



**Bor v Absa Bank PLC (Petition E003 of 2023)
[2024] KEELRC 1062 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1062 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E003 OF 2023**

HS WASILWA, J

APRIL 24, 2024

**IN THE MATTER OF ARTICLES; 21, 22,23(3), 27,28,35,41,47,47,38 AND 50(2) OF
{{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}} OF KENYA,
2010 FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS;**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 21,22,23(3), 27,28,35,41,47,48,50(2) OF {{>/
AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}} OF KENYA 2010**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF THE {{>/AKN/KE/ACT/2007/11 EMPLOYMENT ACT}}, 2007

AND

IN THE MATTER OF THE CONTRACT ACT

BETWEEN

BENARD KIPROTICH BOR PETITIONER

AND

ABSA BANK PLC RESPONDENT



JUDGMENT

1. This suit was instituted by a Petition dated 10th May, 2023, seeking for the following reliefs;-
 - a. A declaration that the decision vide letters dated 28th February, 2023 and 10th February, 2023 by the Respondent against the petitioner were flawed, manifestly unreasonable and violates the petitioner's rights inter alia; their right to fair administrative action, fair hearing and therefore is null and void ab initio.
 - b. A declaration that the petitioner herein cannot be held criminally liable for acts committed by other employees serving within the Respondent's company and that by finding the petitioner liable for criminal acts of a fellow employee and terminating the employment of the petitioner is unlawful as it interfered with the petitioner's rights under *the Constitution* of Kenya, 2010 particularly the right under Article 41(1) and (2) of *the Constitution*.
 - c. The Respondent be compelled to issue the petitioner with a certificate of service.
 - d. That Respondent be compelled to reinstate the petitioner herein to his former job at the Respondent's bank.
 - e. The Respondent be compelled to issue a written apology to the petitioner in a newspaper of wide circulation for the damage caused as a result of the unlawful termination.
 - f. That this Honourable court do find that there is a contract between the Respondent and the petitioner which was unlawfully breached by the Respondent.
 - g. The Honourable Court be pleased to declare that the Respondents bank violated the petitioner rights to fair labour practices namely reasonable working conditions of services as protected under Article 41(1) of *the Constitution* and the provisions of the *Employment Act*.
 - h. A declaration that the Respondent has violated the petitioner's rights to human dignity under Article 28 of *the Constitution* and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under Article 29(c) and (f) of *the Constitution*.
 - i. A declaration that the Respondent has violated the Petitioner's right to equal benefit of law under Article 27 of *the Constitution*, right to fair administrative action under Article 47, Right to fair hearing under Article 50 and the right to access justice under Article 48 of *the Constitution*.
 - j. An order of Judicial Review to quash any decision of the Respondent made pursuant to flawed, biased and unreasonable investigation and or recommendations of the Respondent.
 - k. An award of damages for pain and suffering, humiliation and distress visited upon the petitioner.
 - l. In the alternative and in addition to prayer a-k above, the Petitioner prays that judgement be entered as against the Respondent for unfair dismissal.
 - m. The Respondent be compelled to pay the petitioner 12 months' salary compensation for breach on the part of the Respondent under section 49 of the *Employment Act*. Kshs 335,016 x 12 = Kshs. 4, 020,192.



