or Mr. Grey Mwenda with starting of the fire with coal tar or by anything else. I neither find any circumstantial evidence that is enough to satisfy the insurance discharge of burden of proof.’

Respondent’s submissions

34. A quick glance at the Termination letter dated 23rd August, 2016 reveals that the claimant was not accused of orchestrating the fraudulent transaction. The letter clearly states as follows: ‘I am satisfied that you acted contrary to your terms and conditions of employment, information risk management (IRM) policies and the Bank’s value of integrity.’ Clearly the claimant was not accused of fraudulent transactions as alleged. He was accused of breaching the bank’s policies and acting contrary to his terms and conditions of employment by initiating suspicious interrogations and sharing customer details irregularly contrary to the Bank’s IRM policies. For example, there was no need to conduct a CASA Balance information view on the said account if all he needed to check was whether the customer was onboarded onto the ‘Hello Money’ mobile banking platform. On page 44 of the Respondent’s list it can be seen that after checking mobile banking at 9:29:24 the claimant went ahead to seek out the account balance at 9:30:15. The respondent submitted that the claimant was never accused of fraud as alleged.



Decision.

35. The claimant produced his letter of termination dated 23rd August 2016 (page 33-34 of his bundle). The letter stated the reason as follows:-

‘Dear Kissinger,

Termination Letter

Reference is made to the investigations into the fraudulent transactions which were performed onto a customer account number 2027692349 INO Eunice Agengo on 13 June 2016 of Kes 860,000 and 14 June 2016 of Kes 920,000 and disciplinary hearing conducted on Tuesday, 16 August 2016. I am satisfied that you acted contrary to your terms and conditions of employment, Information Risk Management (IRM) policies and the Banks value of integrity.’ The court found it was a fact that fraudulent transactions were performed on the said customer account. The letter did not state it was the claimant who performed the fraud act. The letter stated the claimant with respect to the transaction which happened in the Diani branch, where he was the boss, the respondent was satisfied he acted contrary to his terms and condition of employment acted contrary to your terms and conditions of employment, Information Risk Management (IRM) policies and the Banks value of integrity.

36. The respondent produced uncontroverted evidence of the basis of the assertion being the view of customer balance and customer information and taking down of the same to a personal diary in the absence of the customer. The court upholds its finding on reason for the termination being valid.

Whether the claimant was subjected to procedural fairness prior to dismissal.

The claimant’s submissions

37. By way of a letter titled Notificaton Of Interview Arrangements dated 8th August, 2016, the Respondent informed the Claimant that it had completed investigations into the Fraudulent transactions and invited him for a disciplinary hearing on 16th August, 2016 to assess the material provided and his explanation. By way of a letter dated 12th August, 2016 produced by the Respondent and the Claimant on page 32, the Claimant acknowledged the said letter and made a request as follows:

‘...kindly do supply me with the Report, documentation and/or any material of investigation that you intend to rely on during the disciplinary haring. The said documents will permit me to prepare for the hearing.’ However, the Respondent did not supply the documents to the Claimant as pleaded in paragraph 14 of the Amended Memorandum of Claim. The court record will show that DW2 admitted that he did not have anything before the court to show that the Claimant’s request in writing had been complied with. Such failure makes the entire disciplinary process flawed. In support of submissions that indeed the non-availing of the report was fatal to the validity and fairness of the charges, the claimant relied on the case of Lawrence Lien Shoono v East Africa Portland Cement Company Limited [2018] eKLR where the employer declined to supply to the employee a copy of the Forensic Audit from which the charges originated from; the court held emphatically as follows:

‘The respondent has admitted not supplying the claimant with a copy of the forensic audit report as well as all other documents and particulars he sought to enable him respond to the show cause letter.... Having been suspended from service, he had no access to documents



to enable him respond to the charges against him which as I have pointed out were general in nature. I find that the respondent's refusal to supply copy of the audit report and other particulars sought by the claimant to enable him respond to the notice to show cause was prejudicial to him and made it extremely difficult for him to respond to the charges raised in the notice to show cause..." A perusal of the Minutes shows that no charges were read and explained to the Claimant in a language that he understood at the commencement of the sitting, and no evidence or witnesses was adduced or called to testify to prove the charges that the Claimant was charged with including the investigator (DW1) whose report did not feature anywhere during the hearing. The opening statement of the MINUTES filed by the Bank starts as follows: "We are here to hear your story of what happened on this case." At one point during the hearing, the Claimant is asked, "What is the link between you and the customer that made you to be here? The Claimant answered as follows: I am not sure why am here since I did what I was expected to do." Even at that point, no charges were read to him. The claimant submitted that the reading and explaining the charges to an employee facing disciplinary action was important considering that no SHOW CAUSE LETTER had been issued to the Claimant containing clear allegations facing him.

