



**Mutai v Co-operative Bank of Kenya (Cause 16 of 2020)
[2024] KEELRC 412 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 16 OF 2020
NZIOKI WA MAKAU, J
FEBRUARY 28, 2024**

BETWEEN

JOHN MUTAI CLAIMANT

AND

THE CO-OPERATIVE BANK OF KENYA RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent Bank claiming unlawful or unfair termination of his employment and prayed for orders that:
 - a. The termination from employment of the Claimant was substantively and procedurally unlawful/unfair.
 - b. The claimant be re-engaged in his former position and/or equivalent position without loss of any benefits and/or seniority in terms of years of service.
 - c. The Claimant be paid twelve (12) months gross salary compensation for suffering wrongful/unfair termination amounting to Kshs. 1,034,820/- (86,235/- x 12).
 - d. Interest from the date of filing the Claim.
 - e. Costs of the suit.
2. The Claimant averred that the Respondent employed him as a Graduate Clerk on a fixed term contract of 24 months by a letter of appointment dated 5th July 2013 and he reported to work at the Head Office - Credit Operations Department. That his Probation Report was satisfactory and he was confirmed to fixed term contract by a letter dated 8th January 2014. The Claimant further averred that his contract of service was renewed for an additional two (2) years effective 8th July 2015 and his terms of employment were changed from fixed term contract to permanent and pensionable terms with effect from 1st April 2016 by a letter dated 29th March 2016. He notified the Court that because he served the Respondent



- with loyalty and diligence, he was once issued with a commendation letter for ensuring that the bank complied with the new interest rates regulations within the stipulated time. He asserted that he was covered by a Recognition Agreement and CBA entered between Banking Insurance and Finance Union (BIFU) and Kenya Bankers Association (KBA).
3. The Claimant's case was that he went on his annual leave on 22nd July 2016 and when he reported back to work on 12th August 2016, he found his password had been disabled in the bank system, as was the norm, and requested the CIT staff for reset. He averred that he was arrested on 16th September 2016, on which date he also recorded a statement with the Bank's security team, was taken to Court and was remanded. That while in custody, the Respondent subsequently suspended him on 19th September 2016 on allegations that he facilitated fraudulent transfer of Kshs. 75,235,000/- into 37 Bank Customer Accounts that led to the Bank losing Kshs. 6 Million. The Claimant received the Suspension Letter on 4th October 2016 and on 25th October 2016, was issued with a Show Cause Letter on suspicion that he was allegedly involved in the aforesaid irregular disbursement and subsequent transfer of funds at the Respondent's Credit Operations Unit. He replied to the show cause by his letter dated 31st October 2016 denying the allegations as he was on leave when it is suspected that his password was used to view the account of Jojami General Suppliers on 31st July 2016. Moreover, that he did not have access to the Bank's system at the time of the alleged irregular disbursement and subsequent fund transfers to different accounts. The Claimant further averred that on 22nd November 2016, he was notified of a staff disciplinary hearing meeting scheduled for 28th November 2016 at the HR Division Meeting Room. He stated that he defended himself at the disciplinary hearing but the investigations were biased against him because his password log details for the alleged period were never provided yet for other staff were provided. In addition, his colleagues whose passwords were allegedly reset while they were on leave were exonerated. It was the Claimant's that his employment was terminated on 16th January 2017, he was issued with the certificate of service and that at the time of the termination, his gross salary was Kshs. 86,235/-.
 4. According to the Claimant, he was not dismissed based on any of the grounds set out in the CBA and that whereas the Respondent had a duty to protect and uphold his rights as its employee as envisaged under the law, it chose to violate his employment rights. He argued that viewing of account is not an offence and in any event, he did not view the said account because he was on leave during the said period. Additionally, he cannot be held responsible for system errors and/or failure and/or hacking that is not under his control yet the employees whose user passwords introduced the new computer in the Bank system are still in employment. The Claimant contended that both the Investigation Report by the Respondent's security analysts and the DCI Cyber Crime Forensic Examination Report exonerated him.

