



Njogu v Daraja Micro-Finance Bank Ltd (Employment and Labour Relations Cause 2369 of 2017) [2024] KEELRC 1683 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1683 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2369 OF 2017**

**AN MWAURE, J
JUNE 27, 2024**

BETWEEN

JERIDAH ANYONG'A NJOGU CLAIMANT

AND

DARAJA MICRO-FINANCE BANK LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 27th November 2017.

Claimant's Case

2. The Claimant avers that she was employed by the Respondent as a Branch Manager at Dagoretti Corner on a basic monthly salary of Kshs 170,000.
3. The Claimant avers that she underwent a 6-month probation period and was subsequently confirmed as a permanent and pensionable employee on August 2015.
4. The Claimant avers that she diligently worked for the Respondent leading to her promotion to Business Development Manager on 03/05/2016, however, her salary was not increased.
5. The Claimant avers that on 27/06/2017, she was instructed by the Respondent's Chief Executive Officer, Simon Gatecah, to go on compulsory leave to allow for an audit and investigation to be conducted in her branch.
6. The Claimant proceeded home as instructed and on 05/08/2017, she was raised upon conclusion of the Auditor's investigations.



7. The Claimant avers that the Auditor's Report raised queries on a loan facility for an asset finance alleged to have been awarded without all requisite documents. She answered to the queries comprehensively to the satisfaction of the Respondent.
8. The Claimant avers that she did not manage any finance issues at the Respondent as this was done by the Credit Manager in charge of Security Perfection. From the branch, the file is handed to the Credit Manager who authorises disbursement of the facility and thereafter the file proceeds to the Finance Manager who authorises credit/loan proceeds to the client's account.
9. The Claimant avers that if the funds were being paid to a dealer in her response, the file proceeded to the CEO to authorise the transfer from the bank to the dealer and the process is further subjected to a compliance review by the risk department.
10. The Claimant avers that she received a letter dated 14/08/2017 terminating her services. This was done without her being accorded a chance to defend her case before the Respondent.
11. The Claimant avers that the Respondent's action was malicious and illegal and she urges the court to compensate for the loss of her job bearing in mind she is 48 years old and getting another job is difficult.

Respondent's Case

12. In opposition to the Memorandum of Claim, the Respondent filed a Statement of Response dated 30th May 2023.
13. The Respondent avers that the Claimant's employment was subject to the terms and conditions contained in her letter of employment dated 02/02/2015.
14. The Respondent avers that the investigations and audit was occasioned by losses it suffered under the Claimant's watch.
15. The Respondent avers that upon conclusion of the investigation and audit, the Claimant was presented the audit report and given a hearing and an opportunity to respond, however, her response was not satisfactory.
16. The Respondent avers that the termination of the Claimant's employment was in accordance with the terms of her employment.

Evidence in Court

17. The Claimant (CW1) adopted her witness statement dated 27/11/2017 as her evidence in chief.
18. During cross examination, CW1 testified that her terms of reference was to take full charge of the operations of the bank as per her letter of appointment. These were her roles as branch manager.
19. CW1 testified as per the letter dated 27/06/2017 she was sent on compulsory leave, she was not aware there would be an audit in the branch but was told an investigation was to be conducted.
20. CW1 testified that she received a letter dated 04/08/2017 forwarding the audit report and she responded to the letter the same day but she did not receive any response from the auditor.
21. CW1 testified that she was not invited for any disciplinary hearing on 10/08/2017 but she had a brief conversation with the CEO and internal auditor regarding her response. The CEO did not inform her the meeting was unsatisfactory.



22. CW1 testified that she received a termination letter dated 14/08/2017 which referred to a hearing held on 05/08/2017. However, she did not appeal the decision.
23. CW1 testified that she was paid by the Respondent one-month salary in lieu of notice; 14 days worked and she received her providence fund.
24. CW1 testified that she took 13 days leave days so there were no leave days owed by the Respondent.

Respondent's case

25. The Respondent's witness (RW1), Jane Wambui Mwangi stated she is a Relationship Manager of the Respondent and adopted Simon Gathecah's witness statement dated 11/03/2020 as her evidence in chief and produced exhibits 1-20 as her exhibits.
26. During cross examination, RW1 testified that the Respondent invited the Claimant for a disciplinary hearing vide a letter dated 05/08/2017 but, however, she was not informed to take an employee of her choice during the hearing.
27. RW1 testified that the Claimant disbursed Kshs 960,000 to one Christabel Barasa without following due procedure. There was no document to show that any loan went to the client.
28. RW1 testified that vide a letter dated 27/06/2017, the Claimant was sent on compulsory leave to allow for investigations, however, she did not have any representative during the hearing.
29. RW1 testified that vide a letter dated 10/06/2015, the Claimant was given an additional role and change of designation, however, the letter was clear this was additional to her role before the expiration of the probationary period. There was a change of designation not additional role.