38. To buttress the foregoing submissions the claimant relied on the decision in *Andrew K. Tanui v Postal Corporation of Kenya* (2014) eKLR where the Judge stated as follows:-

'...the Employer must make an effort to explain the charges to the Employee at the hearing, call evidence in showing the truthfulness of those allegations, and if there are Witnesses, allow the Claimant the opportunity to question the Employers' Witnesses. Evidence contained in documents must be produced. The Forensic Audit should have been supplied to the Claimant before the hearing date, and should have prominently featured at the hearing. Conversely, the Employee must be allowed the opportunity to adduce evidence and call Witnesses. The hearing process is different from the letter to show cause. If these were the same processes, there would be no need of a formal hearing. The hearing itself is not a mere technical appearance before a Disciplinary Panel; the opportunity to be heard means much more than being asked to add, or subtract, any answers that may have been given in responding to the letter to show cause. The Respondent failed the procedural test on these grounds" The Bank did not make any effort call evidence to show the truthfulness of the allegations. No witness was brought by the Respondent before the Disciplinary Committee to justify the infractions and to be cross-examined by the Claimant and therefore the claimant was denied an opportunity to cross examine the makers of the alleged investigation report which violates the principle of the right to a fair hearing as espoused in Article 50(1) of *the Constitution*. The claimant urged the court to make a similar finding on the question of the validity and fairness of the reasons for termination and the procedure used right from causing the Claimant to be arrested on a Friday of 29th July, 2016 by the Police.

Respondent's submissions

39. The *Employment Act*, 2007 under Section 41 creates the requirement that while an employer has a valid reason to terminate the employment the same must be procedurally fair. Specifically, it states follows:-

"...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. 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"

40. The Respondent vide letter dated 1st August, 2016 informed the Claimant of the reasons it had contemplated taking disciplinary action, including termination of his contract of employment. Specifically, the letter states as follows: "You interrogated this account without cause or reason on 8 June 2016" After the investigations were complete and the Claimant was found culpable the Respondent invited the claimant to a disciplinary hearing vide letter dated 8th August, 2016 and informed him of his right to be accompanied by a union representative or a colleague of his choice. Equally, once the decision to terminate the Claimant's employment was made he appealed the decision which was heard by a separate panel which upheld the decision to separate. The Respondent followed proper procedure in terminating the Claimant's employment per the law.

Decision

41. The court on evaluation of the process found that the only lapse was the failure to provide the Claimant with the investigation report which he requested for on 12th august 2016 and which was relied on by the disciplinary committee. The respondent stated it issued the documents but there was no evidence of the same. The court was of the opinion that section 41 of the Employment Act does not specifically require notice to show cause in any format. It is stated:-'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.'" The claimant in communication before and including the invite to the disciplinary hearing was informed the reason the employer was contemplating the termination. The court only faulted the process for failure to supply the claimant with the investigation report as per his request. In the upshot, the court finds that the reasons for termination were fair but the procedure flawed to that extent.

Whether the claimant was entitled to reliefs sought

42. The claimant sought the following reliefs:-
- (a) A declaration that respondent's decision to summarily dismiss the Claimant from its employment was unreasonable, unfair and unlawful.
 - (b) An order do issue revoking or annulling the claimant's termination and reinstating him as the Respondent's employee forthwith without loss of any salary and benefits thereof.
 - (c) In the alternative to (b) above, the Claimant prays for remedies for wrongful dismissal and unfair termination as follows:
 - a. Maximum Compensation for unfair termination
 - b. Exemplary Damages.
 - c. General Damages. Damages for discrimination and harassment.
 - d. Damages for Constitutional Violations
 - e. Interest on (a) to (c) above from the date of termination to the date of payment in full.