Respondent's Case

5. In its Memorandum of Response and Counterclaim dated 3rd February 2021, the Respondent averred that as was indicated in the Letter of Offer, the Claimant's employment was subject to the provisions of the Respondent's Business Code of Conduct and Ethics, the Staff Manual in place and administrative circulars. With respect to the issues leading to termination of the Claimant's employment, the Respondent asserted that it carried out preliminary investigations sometime in 2016 and discovered fraudulent disbursement of loans to three (3) accounts, totalling to Kshs. 75,235,000/- (hereinafter "the funds"), which had subsequently been transferred to 37 accounts. It narrated that a computer not belonging to it and identified with the name HSE01H001, was introduced into the Respondent's network on 5th July 2016 and further accessed its network on 6th, 19th, 30th and 31st July 2016. That notably on 31st July 2016, the unauthorised computer accessed account number 01136275998700



belonging to Jojami General Suppliers Ltd, which account was a few weeks later the beneficiary of the fraudulently disbursed loans of an amount totalling Kshs. 14,700,000/-. That in this regard, it was on 4th September 2016 when the unauthorised computer accessed the Respondent's network yet again and carried out the aforesaid fraudulent disbursements to three accounts. The Respondent's position was that investigations by its Security Department established that the unauthorised computer had been installed with the Bank Fusion Universal Banking (BFUB) system (the Respondent's banking platform), and had accessed customer accounts when logged under the user "jmutai" belonging to John Mutai, the Claimant herein. That upon counterchecking with the Cisco ISE (Identity Service Engine) logs, it was confirmed that the Claimant had logged into the BFUB system using the unauthorised computer used to make the fraudulent disbursements. That the Cisco ISE logs also established that the user accounts of Eunice Musyoki and Sophia Muriuki had been compromised to log into the Respondent's network yet the two had neither reported to work on the day of the fraudulent transfers nor requested for a password reset.

6. It was the Respondent's averment that the Claimant's reply to the show cause letter was inter alia, that his user password must have been obtained fraudulently as it was not reset. That during the staff disciplinary hearing, the Claimant further denied having shared his password with anyone and submitted that he did not know the owner of the account named Jojami General Suppliers Limited. That the Claimant could also not explain how his credentials were used to check transactions of the said account. The Respondent's case was that it considered the Claimant's responses at the disciplinary hearing and summarily terminated his services in accordance with his employment contract and clause A5 of the CBA; on the primary ground that the Claimant accessed a customer's account which he had no business reason or need to thereby conspiring to defraud the bank. According to the Respondent, the Claimant's misconduct was highly prejudicial to the operations of its business given the duties bestowed on him. It fronted that the Claimant did not appeal the decision to terminate his employment and was consequently issued with a Certificate of Service dated 24th January 2017 and paid his terminal benefits of Kshs. 55,616.25 through a credit to his Internal Settlement Account.
7. In the Counterclaim, the Respondent averred that the Claimant had applied for and been advanced various staff loans that he had not cleared as at the date of termination of his employment. That the Claimant's liabilities with the Respondent as at 1st December 2020 were Kshs. 430,197.30 on account of a personal loan and Kshs. 76,349.70 on account of a laptop loan, both of which remain outstanding to date. The Respondent thus prayed that the Claimant's Memorandum of Claim be dismissed with costs and judgment entered against the Claimant for:-
 - a. A declaration that the Claimant is liable to settle all outstanding loans due to the Respondent together with interest at the prevailing commercial bank interest rates until payment in full.
 - b. The sum of Kshs. 506,507/- being the outstanding loan liabilities due from the Claimant to the Respondent as at 1st December 2020.
 - c. Interest on (b) above at the prevailing commercial bank interest rates until payment in full.
 - d. Costs of this suit and the Counterclaim together with interest at court rates.
 - e. Any other relief this Honourable Court may deem fit to grant.

Evidence

- 8 The Claimant testified that the proceedings on the alleged fraud were still in court and had been since 2016 under the charge sheet for conspiracy to commit a felony. He reiterated that neither his name nor his user name appears anywhere in the Report from Cybercrime DCI and questioned how he was made



part of the subject allegations. He asserted that the Respondent did not consider many facts and that due to the unfair termination, he had to go for counselling. Under cross-examination, the Claimant confirmed that he was told of his right to be accompanied by another person to the disciplinary hearing but which he chose not to exercise. In addition, that the charges were read to him, he was given an opportunity to respond and received a copy of the Minutes and that after getting the termination letter, he was also informed of his right to appeal but did not appeal. The Claimant also confirmed that he had a personal loan or liabilities with the Bank and asserted that the Respondent has a right to recall the loans issued to persons who cease being employees. He stated in re-examination that he was not at work on 31st July 2016, which was also a Sunday and that he only worked from Monday to Friday.