- n. The Respondent herein be compelled to pay the petitioner herein one-month salary in lieu of termination notice of Kshs 335,016.
 - o. The Respondent be compelled to pay the petitioner Gratuity/ Service pay for the Seven (7) years worked of Kshs. 335,016 x 7= Kshs. 2,345,112.
 - p. The Respondent herein be compelled to pay the petitioner 12 months' wages compensation as per section 15 of the Labour Institution Act of Kshs 4,020,192.
 - q. The Respondent herein be compelled to pay the petitioner herein interest at Court rates with respect to awards in m, n, o and q above.
 - r. The Respondent to pay costs of the Petition.
 - s. Any other or further relief that this Honourable Court considers appropriate.
2. The basis upon which the petition is made is that the Petitioner was employed by the Respondent, formerly Barclays Bank, on the 10th December, 2015 as the Bank manager and worked until 10th February, 2023 when his services were terminated. He appealed the decision but the Respondent upheld the disciplinary decision in the meeting held on 28th February, 2023. At the time of termination, the petitioner was earning Kshs 335,016.
 3. Prior to being employed by the Respondent herein, the petitioner worked for various financial institutions such as Equity Bank and Paramount Universal Bank PLC for accumulative period of 9 years and that throughout his employment in the various banks, he maintained a clean record when it came to money and related items.
 4. He stated that the reasons for termination was offenses in the criminal nature in which the culprits responsible were apprehended and dealt with as such his finding of culpability was a witch hunt aimed at destroying his clean truck record.
 5. The petitioner stated that he did not authorized the irregular and fraudulent withdrawals of cash by his fellow employees and that the said employees withdrew the said money in their own respective capacities and their full details are well known by the Bank. Hence he was punished for the offenses of his colleagues contrary to the law.
 6. The Petitioner stated that the employees who had illegally withdrawn the said money confessed the said illegal dealings and even entered into an agreement with the Bank to pay back the said money to the last cents and subsequently resigned from their positions, a fact that was acknowledged by the bank, as such the allegations levelled against him of causing the bank loss of Kshs. 1,500,000 is not true.
 7. He stated that the Cash Operating Procedure guidelines stipulates that a reviewer has a duty to confirm that call over has been done and if any discrepancy has been raised, the reviewer needs to action the discrepancy. However, that in this case, the petitioner executed his duties diligently as per the cash operating guidelines since the call overs were done and no discrepancy was raised on the material day of 19th May, 2021.
 8. The petitioner stated that the complaint regarding the fraud was first raised with a customer advisor who escalated the matter to him and he then followed up the matter until its conclusion, an indication that he diligently performed his duty.
 9. He stated that the disciplinary committee, did not consider his defence during hearing as such, he was condemned unheard.



10. He stated that at the time of termination, he had loans and on termination, he was no longer able to meet his financial obligation and since the termination was without any notice or payment thereof, he was financially embarrassed by the Respondent.
11. He maintained that the petitioner's termination was in violation of Articles 27,28,29(c)&(f), 40, 47, 48 and 159(2)(a) 7(b) of *the Constitution* which violation is likely to continue unabated unless this court intervenes. Additionally that the termination violated sections 41(1), 44(4) and 45(2)(a)&(4)(b) of the *Employment Act* .
12. On particulars of violations against the petitioner, it was stated that the petition herein has been brought to this Court on strength of Article 22 of *the Constitution*. Further that in the way in which he was dismissed, the Respondent violated his right to equal protection of the law under Article 27, Right to Human Dignity and have his dignity respected under Article 28 of *the Constitution*, right not to be subjected to any form of violence under Article 29(c) of *the Constitution*, and right not to be treated or punished in a cruel, inhuman and degrading manner under Article 29(f) of *the Constitution*. Also that he was not accorded right to fair administrative Action and right to access justice as guaranteed under Article 47 and 48 respectively.
13. He expounded on violation of these rights and stated that the Respondent did not carry out proper investigations or constitute an independent disciplinary committee in violation of his right under Article 27 of *the Constitution*.
14. On violation of Article 28 of *the Constitution*, the petitioner states that he was humiliated by the Respondent in the way the disciplinary hearing was carried out, when he was a senior staff.

Respondent's case

15. The Respondent entered appearance through the Firm of Okweh Achiando & Company Advocates on the 23rd May, 2023 and filed a response to the petition by a replying affidavit sworn on 7th September, 2023 by Valsas Odhiambo, the head of Employment Relations at the Respondent's employ.
16. The affiant stated that the petition as filed is a mala fide, misconceived, incompetent, frivolous and an abuse of Court process. Furthermore, that it does not meet the mandatory threshold for pleading constitutional violations as was established in the case of Anarita Karimi Njeru V Republic [1976-1980] KLR 1272 and the case of Mumo Mutemu V Trusted Society of Human Rights Alliance and 5 Others [2013] eklr. Therefore, rendering the entire petition incurably defective.
17. He stated that the petition as drafted does not provided proper particulars of the alleged infringements, apart from citing an omnibus provision of *the Constitution*. Additionally, that the petitioner pleaded irrelevant fact in paragraphs 37 and 38 of the Petition, which the Respondent is unable to adequately respond to.
18. With regard to the termination of the petitioner, the Respondent states that on or about 10th December, 2015, the petitioner was employed as the Branch manager in retail banking department, a position that he held until his termination on 10th February, 2023.
19. That on 28th December, 2022, the Respondent received an investigation report regarding a whistle blow on the manager of Bomet Branch, the Petitioner herein, on two issues; irregularly taking money from the cashier tills for his personal use and a complaint by a disgruntled customer S. Keter, following unfulfilled promise by the petitioner to refund cash irregularly withdrawn of Kshs 1,500,000 from the customers Zidisha account without the customer's consent.