- f. Certificate of Service.
- g. Notice pay Kshs, 206, 382.00
- h. Disturbance allowance Kshs. 412,764.00
- i. Untaken leave days Kshs. 127,956.00.
- j. Unpaid salary for August 2016 Kshs. 158, 226,00,
- (d) Costs of this suit.
- (e) Any other relief that the court may deem appropriate to grant.

Claimant's submissions

On Compensation for unfair termination.

43. The Claimant is seeking compensation equivalent to 12 months' salary as compensation for unfair termination. The Claimant deserves maximum compensation taking into account the manner in which he was handled despite serving the Respondent diligently. He had just been interviewed and promoted. The court be guided by the finding of the court in the decided case of Lawrence Lien Shoonaa v East Africa Portland Cement Company Limited [2018] eKLR where the court held as follows:

"I however agree with the claimant that this rights to fair labour practices under Article 41 was violated by his suspension on the following grounds: first there was no valid reason for suspension. Secondly, he was denied a copy of the forensic audit report that the suspension was anchored on and thirdly the letter of suspension did not specify the period within which the claimant was expected to be on suspension."

44. The claimant's dismissal from employment had the effect of denting the Claimant's chances of securing an alternative or comparable employment in his area of expertise. He told the court that he has been jobless living in his rural home since no employer in the financial sector can touch him. The claimant urged the court to factor the foregoing circumstances into account in granting the Claimant maximum compensation as was held by the learned Maureen Onyango J in Rael Mwiya Mutinda v Kenya Commercial Bank Limited [2019] eKLR:

"On the prayer for compensation for unfair termination, it is my opinion that taking into account all the circumstances of her case including the manner in which her services were terminated, the benefits paid to her, the length of service and the Respondent's own contribution to the circumstances that led to the termination of her employment, she is entitled to maximum compensation. I award her 12 months' salary in the sum of Kshs. 1,986,708." That the claimant did not contribute to the dismissal in any way. He was only doing what he was engaged by the Bank to do.

Exemplary Damages.

45. The Claimant was taken through an extreme form of unfairness in the manner that he was arrested on a Friday and charged before a criminal court on Monday and efforts to have him released on cash bail were futile due to the influence of the Respondent. In paragraph 35 of his witness statement, he testified that he was surprised to read the witnesses statements, appearing on page 170 to 186, from the Respondent that did not accuse him of any wrongdoing in so far as the accusations facing him were concerned. One of the witnesses is captured at page 141 of the Claimant's bundle stating that, "I was told that one of the



staff members was involved in the incident...The information I got was there was account information shared with fraudsters.” However, there was no such evidence against the Claimant brought before this court for verification. On paragraph 39 and 40 of his Witness Statement, the Claimant explained that due to lack of livelihood, he was unable to hire a lawyer to defend him during the hearing of the criminal case that took more than 4 years. The criminal trial was instigated by the Respondent considering that the police had not done any investigations of the matter prior to arresting the Claimant on 29th July, 2016 and charging him in court on 1st August, 2016 with stealing of Kshs. 1,780,000, the property of Barclays Bank of Kenya Ltd. The claimant urged the court to find that there exist various aggravating circumstances warranting this court to grant exemplary damages to the Claimant having suffered extreme form of unfairness in the hands of the Respondent herein. The Respondent appears to have DW1 as the sole person who decides who should be charged before a criminal court of law. It is reprehensible that the Respondent can leave such an important task to one person without any supervision in place to oversee the work of the so-called lead investigator. Michael Ngobo appears to have been on a mission to fix the Claimant by stating as follows: “We also noted in the interview with Kissinger that he was in Nairobi on 14.06.2016, the day the fraud happened. We highly suspect that Kissinger Musyoka Muli is one of the key masterminds of this fraud.” However, the Claimant was able to explain that he was in Nairobi on 14th June, 2016 on invitation of the Respondent to attend an interview on the following day at 9:00am. (page 188 of the Claimant’s Bundle being email from the Respondent’s Human Resource Division). Consequently, the basis of the suspicion was debunked.