9. A fraud analyst with the Respondent, Mr. Wycliffe Tongi (RW1), testified that the three accounts issued with suspicious loans were those of Anthony Kimani – Kshs. 20 Million, Antony Bundi – Kshs. 29,795,000/- and Victor Kimanthi – Kshs. 20,500,000/-, which individuals then started transfers to 37 different accounts. It was the testimony of RW1 that after noting the suspicious activity, they blocked the 37 accounts and the three suspicious loan accounts and that after a further review, he noted that Kshs. 8,331,168/- had been withdrawn through Gspot Cash POS and ATM withdrawals. That whereas the said fraudulent transactions were done on a Sunday morning between 6.00am and 7.45am by two users in the Credit Department at HQ, the said users did not work on weekends and were not present to initiate the transactions. He further testified that they then reported the matter to Banking Fraud Investigations and nine (9) suspects who went to withdraw the funds at various branches were arrested and arraigned in court, including the Claimant herein. RW1 asserted that the internal investigations found that the users “emusyoki” and “smuriuki” had been fraudulently accessed at 5.27am and their password reset when the two were not on duty. That from the investigations, they found that a mobile device (laptop) named HSE0401H001 initiated the said changes from a wireless network and was not a bank device. He clarified that even if one was away on leave, they are able to access the Bank system network using their username and password as long as it is within the Bank’s domain.
10. Further, it was the testimony of RW1 that the Claimant had accessed one of the accounts named Jojami on 31st July 2016 at 4.54pm, which account had been credited with Kshs. 14.8 Million, and that the Claimant had no business need to access the accounts. That when they questioned the Claimant’s interaction with the said accounts, he could not explain why he accessed the accounts and the system logs further established that his username was used in the fraudulent transactions. RW1 stated that the Claimant violated the Bank User Policy because connection to user domain should be for bank business. Under cross-examination, RW1 confirmed that they do not deactivate users when on leave and clarified in re-examination that there was no record showing the Claimant made a request for reset of his account’s password.
11. Ms. Leah Kerich (RW2), confirmed during her cross-examination that the Claimant was first employed in 2013 and was not in the Respondent’s employ in 2011. She similarly stated that the Claimant’s password was used in the computer that hacked the bank.

Claimant’s Submissions

12. The Claimant submitted that the issues for determination are as follows:
 - a. Whether the termination of the Claimant from employment was substantively and procedurally fair.
 - b. Whether the Claimant is entitled to the reliefs sought.
 - c. Who bears the costs of the claim?