20. On the withdrawal of the Kshs 1,500,000, the affiant stated that after investigations it was established that on 4th November, 2022, a customer by the name S. Keter went to the Bomet branch to transact from his Zidisha Account that had over 1.2 Million and upon checking the account, it had only Kshs. 905. That he raised the issue with Vincent Cheruiyot, the Bank Enquiries desk person and the matter was escalated to the branch manager, the Petitioner herein who promised to resolved the issue.
21. On 8th November, 2022, the customer went back to the bank and asked for a statement of his bank account, which showed that the said money was send in Five transactions of Kshs, 300,002 each all adding upto Kshs 1,500,000, all done in quick successions. That the customer did not receive any alert for the said withdrawals and that the call over reviewers on that particular day 19th May, 2021 was done by the petitioner.
22. It is averred that despite the customer making the said complaint, the same was NOT reduced to writing or a formal record filed at the Branch instead, the Branch Operations Lead(BOL) Thomas Onyango and the petitioner herein carried out parallel investigations without notifying the forensic investigator about the incident.
23. It is averred that the petitioner retrieved the counter withdrawal vouchers and call over documents for scrutiny and engaged Teller Kenneth Kirui (the employee who made the disputed transactions) and even started negotiations with the family to refund the cash and on 22nd November, 2022, the branch management through the petitioner disclosed that a recovery of Kshs 960,000 had been made but the outstanding balance reflected therein was largely unchanged.
24. The affiant stated that the delay for more than two weeks in resolving the issue, infuriated the customer, coupled up with the fact that the complaint was not formally recorded when the petitioner himself confirmed that the issue was a fraud case.
25. It is also stated that the bank noted that the exception certificate attached to the call over documents of the material day had listed four of the five transactions in question and against each that no discrepancy noted when the splitting of the transactions in itself was a conspicuous red flag.
26. It is stated that there was a deliberate effort by the petitioner to disguise the customer complaint while sending the regular updates to the Respondent's senior management. Further that in the initial statement by the petitioner, there was no mention of the complaint by the customer made on 4th November 2022., when the client first lodged the query in respect to the disputed transactions.
27. The affiant stated that following this revelations, the petitioner was suspended by the letter of 31st December, 2022 for a period of 30 days to pave way for further investigations and on 4th January, 2023, the petitioner was issued with a show cause letter for gross negligence and required to make a response by 9th January, 2023.
28. The petitioner responded to the show cause letter by the letter of 5th January, 2023 and since the response was not satisfactory, the petitioner was invited for disciplinary hearing to be held on 16th January, 2023 and in the letter he was informed of his right to be accompanied by a representative.
29. On 16th January, 2023, the hearing was conducted, where the petitioner defended himself before the committee but was not accompanied as had been advised. Another follow up hearing was conducted on 30th January, 2023, in which the petitioner was accompanied by a representative.
30. After hearing and analysis of the evidence, the Respondent's disciplinary committee found that the petitioner had committed gross negligence and recommended for his dismissal. That upon appeal, the appeal was returned unsuccessful.



31. The Respondent maintained that the petitioner was terminated for a justified reason of failing to exercise his oversight role as the branch manager leading to the fraudulent withdrawal of Kshs 1,500,000 from the customer's account. Further that he was subjected to due process as such the termination was properly conducted.
32. It is also stated that the branch manager designated Vincent Cheruiyot to conduct call over when the said employee was in the rank of BA1 and not BA3 as required under the Cash Operations Procedure Manual. Further that as per section 5.4 of the Respondent's cash operations Procedure manual, the Branch manager and the Operations manager are the ones tasked with review of all exceptions raised by the checkers/ call over and take appropriate action in case of any concerns and report to the head of Operation and Controls, Regional manager and Forensic investigations.
33. The respondent contends that the termination of the petitioner was done in accordance with section 41, 43 (1)&(2) and 45(2)&4(b) of the Employment Act and the Respondents Disciplinary, Capability(Performance) and Grievance Policy and Procedure.
34. He confirmed that some of the other employee that were implicated such as Lily Cheron and Kenneth Kirui resigned.
35. He also stated that after termination of the petitioner, the Respondent received a complaint from one of its customer, seeking assistance to recover the sum of Kshs 834,000 from the petitioner, a sum that the petitioner had borrowed from him, while working as a manager of the Respondent.
36. It is stated that the petitioner was terminated and not summary dismissed as provided for under section 44 (1) of the Employment Act. Furthermore, that upon termination, the petitioner was paid one month's salary in lieu of notice as such notice pay is not due. On the reliefs sought, the Respondent maintained that the petitioner was terminated following proper procedure and for justified reason as such, he does not deserve any of the reliefs sought.