46. Despite the investigation report noting that the bank officials evidently paid funds to an imposter, the investigator did not handover the said two (2) staff to the police. Instead, the claimant is the one who was charged in a criminal court which was unreasonable decision on the part of the Respondent. in Patrick Njuguna Kariuki –Versus- Del Monte (K) Limited the court held as follows:

“The Claimant was found innocent in the criminal case initiated by the Respondent. The Claimant stated that after the unfair dismissal, prospective employers could not employ him in view of the dismissal by his long serving employer. The Claimant was a top manager in the Respondent’s establishment and was entitled to fair treatment as provided for in the cited provisions of *the Constitution* and the *Employment Act*, 2007. The Respondent deserves censure for such flagrant breach of the law against its trustworthy and long serving officer who had dedicated all his professional life from the youthful age, immediately after university graduation, to the service of the Respondent. The court finds that the compensation as may be awarded under the *Employment Act* shall not serve to do justice to the injury the Claimant has suffered and purge the malicious and outrageous conduct of the Respondent. The court therefore awards a sum of Ksh.5,000,000.00 on account of exemplary damages and as prayed for by the Claimant.”³⁴. Michael Ngobo had a predetermined mind in that he failed to share the draft report with the Claimant despite mentioning him adversely in his report for his comments and clarification.

Damages for discrimination and harassment

46. Section 5(3) of the *Employment Act* prohibits any employer from discriminating directly or indirectly against an employee in respect of termination of employment or other matters arising out of employment. The Claimant was directly discriminated considering the following:
- a. It is only him who was summoned to Nairobi from Diani Branch to record a statement irrespective of the fact his colleague had equally accessed the customer’s account since the mobile registration system has a maker and a checker.
 - b. He was the only one who was handed over to the police leaving out the staff that had made the payment to the imposter.



- c. He was handed over to the police prior to investigations being completed and properly considered by the Bank.
 - d. The staff who made the payment to the imposter did not face any disciplinary action despite the fact that the Bank has a system to ensure that conmen do not impersonate the bank customers.
 - e. A perusal of the witness statements from the 2 branches shows clearly that the said staff went out their way to assist the imposter to withdrawal the funds.
 - f. The Respondent lodged a criminal complaint maliciously and in bad faith despite the Claimant have been cleared by Ibrahim Kosgei and released to go back to Mombasa only to be called back.
47. Notice pay
- As pleaded under paragraph 29F of the Amended Memorandum of Claim. The same has not been denied noting that the Respondent did not bother to file an amended Memorandum of Response despite being granted leave to do so by the court.
48. Disturbance allowance.
- This claim is pleaded and justified under paragraph 29G of the Amended Memorandum of Claim.
49. Untaken leave days and unpaid salary.
- Similarly, the claims pleaded under paragraph 29H have not been disputed.
50. Costs
- Section 12(4) of the Employment and *Labour Relations Act* empowers this court to make such orders as to costs as it considers just. It was necessary for the Claimant to institute this suit after his demand letter dated 26th July, 2019 was ignored by the Respondent.

Respondent's submissions

a) Maximum compensation for unfair termination –

- 51. The Respondent reiterates that it had a valid reason to terminate the Claimant's services as indicated herein above. Equally, the Respondent followed a fair procedure in terminating the claimant from employment. This head of claim is therefore devoid of merit.

b) Exemplary damages

- 52. The nature of this head of claim is that the same is awarded in the most extreme of circumstances where the conduct of one party is so egregious to warrant its award. The Claimant has not established any conduct by the Respondent bank that warrants the award of exemplary damages. Devoid of proof, this head of claim be dismissed. In Court of Appeal decision in DK Njagi Marete v Teachers Service Commission [2020] eKLR addressing the issue of exemplary damages.

c) Damages for discrimination, harassment and constitutional violations

- 53. The Claimant has not shown any conduct by the Respondent that substantiates a claim for harassment and discrimination. The Claimant has not substantiated any alleged constitutional violations that would warrant the award of compensation over and above the reliefs available under Section 49 of the *Employment Act*, 2007.



d. Notice pay

54. The Respondent summarily dismissed the Claimant from employment based on a valid and fair reason as explained above and equally followed a fair process in initiating the disciplinary process.

d. Disturbance allowance

55. The claimant has not laid basis for the same. The same notwithstanding, the claim is statute barred under Section 90 of the [Employment Act](#).

