



Chepkwony v Standard Chartered Bank of Kenya Limited (Cause E014 of 2021) [2024] KEELRC 1600 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1600 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E014 OF 2021
DN NDERITU, J
JUNE 26, 2024**

BETWEEN

HILLARY KIPTOO CHEPKWONY CLAIMANT

AND

THE STANDARD CHARTERED BANK OF KENYA LIMITED .. RESPONDENT

JUDGMENT

1. In a memorandum of claim dated 8th October, 2021 filed through Sang & Sang Advocates the claimant prays for: -
 - i. A declaration that the termination of the claimant's employment by the respondent was illegal, unfair, unlawful and unprocedural.
 - ii. Damages as set out hereunder;
 - a. Damages for unlawful termination of employment.
 - b. Payment in lieu of Notice of Termination.
 - c. Payments in lieu of annual leave.
 - d. Unremitted Provident Fund for the year 2015-2021
 - e. Gratuity/Service pay
 - f. Bonus for the year 2020
 - iii. Order of Mandamus directing the Respondent to issue the claimant with a Certificate of Service.
 - iv. Costs of the suit.



- v. Interest on the damages and the costs of the suit.
 - vi. Any other relief the court may deem fit to grant.
2. Alongside the statement of claim, as expected, was filed a verifying affidavit and a statement by the claimant. On 31st May, 2022 the claimant filed a list and bundle of copies of the listed documents in support of the claim. The claimant filed a further list of documents and a bundle of copies thereof on 17th June, 2022.
 3. On 29th November, 2021 the respondent entered appearance through Kalya & Co Advocates and filed a statement of reply to the claim on 13th January, 2022. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits.
 4. In addition to the reply to the claim, the respondent filed a list and bundle of copies of the listed documents on 12th May, 2022, and a list of two witnesses, Faith Lumumba (RW1) and Lorraine Oyombe (RW2), and their respective statements. On 15th June, 2022 the respondent filed a further list of documents and a bundle of the documents listed.
 5. This cause had initially proceeded for hearing before Makau J and the claimant's case was heard and concluded. However, on 7th November, 2022, Miss Chepng'etich for the claimant and Miss Karuga for the respondent agreed and consented that the matter be heard de novo before this court following the transfer of Makau J.
 6. The cause came up for hearing in open court on 7th February, 2022 when the Claimant (CW1) testified and closed his case. Without any reasonable explanation or excuse, counsel for the respondent did not attend court notwithstanding that the date had been taken by consent. The defence was heard virtually on 21st March, 2023 with RW1 testifying and the respondent's case was closed.
 7. Counsel for both parties addressed the court and summed up their respective client's case by way of written submissions. Counsel for the claimant filed her written submissions on 13th April, 2023, while counsel for the respondent filed on 8th May, 2023.

II. The Claimant's Case

8. The claimant's case is expressed in the statement of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by his Counsel, and the same is summarized as hereunder.
9. In his memorandum of claim, the claimant pleaded that he was engaged by the respondent, a licensed bank in Kenya, in sales and marketing rising to the position of a branch and sales service executive in 2015. It is pleaded that he retained that position until October, 2020 when the respondent suspended him on allegations of fraudulent gross misconduct and he was subsequently terminated on 31st May, 2021. It is the claimant's case that the termination was unlawful for lack of both substantive and procedural fairness based on the particulars pleaded in paragraph 7 of the statement of claim.
10. It is pleaded that the claimant started with a monthly gross salary of Kshs.41,875/= but as at the time of termination the same had improved to Kshs.145,500/=. It is stated that his terms of engagement were permanent and pensionable as per the written contract between the parties.
11. The claimant's testimony in court was based on his filed statement and the contents in the statement of claim. He testified that he is currently working with Absa, another bank, as a relationships manager more or less performing the same duties as he did with the respondent. He stated that during the period



of Covid-19 pandemic he registered a customer for online mobile-banking services only to be told that the phone line that he applied belonged to another person yet, according to him, the records in the respondent's database indicated that the concerned customer had supplied the line as his own. To verify the customer's identity and authenticity, the claimant stated that he called the customer in person as per the respondent's covid-19 period operations guidelines and on that basis and evidence he registered the customer for mobile-banking. It is only later on that the customer came and complained that someone else had been registered to operate his account with the respondent and he disowned the phone-line used. The customer alleged that money had been fraudulently withdrawn from his account as per the information passed on to the claimant by his line manager.