Rejoinder.

37. By a supplementary affidavit sworn on 1st February, 2024, the petitioner states that the petition herein is properly before this Court as it is a constitutional Petition under Article 23(1) and Articles 162(2) (a) of the Constitution.
38. The petitioner stated that the investigations carried out by the Respondent on 28th December, 2022 did not implicate him but one of the teller called Kenneth Kirui, therefore that he should not be held liable for acts of another person.
39. He stated that the disciplinary hearing was not proper in that the complainants and or witnesses were not called for his cross examination.
40. He denied allocating duties to one Vincent Cheruiyot and stated that the said employee was employed in acting managerial capacity and was standing in for the Branch Operations officer, Thomas Onyango who was on leave. That his acting position was ratified by the Human Resource department.
41. The petitioner stated also that he does review and not call over. He explained that his work with regard to call over is to ensure call over is done. Therefore, that the finding of any discrepancy was the work of the person that does call over, i.e. Vincent Cheruiyot because its upon them to raise an alert of any anomaly. He added that on the material day, it's the said Vincent Cheruiyot acting in managerial capacity that had carried out call over and therefore the fact that the anomaly was not raised was to be blamed on Vincent Cheruiyot and not him.



42. On the failure to have a formal complaint lodged, the petitioner stated that the disgruntled employer was first in contact with the customer advisor, who escalated the issue to him and he immediately took action but that the customer refused to file a formal complaint until 24th November, 2022.
43. He stated that after investigations, it was established that his subordinates are the one that were in the wrong, however he was held liable for the mistakes of the said employees. Furthermore, that the said employees confessed to their illegal acts, paid up the money to the customer and even resigned from the bank, as such his punishment was not warranted in the circumstances.
44. He stated that he raised alarm and communicated the said fraud through email to the regional manager and senior leadership and attached evidence of the same on his Appeal but these correspondences did not deter the Respondent pursuit to terminate his services.
45. He also questioned the complainant's letter and stated that it is an afterthought as the same was made a month after his termination, a clear indication of the Respondent intention to terminate his services by all means.
46. The Petition was canvassed by written submissions with the Petitioner filing on 2nd February, 2024 and the Respondent filed their submissions on 29th February, 2024.

Petitioner's Submissions.

47. The Petitioner submitted on Four issues; whether the Respondent had a valid reason to terminate the petitioner's employment, whether due process was followed before the petitioner was terminated, whether the petitioner is entitled to the remedies sought and who should bear the costs of this Petition.
48. On the first issue, it was submitted that the employees that was found to have taken a customer's money on 19th May, 2021 was one Kenneth Kirui Kiplangat, who confessed the said illegal acts and refunded the said money in full and then resigned. He argued that no such confession could have been done if not for his diligent managerial capacity. He argued further that the termination letter of 10th February, 2023 states that ;-"investigations established that you handled the disputed transactions that were made on the 19th May, 2021", which was not true considering that the person responsible confessed and paid back the said money and even resigned. Based on that alone, the petitioner submitted that the reason for termination was not established under section 43 of the [Employment Act](#).
49. To support this, the petitioner relied on the case of Joseph Oduor Otieno V National Bank of Kenya Limited[2019] eklr, where this court held that;-

“The respondent has averred that the claimant participated in fraudulent activities but have not proved how the claimant is linked to loss of Kshs 2,819,994 as alleged in the letter of termination...the law envisages that the Respondent should prove the reasons for the termination are valid. The respondent has however not shown that they had valid reasons to terminate the services of the claimant.”
50. The Petitioner also relied on the case of Zahida Yasin V Barclays Bank of Kenya Limited [2012] eklr where J. M Mutava held that;-

“In the face of these findings, there was no longer any justification to seek to terminate the plaintiff's employment on grounds of her possible participation in the fraud or indeed on grounds of negligence in not detecting or preventing the fraud. The termination of the plaintiff based on fraud was therefore wrongful...”



51. To buttress its arguments, the petitioner cited the case of *Kepha Henia Wagunya V Equity Bank Limited*[2022]KEELRC 1347, where Byram Ongaya J held that:-

“Further, as Operations Manager he did not negotiate the exchange rates or have rights to access the system to initiate the exchange transaction such as the one in issue and which could only be undertaken by a Cashier or a Teller. The Court has considered that evidence and returns that the respondent has failed to show that the reasons for summary dismissal existed as at the time of dismissal as envisaged in Section 43 of the Act. Further, the respondent has failed to show the reasons Justifying unfair termination under Section 45 of the Act.”