13. It was the Claimant's submission that the legal provisions relating to fair termination of employment are contained in: Article 41 of *the Constitution* of Kenya on fair labour practice; Article 47 of *the Constitution* on fair administrative action; section 12 of the *Employment Act* on disciplinary rules; section 41 of the *Employment Act* on notification and hearing before termination on grounds of misconduct and poor performance; section 43 of *Employment Act* on proof of reasons for termination; section 45(2) of *Employment Act* on what reasons constitutes unfair termination in terms of validity of the reasons and procedural fairness; and section 47(5) of the *Employment Act* providing that the burden of proof of justifying the grounds of termination rests on the employer. According to the Claimant, the Respondent had failed to prove the validity of its reasons for terminating his employment and argued that he cannot be the sacrificial lamp for the Respondent's weak banking system. That his innocence can be discerned from the Investigation Report and in particular the last paragraph on page 22 of the Respondent's Bundle that, "a Dimension Data User added the computer under inquiry into the active directory on 5th July 2016...". That the concluding paragraph of the Investigation Report also points to the fact that the system providers facilitated the fraud. Moreover, that the Cybercrime Unit Report dated 14th November 2016 clearly states that the suspect computer was accessed by "Iwekesa" and "Cmutahi", both of Dimension Data, who are the people who introduced the fraudulent computer into the banking system. That nowhere in the said Report did the Claimant's user appear as having accessed the account of Jojami General Suppliers Ltd using the fraudulent computer as alleged by the Respondent. It was the Claimant's submission that the Respondent did not have any substantive and valid reason to terminate his services as the Respondent had failed to show how the Claimant contributed to the fraud and admitted that fraudulent computer was introduced into the banking system by the system providers. The Claimant cited the case of Grace Wanja Ng'ethe v Kivia Engeneering Services Limited [2023] KEELRC 1226 (KLR) in which this Court held that if a party legally charged to discharge a burden of proof on a certain matter or fact fails to place forth evidence geared towards establishing the same, it cannot be said that he has discharged the burden.
14. The Claimant further submitted that the Respondent did not adhere to its own Disciplinary, Grievance Policy and Procedures when terminating him from service. That para 27.12(x) of the said Disciplinary Policy and para A5(b) of the CBA provide for termination or dismissal after committing three (3) offences within 12 months and also for remedial sanctions in cases of alleged breach of company policy before dismissal. That in short, the termination ought to have been proceeded by two warning letters with the second warning letter being alive within 12 months and the termination being on the 3rd misconduct. The Claimant urged this Court to be persuaded by the holding of this Court that failure by an employer to observe its own disciplinary procedure may amount to repudiation of contract as held in Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd [2015] eKLR. The Claimant further urged the Court to find that he was unfairly and unprocedurally terminated from employment. He also relied on the case of Christine Butoyi v Sheer Logic Management Consultants Ltd [2022] KEELRC 1456 (KLR) in which the Court held that since the respondent had failed to demonstrate both substantive justification for the termination and procedural fairness, the dismissal was unfair in terms of sections 43 and 45 of the *Employment Act*.
15. On the reliefs sought, it was submitted by the Claimant that he is entitled to all the remedies under section 49 read together with section 50 of the *Employment Act* 2007, and section 12 of the *Employment and Labour Relations Court Act*. That the instant case was one of the exceptional cases for the primary remedy of re-engagement available outside three (3) years re-instatement limitation from the date of termination and that there is no limitation as to re-engagement. That with re-engagement, he could be posted to any branch of the Respondent which would give him life as he has been out of employment since January 2017 and the prospect of getting another employment keeps diminishing over time. The Claimant submitted that in the alternative, he should be compensated 12 months' gross



salary for the unfair and unlawful termination from employment. Whereas the Claimant admitted the Counterclaim at Kshs. 506,507/-, he denied that the same should attract commercial interest since he was hounded out of office without any justifiable reason, excuse and/or cause.

Respondent's Submissions

16. The Respondent affirmed that there is an implied term of trust and confidence imposed in the employment relationship between it and its employees, which term precludes an employee from conducting themselves in a manner that would lead to the breakdown of the said trust and confidence as held in the UK case of *Mahmud v Bank of Credit and Commerce International SA* [1977] ICR 606, 621; [1998] AC 20, 45-46, as per Lord Steyn. Furthermore, that customers must trust their banks and banks must trust their employees. It cited the case of *Samson Thuku Mutiso v Diamond Trust Bank Kenya Limited* [2015] eKLR wherein the Court held that trust, integrity, and confidentiality are some of the values highly expected of players in the banking field and that suspicion and or involvement in any activity that could compromise these standards would therefore be a valid reason for dismissal or termination.
17. The Respondent submitted that section 43(2) of the *Employment Act* provides that the reason(s) for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and caused the employer to terminate the services of the employee. That section 44(3) of the Act permits an employer to dismiss an employee summarily when the employee has, by their conduct, indicated that they have breached their obligations arising under the contract of service. That section 45(5) of the Act requires the Court to consider several factors in evaluating whether it was just and equitable for an employer to terminate the services of an employee, including the conduct and capability of the employee up to the date of termination. It was the Respondent's submission that the record reflects that it followed the laid down procedure under section 41 of the *Employment Act* in effecting the termination of the Claimant's employment. It fronted that the test for substantive fairness is as set out under section 43(2) of the Act and this Court is tasked with interrogating whether the Respondent had valid and fair reasons, which it genuinely believed to exist, for terminating the Claimant's services as it did. It cited the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR and further cited the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR in which the Court of Appeal held that "...The standard of proof is on a balance of probability, not beyond a reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist" causing it to terminate the employee's services...". The Respondent urged this Court to take notice of the documentary and testimonial evidence on record, which if taken together, concretely establish that the reasons for the Claimant's summary dismissal were justified. It further submitted that even though the Claimant was acquitted in the Criminal Case through the Judgment dated 7th December 2023, the Court of Appeal has held in *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR that the burden of proof in the internal disciplinary proceedings that are anchored on the contract of the employment is on a balance of probability, while criminal proceedings require proof beyond a reasonable doubt. The Respondent implored this Court to dismiss the Claim herein and uphold the Claimant's dismissal and be persuaded by the precedent of the Court of Appeal in *Violet Kadala Shitsukane v Kenya Post Savings Bank, Nairobi* [2020] eKLR (Civil Appeal No. 295 of 2016).
18. The Respondent submitted that since the termination of the Claimant was neither wrongful nor unfair, he is not entitled to the reliefs sought in the Statement of Claim. That it was crucial to underscore that it did not violate any contractual terms when opting for the Claimant's summary dismissal to warrant his pursuit for damages. As regards the Claimant's quest for re-engagement, the Respondent submitted that a Court of law cannot compel parties to exist in a working relationship