12. The claimant stated that he was not issued with a show-cause letter as the first letter that he received was that of suspension. However, he admitted that a virtual disciplinary hearing was conducted and that he signed the minutes thereof. He stated that the respondent wanted to false him to admit to something that he had not done.
13. Subsequently, he was terminated. He appealed against the termination but his appeal was dismissed. He was not called for a hearing of the appeal.
14. He stated that the entire disciplinary process leading to his termination was unfair and unlawful as he was not issued with a show-cause letter detailing his alleged misconduct and or laying out the charges or allegations against him, no evidence was availed to him and none was called during the hearing, and his appeal was casually dismissed notwithstanding that he had raised 12 grounds of appeal.
15. He stated that he holds the same position at Absa as he held with the respondent and that he could not have landed or secured his new job if he had committed any misconduct as alleged by the respondent within the closely-knit banking industry. He produced his filed documents in the two lists as exhibits 1 to 8.
16. He stated that his professional reputation was tarnished as the respondent portrayed him as dishonest, unprofessional, and fraudulent. He also stated that his family really suffered as a result of his termination and that he suffered pecuniary embarrassment as he was allegedly impecunious following the termination.
17. The claimant was not subjected to cross-examination as counsel for the respondent, without any explanation, did not attend court.
18. It is on the basis of the foregoing evidence that the claimant prays that judgment be entered against the respondent as prayed. The submissions by his counsel shall be considered in a succeeding part of this judgment alongside those by counsel for the respondent.

III. The Respondent's Case

19. The respondent's case is expressed in the reply to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions filed by its counsel. The respondent's case is summarized as hereunder.
20. In the filed response to the claim the respondent denies all the allegations levelled against it by the claimant and more so that it is liable for the alleged unfair and unlawful termination or wrongful dismissal of the claimant from employment. It is pleaded that the claimant was regularly, fairly, and lawfully terminated and afforded due process both in substance and procedure. It is categorically and vehemently denied that the claimant is entitled to the reliefs sought and the court is urged that this claim be dismissed with costs.



21. It is pleaded that the claimant fraudulently, carelessly, and or negligently registered many customers for online mobile-banking without any requests from the customers and that he admitted as much and apologized for his mistakes during the disciplinary hearing.
22. It is pleaded that the claimant was afforded and accorded a fair hearing both in substance and procedure. Further, it is pleaded that the claimant was paid his lawful dues upon termination as per the letter of dismissal dated 31st May, 2021.
23. In his testimony in court, RW1, an investigator, relied on her filed statement dated 11th May, 2022. She produced as exhibits 1 to 15 the documents listed in the respondent's two filed bundles.
24. She stated that on 16th October, 2022 a customer by the name Chepkok reported unauthorized transactions in his account totaling Kshs.517,100/=. The customer reported the alleged fraudulent transactions to the respondent's Kericho Branch wherein he held and operated an account. RW1 was on 19th October, 2022 instructed by the manager of the said branch to investigate the matter. Upon conclusion of the investigation, which involved recording statements from various witnesses including the claimant and the complaining customer, she prepared a report which she availed and produced in court as one of the exhibits mentioned above.
25. RW1 stated that the investigation revealed that the claimant registered customers for mobile-banking without their consent and reset PINs for the accounts without the approval or consent from the concerned customers. She stated that this amounted to gross misconduct on the part of the claimant and as such she recommended disciplinary action against the claimant. She testified that the claimant also failed to keep and maintain records of his allegedly fraudulent activities, including a formal request from the affected customers for such registration which was supposed to be evidenced with an authorization standard form duly filled and signed by the customer.
26. In cross-examination by counsel for the claimant she confirmed that she prepared the investigation report dated 12th November, 2022 which formed the basis of the disciplinary action against the claimant. She stated that the complaint by Mr. Chepkok is dated 16th October, 2020 but stamped as received by the respondent on 15th October, 2020. She admitted that she had no explanation for the discrepancies but she attributed the same to a possible human error.
27. She stated that the monies from the customer's account had been withdrawn through a phone-line registered in the name of one John Omondi Owilla. However, she did not support this allegation with a statement from the service provider, Safaricom Limited. She also admitted that the statement that she had allegedly recorded from the claimant was not filed in court.
28. She stated that the customer Mr. Chepkok was 91 while the fraudster, John, was only 23 and as such had the claimant taken the trouble to call the customer he should not have failed to discover the mischief, resulting in the loss of funds to the named fraudster. However, no evidence was adduced in support of the age of the persons stated above. She insisted that the claimant failed to keep records and comply with the policy guidelines on how to register a customer for mobile-banking.
29. Responding to a question by the court, the witness stated that she was not aware if any action was taken against or efforts made to trace the alleged fraudster. She admitted that there is no evidence that the claimant was a beneficiary of the fraudulent activities.
30. RW2 is the employee relations manager of the respondent and she was a member of the panel that handled the claimant's disciplinary process. She stated that once the investigation report by RW1 was received the claimant was suspended on 29th October, 2020 and invited for a disciplinary hearing vide a notice dated 22nd February, 2021.