52. Accordingly, he argued that the impugned transaction was carried out by a teller, who confessed to these actions and therefore pinning the mistake on the petitioner was unfair. Further that the Respondent did not establish any link between the fraudulent activities and the petitioner participation in these activities.

53. On procedure, it was submitted that firstly, that no notice of intention to terminate was served on the Petitioner, secondly, that the charges and imported of the charges against the petitioner was not read to him, Thirdly, that the disciplinary committee did not call the complainant and or witnesses for cross examination by the petitioner in contravention of section 35(1)(c) of the *Employment Act*.

54. In further support of the requirement to give a notice of termination, the petitioner relied on the case of *Kennedy Michira Mangerere V Sentido Neptune Paradise Hotel*[2015]eklr and the case *Janeth Chepkemoi Machira and Another V Laikipia University*[2021] eklr where this Court held that:-

“My understanding of section 41 of the *Employment Act* is that the employee is entitled to a fair hearing. The gist of the fair hearing includes knowing the charges against you, hearing evidence presented by any witness and cross-examining such witness and calling one’s own witness. In the case of the claimants no witnesses were even called to testify against them. It is as if they were told you committed an offence of theft which they denied and then a determination to dismiss them was made. This in my view falls below a fair hearing and it is my finding that the claimants were denied a fair hearing.”

55. On the remedies sought, it was submitted that since the termination was flawed as discussed above and due to the violation of the petitioner’s right to fair administrative action, fair hearing, he ought to be awarded the notice pay and compensation for the unfair termination.

56. The Petitioner submitted on the violations of his right under *the constitution* and stated that in the way in which the termination was conducted, the Respondent violated his right to human dignity under Article 28 and Article 29(c) &(f) on the right not to be subjected to any form of violence or be treated in an inhuman or degrading manner. He added that having been dismissed on unsubstantiated grounds, his truck record as a professional banker has been tainted and his right under Articles 28 and 29 violated.

57. It was argued further that the Respondent violated his right under Article 27 on right to equal benefit of the law, Article 47 on the right to fair administrative actions, Article 48 on the right to access justice and Article 50 on fair hearing, on the way in which the hearing was conducted on assumption that the petitioner understood the import of the disciplinary hearing and its effect of causing termination of his employment.

58. It was also submitted that the investigation report by the Respondent did not implicate him in any of the offenses raised against him, regardless, he was terminated on unsubstantiated grounds.



59. The Petitioner prayed to be awarded maximum compensation for the unfair termination and relied on the case of Joseph Oduor Otieno V National Bank of Kenya Limited(Supra) and the case of Patrick Chebos V Stokman Rozen Kenya Limited [2016] eklr.
60. On costs, it was submitted that costs follow event as provided for under section 27 of the Civil Procedure Act and reiterated by the court in Republic V Kisii University Ex parte Mary Jebet Mutai and the case of Republic V Rosemary Wairimu Munene Ex parte Applicant Versus Ihururu Dairy Farmers Co-operative Society Limited [2014] eklr.

Respondent's Submissions.

61. The respondent submitted on Five issues; whether the petitioner has met the threshold for pleading constitutional violations, whether there were valid reasons to warrant the termination of the petitioner, whether the procedural requirements set out in section 41 of the Employment Act were observed, whether the petitioner is entitled to the reliefs sought and who bears the costs of the suit.
62. On the first issue, the Respondent submitted that Article 22 empowers every person to institute a petition claiming breach of their rights and freedoms, Article 23 clothes the High Court, and by extension this Court, with jurisdiction to hear and determine suits on redress of violation of the rights and freedoms and grant appropriate reliefs. However that in approaching the court, the party alleging violation of their right and or freedoms has to do so with utmost precision as was held in the case of Anarita Karimi Njeru V Republic [1976-1980] KLR 1272 and the case of Mumo Mutemu V Trusted Society of Human Rights Alliance and 5 others[2013] eklr.
63. Similarly, that Rule 10(1)&(2) of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, give a detailed requirement of what must be pleaded in a constitutional petition and reiterates that the violations should be done with precision.
64. Accordingly, that the Petition herein does not set out with reasonable degree of the precision the constitutional provisions which the petitioner complains of, the manner in which they are violated and constitutional reliefs being sought. It was argued that though the Petitioner alleged that the Respondent Violated Articles 27, 28,47, 48 and 50 of the Constitution, particulars of the acts that led to these violations have not been demonstrated with precisions, therefore that the whole petition is not merited. In support of this, they relied on the case of Khen Kharis Mburu V Inspector General Police Service & 3 Others [2019]eklr where the Court held that;-

“One of the cordial principles in constitutional litigation is that a party who claims that a right or fundamental freedom has been violated, is being violated or is threatened, must plead with accuracy and precision demonstrating the right violated, or infringed, the article of the Constitution violated and the jurisdictional basis for it. That is; it is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.”