against their will and that the Claimant was the architect of his own misfortunes. It further submitted that its Counterclaim was unopposed, the same should be allowed as prayed and that the Claimant should also bear the cost of the Claim. That denying costs to the Respondent would be unjust and a failure to recognize the fundamental principle that costs are intended to compensate the prevailing party for the trouble endured throughout the legal proceedings.

19. The Claimant was dismissed ostensibly for reason that his account was used to defraud the bank of funds paid out to various individuals. The forensic investigations undertaken by the Respondent revealed that a computer alien to the Respondent and identified with the name HSE01H001, was introduced into the Respondent's network on 5th July 2016. The computer accessed the Respondent's network on 6th, 19th, 30th and 31st July 2016. Of note is that on 31st July 2016, the unauthorised computer accessed account number 01136275998700 belonging to Jojami General Suppliers Ltd, which account was a few weeks later the beneficiary of the fraudulently disbursed loans of an amount totalling Kshs. 14,700,000/-. Subsequently on 4th September 2016, the unauthorised computer yet again accessed the Respondent's network and carried out the fraudulent disbursements to three accounts. The investigations by the Respondent's Security Department established that the unauthorised computer had been installed with the Respondent's banking platform – Bank Fusion Universal Banking (BFUB) system, and it accessed customer accounts when logged under the user "jmutai" belonging to John Mutai, the Claimant herein. The Respondent asserted that upon counterchecking with the Cisco ISE (Identity Service Engine) logs, it was confirmed that the Claimant had logged into the BFUB system using the unauthorised computer used to make the fraudulent disbursements. That the Cisco ISE logs also established that the user accounts of Eunice Musyoki and Sophia Muriuki had been compromised to log into the Respondent's network yet the two had neither reported to work on the day of the fraudulent transfers nor requested for a password reset. This in the Court's view was sufficient basis for the disciplinary proceedings against the Claimant leading to his termination. Notwithstanding the acquittal by a competent criminal trial court, the dismissal of the employee was not on the same threshold. For a court to overturn the termination, there must be manifest unfairness, both procedural and substantive. In this case, the Respondent carried out the termination following the Business Code of Conduct and Ethics, the Respondent's Staff Manual and the administrative circulars. Having discharged its mandate under section 43, the termination is deemed to have been fair and within legal bounds. As such, the Respondent is not faulted for the termination undertaken against the Claimant. The result is that the Claimant's claim is dismissed albeit with no order as to costs.
20. The Claimant admits the sum owed in the Respondent's counterclaim. That means the Respondent is successful in the counterclaim and a judgment is entered in its favour for the sum of Kshs. 506,507/- being the outstanding loan liabilities. The Respondent will have costs on this sum alone. There was the issue of interest. The award of interest is at the discretion of the Court. In determining the issue of interest, the court is entitled to look at among other considerations, the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the relationship between the parties and the ever present need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c). I am bound to consider the likely consequences of the order for interest which in this case may be debilitating for the Claimant who is not on sound economic footing. As such I decline to award interest on the sum awarded to the Respondent in its counterclaim.
21. In the final analysis, I enter judgment for the Respondent as against the Claimant on the Respondent's counterclaim:-
 - a. Kshs. 506,507/-
 - b. Costs of the suit.



22 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