Claimant's Submissions

30. It submitted for the Claimant that her dismissal on the ground that she disbursed a loan of Kshs 960,000 to Christabel Barasa without following due procedure or having all requisite documents attached is not a valid a reason because: - The alleged missing documents were never listed or identified for the Court or the Claimant; and the Respondent has not specified which particular step the Claimant failed to follow.
31. The Claimant submitted that in dismissing the Claimant on the ground that she failed to escalate an alleged complaint by Paul Mathenge, which signalled a fraud, to her superiors for further action was an invalid reason for termination because while the Respondent alleges there was fraud in its organization, it has not produced evidence of the same before this Honourable court.
32. The Claimant submitted that she did not have any disciplinary issue before dismissal. This shows that the Claimant was in good standing with the Respondent and neither her conduct nor capacity were the reason for her dismissal.
33. It is the Claimant's submission that there is no proof that she was ever invited to a disciplinary hearing before she was summarily dismissed; and neither has the Claimant signed purported minutes dated 10/08/2017. Further, the Respondent has not produced any evidence to attest there was a hearing on 05/08/2017.
34. The Claimant submitted that she is 55 years, and the chances of her securing comparable employment with another employer at her age are extremely low which has and continues to gravely prejudice her source of livelihood.



Respondent's Submissions

35. The Respondent submitted that it has proved that there was valid reason to terminate the Claimant's employment for wilfully neglecting her duties and carelessly and improperly performing her work in a manner that led the Respondent to suffering financial losses. The Respondent proved that the Claimant allowed loans to be disbursed without production of the required documents and failed to escalate cases of fraud on her watch.
36. The Respondent submitted that the Claimant's position as a Branch Manager was such that any disciplinary hearing could only be heard by a person superior to her hence the Respondent's CEO ended up hearing her case.
37. The Respondent submitted that it has demonstrated in its testimony that the Claimant a fair hearing, the charges and complaints were set out in the audit report which was availed to her; she responded to the charges and was called to a hearing where the charges were again set out and she was accorded an opportunity to respond.
38. It is the Respondent's submission that the Claimant's contract of employment provided that either party could terminate the employment by giving one month's notice or payment of the equivalent salary in lieu notice. It proved and the Claimant has admitted that she was paid one month salary in lieu of notice.
39. The Respondent submitted that the Claimant has failed to prove that the termination of her employment was unfair or unlawful and therefore not entitled to any damages as claimed.

Analysis and Determination

40. Having considered the pleadings, affidavits, submissions and evidence on record, the issues for the Court's determination are:
 - a. Whether the claimant's termination was substantially justified.
 - b. Whether the termination was procedurally fair
 - c. Whether the Claimant is entitled to the reliefs sought.

Whether the termination was substantially justified.

41. Substantive justification is provided for under Section 43 and 45 of the [Employment Act](#). Section 43 provides that:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

42. Further, Section 45 (2) of the Act provides that:

“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 employee's 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.”

43. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court held:-

“In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.

Commenting on this question, the Court of Appeal in *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR said as follows: -

“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 employee’s services. That is a partly subjective test.”

44. It is the Respondent’s submission that the Claimant’s employment was terminated on grounds that she wilfully neglected her duties and carelessly performed her work leading to it suffering financial losses. He further says that the Claimant allowed loans to be disbursed without production of the required documents and failed to escalate cases of fraud on her watch.
45. The audit report dated 04/08/2017 which the Claimant testified was forwarded to her vide a letter dated 05/08/2017 clearly laid down the reasons and is the basis behind her termination. The claimant having been the branch manager did interfere with recovery of debts and the people she was supervising could not do their debt collection in some instances due to her interference as she was negligent as a team leader and could have caused losses to the respondent
46. Therefore, the Respondent has proved that it had valid reasons to terminate the Claimant’s employment.

Whether the termination was procedurally fair

47. Section 41 of the *Employment Act* provides for the proper procedure to followed by an employer before dismissing an employee as follows:

- “(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.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

48. The Claimant testified that on 10/08/2017 she had a brief conversation with the CEO and internal auditor regarding her response to the investigation report. However, she was not informed that the same was a disciplinary hearing.
49. The Respondent also did not provide before this court any evidence that the Claimant was invited for a disciplinary hearing and was informed of her right to have another employee or a shop floor union representative of her choice present. After her response the next thing she received was a letter of termination. In that case the respondent failed the test for procedural fairness stipulated in section 41 of the *employment act*. The claimant did not defend herself or at all and before a witness of her choice. This is a mandatory legal requirement.
50. In view of the foregoing, the termination of the Claimant’s employment was procedurally unfair hence unlawful and unfair and so the court will enter judgment in her favour.

Whether the Claimant is entitled to the reliefs sought

51. Having established the termination of the Claimant’s employment was unlawful and unfair, this court will look upon the reliefs sought as follows:-
52. The Claimant testified that she was paid salary in lieu of notice and 14 days worked in the month of August before her termination, therefore she is not entitled to the same as per her prayers a & b of the statement of claim.
53. The Claimant further testified that she took her leave days and the Respondent does not owe her any leave days as claimed and so that prayer c is also declined.
54. The court considering the claimant was negligent in performing her duties will only award her one month salary as compensation as in prayer d. She is awarded kshs 170,000/-.
55. She was also paid her providence fund as per her testimony in court and hence that prayer is declined.
56. She is awarded costs of the suit.
57. She will receive interest at court rates from date of judgment until full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