65. On reason for termination, it was submitted that for termination to be justified, proper reason must be given as is required under section 43 of the Employment Act and reiterated by the Court in Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eklr. On that basis, it was submitted that the Petitioner acted in gross negligence of his duty in failing to exercise his oversight role as a branch manager leading to fraudulent withdrawal of Kshs 1,500,000 in violation of clause 5.2.2. of the Disciplinary, Capability and Grievances Policy and Procedure manual. Furthermore, that the



petitioner failed to perform his duties as a call over reviewer and delegated the responsibility to a colleague who had not mandate to carry our review of call over as per Clause 5.2 as read with Clause 5.4 of the Respondent's Cash Operations Procedure Manual.

66. It was also submitted that the petitioner failed in his oversight role as he did not note the irregular splitting of the five irregular transactions, which ought to have been flagged as suspicious as per the cash operations guidelines. Therefore, his failure to note these discrepancies, showed that he was negligent in his oversight role as the bank branch manager. To support this, they relied on the case of *Albert Mutekhele Mzunda V Postal Corporation of Kenya* [2019] eKLR where the court held that;

“The Claimant testified that he had carried out all the required checks and inspection of all post offices under his area, but unfortunately his oversight failed to detect the ongoing noncompliance by the Post Master Kamuriai between the period 1st September, 2014 and 14th April, 2015 giving opportunity to the Post Master Mr. Wanyonyi and officers under him to misappropriate Kshs 5,060, 700.00. This loss was a large amount and it could not go undetected if it is true that the claimant being in charge of the postal area was diligent in his duties.... The disciplinary committee cannot be faulted or for rejecting the explanation by the claimant that tended to diminish his responsibility and shifting the same to the regional account and to his subordinate cashiers Bungoma Post office whereas the claimant's responsibility being in charge of the Head post office, responsible for the area and therefore had oversight over Kamuriai Post office. It is the Court finding that the Respondent successfully rebutted the case put forth by the claimant vide the evidence of RW1. The Claimant did not prove on a balance of probabilities that his summary dismissal was not for a valid reason.”

67. The Respondent also relied on the case of *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR where the Court held that;-

“In a nutshell this evidence is an admission by the Claimant that the Respondent lost the money in question only that the claimant was not involved. The Court finds that the Account given by the claimant quite startling, as the branch head of the Hola Branch, it surely must have been clear to the claimant that the said branch was under his watch. That he was to ensure the sound management of the branch. Therefore, to attempt to steer clear of mismanagement of the Respondent's finances at the branch by other employees allegedly on the ground that he was not in charge of the finances is to abdicate his role as head of the branch. This is particularly so because even though the branch account signatories may have been four (4), the Claimant was the principal signatory to them. Thus, he was reasonably expected to oversee what was going on with respect to the said accounts.”

68. On procedure, it was submitted that under section 41 of the Employment, the Employer is required upon establishing reason for termination to subject the employee to due disciplinary process which begins when the employer provide the employee with details of the accusations against the employee, allow an employee an opportunity to respond to the charges, inform the employee of the right to be accompanied by a representative, hear the employee and finally provide the employee with the decision of the disciplinary hearing. On that note the Respondent argued that upon receiving a complaint of fraud, they suspended the petitioner by the letter of 31st December, 2022, issued him with a show cause letter dated 4th January, 2023, invited the petitioner for hearing by the letter of 11th January, 2023 for hearing on 16th January, 2023, where the petitioner was head on 16th January, 2023 and follow up



hearing on 30th January, 2023 and eventually a decision to terminate his services communicated to him, informing the Appeal which he lodge but after review, the Appeal was dismissed.