Unpaid salary for August, 2016 Kshs. 158,226 and untaken leave days Kshs. 127,956

56. The Claimant was paid his dues for August, 2016. His terminal dues were applied towards settling his debt with the Respondent in accordance with Section 19 of the [Employment Act](#), 2007.

d. Costs of the suit

57. The Respondent denies the claim for costs and interest as the claimant's services were terminated fairly in accordance with the law and hence the claimant was an author of his own misfortunes.

d. Certificate of service

58. The Claimant was issued with the certificate of service as per Section 51 of the [Employment Act](#), 2007

Decision on reliefs sought

59. The court held the reason for termination was fair but the process flawed for failure to avail documents as requested by the claimant. The claimant was thus entitled to notice pay of 1 month as sought under section 35 of the [Employment Act](#). The reason for the termination having been justified the claimant was not entitled to compensation and the Notice Pay suffices as ought in Prayer 30(C)g for Kshs. 206,382.00
60. The claimant had sought for reinstatement. Having found valid reasons the same is disallowed. Further the prayer was also outside the 3 year period post termination and not available.
61. Exemplary Damages- the court finds it moot to address this relief having held the reason for the termination as valid.

Damages for discrimination and harassment

62. The claimant submitted that Section 5(3) of the [Employment Act](#) prohibits any employer from discriminating directly or indirectly against an employee in respect of termination of employment or other matters arising out of employment. That the Claimant was directly discriminated considering the following:
- a. It is only him who was summoned to Nairobi from Diani Branch to record a statement irrespective of the fact his colleague had equally accessed the customer's account since the mobile registration system has a maker and a checker.
 - b. He was the only one who was handed over to the police leaving out the staff that had made the payment to the imposter.
 - c. He was handed over to the police prior to investigations being completed and properly considered by the Bank.



- d. The staff who made the payment to the imposter did not face any disciplinary action despite the fact that the Bank has a system to ensure that conmen do not impersonate the bank customers.
 - e. A perusal of the witness statements from the 2 branches shows clearly that the said staff went out their way to assist the imposter to withdrawal the funds.
 - f. The Respondent lodged a criminal complaint maliciously and in bad faith despite the Claimant have been cleared by Ibrahim Kosgei and released to go back to Mombasa only to be called back.
63. Conversely, the respondent submitted that the Claimant had not shown any conduct by the Respondent that substantiates a claim for harassment and discrimination. The Claimant had not substantiated any alleged constitutional violations that would warrant the award of compensation over and above the reliefs available under Section 49 of the *Employment Act*, 2007.
64. The Court having found valid reason for the termination and the claimant having been accused specifically of committing acts alone(the view of account balance and customer details and taking down the same) which the employer believed led to the fraudulent act on the customer account, the court finds that there was no discrimination for lack of comparable acts and positions. Whether action was taken against other staff in the chain of events cannot be a basis of the allegation of discrimination. The court further took into account the fact that the claimant was the boss of the branch of the defrauded customer and was accused of individual action.

Disturbance allowance.

65. This claim is pleaded and explained under paragraph 29G of the Amended Memorandum of Claim. The respondent submitted that this head of claim is without merit, the claimant has not laid basis for the same. That the same notwithstanding, the claim is statute-barred under Section 90 of the *Employment Act*.

66. The law was amended in 2024 for section 90 to read 89 to wit:-

‘89. Limitations

Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” The claimant was dismissed from employment on 23rd August 2016 and filed the suit on the 19th august 2019. The claim related to allowance which was due on transfer. It fell under continuing injury and ought to have been filed within 12 months of terminations. This was not the case and the court holds the item as time barred and is disallowed.

Untaken leave days and unpaid salary.

67. The Claimant submitted that claims pleaded under paragraph 29H have not been disputed. The respondent submitted that- The Claimant was paid his dues for August, 2016. His terminal dues were applied towards settling his debt with the Respondent in accordance with Section 19 of the *Employment Act*, 2007. The court on perusal of the statement of defence found it was to the effect that the claimant had been informed that his terminal dues would be applied to offset his outstanding loans. There was no reply to this statement. The prayer is disallowed.



Conclusion

68. The court found that the termination was substantially fair but procedurally unfair. All other claims failed. The court hereby enters judgment for the claimant against the respondent for Notice pay of Kshs. 206,382.00 with interest at the court rate from date of judgment and costs of the suit.

69. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MAY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : Kairo h/b Kamotho

Respondent:-Okeche