69. Accordingly, the Respondent maintained that Petitioner was subjected to proper procedure and reiterated by the Court in the case of Anthony Mkala Chitavi V Malindi Water & Sewerage Co.Limited [2013] eKLR and the case of Pius Machafu Isindu V Lavington Security Guards Limited [2017] eKLR.
70. On the reliefs sought, it was submitted that the petitioner has not established unlawful termination as such he is not entitled to any of the reliefs sought. On notice pay, it was submitted that since the petitioner was paid on monthly basis, he was entitled to one-month salary, which he was paid.
71. On service pay, it was submitted that the petitioner is not entitled to service pay as he was an NSSF paid up member. Further that gratuity is only payable when the same is expressed in the contract of employment and since gratuity was not indicated in the contract, the petitioner is not entitled to gratuity pay. In this, they relied on the case of John Mwangi V Golden Cara Investment Limited [2020] eKLR and the case of Josephine Mwendu V University of Nairobi [2021] eKLR.
72. On the claim for reliefs under section 15 of the *Labour Relations Act*, it was submitted that such relief are not available as the Act has been repealed.
73. On costs, it was submitted that costs follow event as provided for under section 27(1) of the *Civil Procedure Act* as read with Rule 29 of the Employment and Labour Relations Court(Procedure) Rules, 2016.
74. In conclusion, the Respondent submitted that the petitioner is not deserving the reliefs sought and urged this Court to dismiss the petition in its entirety with costs to the Respondent.
75. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows:-
 - (1) Whether the termination of the petition was fair and justified.
 - (2) Whether the petitioner's constitutional rights were infringed upon.
 - (3) What remedies to grant in the circumstances.

Issue No. 1

76. The Petitioner set out his case stating that he was terminated for mistake not his own but for omission and commissions conducted by other employees.
77. The Petitioner indicated that the employee who was found to have taken out customer's money from the account was one Kenneth Kirui Kiplangat who confessed of the act and even refunded the said money in full and resigned.
78. From the termination letter of the Petitioner dated 10/2/2023 application vol. 11, he is said to have committed the following mistakes
.....“further to the disciplinary hearing, we have reasonable grounds to conclude as follows:
 1. On 19 May 2021, you failed on your oversight role as the Branch Manager whereby five irregular and fraudulent withdrawals of Kes. 300,000.00 totalling to Kes. 1,500,000.00 were made from the account of S. Keter after the official closing hours of 04.00 pm and went undiscovered until the customer raise a formal complaint.
 2. On 10 May 2021, you were grossly negligent in the performance of your duties as the call over reviewer, by failing to note the irregular splitting of the five transactions which ought to have been



flagged as suspicious as per the Cash Operating Guidelines. Further as the Branch Manager you delegated the responsibility of conducting the call over to a colleague not mandated by their role to do so.

3. On 4 November 2022, the customer visited the branch and reported to you the disputed and fraudulent transactions, but you failed/ignored to report the appropriate authority investigations despite establishing that it was a fraud case. Further, you failed/ignore to record the customer complaint on the system/register for follow and resolution as per procedure.

4. You acted in a dishonest manner by failing to disclose to management that the customer initially visited the branch on 4 November 2022 and on 22 November 2022, you remained unclear in reporting the recovery of Kes. 960,000/= relating to the customer complaint.

Your above actions/omissions are not only contrary to the Absa Way code of ethics, values and the Bank's policies/procedures but also exposed the Bank to a loss of Kes. 1,500,000.00 and amount to gross misconduct warranting disciplinary action up to and including termination of your services.

In view thereof, you are hereby terminated from the employment of the Bank in accordance with your terms and conditions of employment by the payment of one month's salary in lieu of notice with effect from Friday, February 10, 2023.

We note that you brought forward 13 days in 2022. Your accrued leave for 2023 is 5 days and you have 3 days paid absence. In view thereof, an equivalent amount of 13 days pay will be credited to your account after all the statutory deductions have been made.

Where applicable, if you are a member of the Defined Benefit (DB) Fund/Defined Contribution (DC) Scheme, you are entitled to access your current Pension benefits in line with the rules of the Fund. To enable the Trustees provide you with the retirement options, please complete the attached claim form and return to People Function".

79. From this letter, it is averred that the Petitioner failed in his oversight roles as Branch Manager and was this negligent in his duties as call over reviewer.
80. He is further accused of having delegated these roles to a junior colleague not mandated by their role to do so. He was also accused of failing to report the customer's complaints.
81. The Petitioner denied all these allegations.
82. In determining whether these allegations are valid or not, I refer to the Respondents Cash Operations Procedure Manual Application Vol. 16.
83. The Respondents submitted that the Petitioner failed in his role under section S.4 of the Respondent's Cash Operations Procedure Manual which provides the action to be undertaken at the close of day. Section 4 (2) and (3) provides that the branch operations lead/branch manager (BOL/BM) will act on the following:

“Log into the flex cube system.

Confirm the Cashier/s has closed the batch before printing their report by checking the batch closure status in screen 7017. Access Fast Path 7775; Adhoc reports> Branch option. Transaction processing. Select TP5050 Batch Journal Report Enter the posting date and respective Cashiers Unser name. Generate the TP5050 for all the Cashier's at the Branch as follows:

On parameter marked "Literal" enter

- (a) CSW for Cash withdrawals



(b) SCW for cheque withdrawals

(c) FTD for Funds Transfer

BOL/BM

Assign Checkers/Call Over officials using an allocation Log for transaction Provide the assigned Checkers/Call Over officials with the respective Cashier's reports."

84. The Respondents further submitted that the Petitioner had a role of assigning a call over to an officer in terms of section 4 of this Manual. They indicated that the call over must be to an employee of BAZ and above.
85. The duties of the branch manager have been explained above which includes assigning checkers (call over officials using an allocation log for transactions and also provide the assigned checkers/call over officials with the respective cashier's report.
86. Did the Petitioner assign call over duties to an officer below the required rank? The Petitioner denied wrongfully assigning one Vincent Cheruiyot call over responsibilities stating that the said Vincent was in acting managerial capacity due to the fact that the branch operations officer Thomas Onyango was on leave and the above was ratified by the Human Resource Department as per the procedure.
87. He further indicated that he reviewed this call over report and failed to note the irregularity as it had not been flagged out as suspicious as per the cash operating guidelines.
88. It was worth noting that the Petitioner was not found culpable of delegating the call over duties to an unqualified person as this reason does not form part of the reasons for his termination.
89. The Petitioner was also accused of failing to note the irregular splitting of five transactions which ought to have been flagged out as suspicious. As per the bank operating procedure the branch manager was to "review all exception raised by the checkers/call over officials and act appropriately...."
90. The Petitioner has submitted that the checkers/call over officials didn't flag out the issue of these payments and he could therefore not know of the suspicious payments.
91. It is indeed true that the branch manager or the branch operations head was to do the review of all exceptions raised, unfortunately in this case, no exceptions had been raised and it would have been a tall order for him to get to the bottom of this irregular transactions unless a complaint had been raised on the issue flagged out.
92. The Petitioner was also accused failing to report to the appropriate authority for investigations despite establishing that it was a fraud case.
93. Indeed the Petitioner denied this and his response to the show cause letter indicated that the customer visited the branch on 4/11/2022 and disputed the fraudulent transaction. He then advised the customer to put the complaint in writing. That the Complainant only put the complaint in writing on 24/11/2022 and the same was shared with the investigators the same day.
94. The Petitioner pointed out that the customer actually made the complaint on 24/11/2022 and this was escalated the same day.
95. I have noted that the customer indeed made his complaint on 24/11/2022 in writing and that he reported to ABSA Forensic Investigations on 30/11/2022.
96. It is therefore apparent that he didn't report the complaint immediately as expected and was therefore in breach of the Respondent's regulations.



97. In view of my findings above, it is apparent that the Petitioner failed in his duty of reporting and escalating a fraud as expected under the Respondent's policy.
98. In terms of the disciplinary process, the Petitioner admitted that he was taken through the disciplinary process. He was served with a show cause letter which he responded to and thereafter was invited to a disciplinary hearing.
99. He had an opportunity to defend himself and after the hearing he was found culpable.
100. The disciplinary process envisaged under section 41 of the *Employment Act* 2007 was adhered to.
101. In view of my findings above, I find that the Petitioner's termination was fair and justified as per section 45 (2) of the *Employment Act* which states as follows:
Section 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—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.
102. On issue No. 2, the question of whether the Petitioner's constitutional rights under *the constitution* were flouted. The Petitioner set out the fact that his rights under Acts 19 (2) 22, 23, 159 (2) of *the Constitution* amongst others were infringed upon.
103. In the petition however, the Petitioner failed to set out the facts pointing to the infringement of his rights. Having established that the Respondent had valid reasons to terminate him and followed due process, I do not find any merit in the submissions that his constitutional rights were breached.

Remedies

104. The Petitioner prayed for various remedies including reinstatement.
105. It is my finding that the Petitioner is not entitled to any of the remedies sought save for issuance of a Certificate of Service.
106. The Petition must fail and I dismiss it accordingly with no order of costs.

Judgment delivered virtually this 24th day of April, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Atieno holding brief Okweh Achiando for Respondent – Present

Mugumya for Petitioner – Present

Court Assistant - Leah

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