31. She stated that the claimant was charged with registration of mobile-banking without consent from a customer whereby the customer lost a sum of Kshs.517,100/=. She testified that the disciplinary hearing was conducted virtually on 24th February, 2021. She stated that the minutes of the meeting have been filed in court and that the claimant approved them after reading the same. It is after the disciplinary hearing that a decision to dismiss the claimant was arrived at as communicated in the letter dated 31st May, 2021. She stated that during the hearing the claimant admitted and owned up to his wrong-doing for irregularly registering a customer for mobile-banking using the wrong telephone-line.
32. She stated that the claimant appealed the termination and the appeal was handled by a different panel which arrived at the same decision and upheld the dismissal as per the letter of 2nd August, 2021. She stated that the ground for termination was gross misconduct. She stated that the claimant failed to confirm the telephone-line of the customer before registering him for mobile-banking yet the correct line was always readily available in the digital and manual records to which the claimant had easy and ready access.
33. She stated that the claimant was paid in full during the suspension and that he was fairly and lawfully dismissed in accordance with the law. She testified that the claimant was given a fair hearing, both in substance and form/procedure, and as such the issue of his compensation as pleaded in the claim does not arise. In any event, she stated that the claimant was paid whatever was due to him upon dismissal. She stated that the fact that the disciplinary panel was composed of ladies only was purely coincidental and did not in any way prejudice the claimant as all the panelists were professional and objective in their approach and verdict.
34. In cross-examination by counsel for the claimant RW2 stated that she is based at the respondent's headquarter in Nairobi and that she had worked with the respondent since 2018. She reiterated that she sat in the disciplinary hearing panel and that the reason for dismissal of the claimant was gross misconduct. She stated that the claimant failed and or neglected, deliberately or otherwise, to verify and use the correct telephone-line as given by the customer in the records of the respondent. She stated that even during the period of Covid-19 pandemic the respondent's banking halls were open to the customers and that in case the claimant wanted to verify the identity of the concerned customer or indeed any other he was free to summon such customer to appear in the bank personally.
35. She stated that while she had sat in the disciplinary hearing panel she is not aware of who comprised the appellate panel. She insisted that the claimant failed in his duties leading to the loss and reputational damage to the respondent.
36. In re-examination she reiterated that the claimant was fully aware and informed of his misconduct and charges from the date of suspension all the way to the hearing and dismissal of his appeal.
37. Responding to a question from the court RW2 stated that the minutes of the disciplinary hearing were not signed as the meeting was virtual and there was no opportunity for the minutes to be signed thereafter. She stated that as at the time of dismissal the claimant had served the respondent for over 10 years with a clean disciplinary record. She stated that the respondent paid to the customer the money that was lost as a result of the claimant's gross misconduct. She stated that no evidence was obtained of the claimant's involvement in the fraud and or benefiting from the lost funds.
38. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.



IV. Submissions by Counsel

39. On the one hand, counsel for the claimant identified two issues for determination – Whether the claimant’s termination was unfair and unlawful; and, Whether the claimant is entitled to the reliefs sought.
40. On the first issue, counsel cited Cooperative Bank of Kenya Limited V Banking Insurance & Finance Union (2017) eKLR wherein it was held that Sections 43, 45(2), and 47(5) of the *Employment Act* (the Act) place on an employer the burden of proving that the reasons for termination or dismissal were fair and lawful and that all that an employee needs to demonstrate is that an unfair and unlawful dismissal has occurred. Counsel also cited Walter Ogal Anuro V Teachers Service Commission (2013) eKLR on the same issue.
41. Further, counsel cited Kenfreight (E.A.) Limited V Benson K. Nguti (2019) eKLR re-emphasizing that it is upon an employer to justify a termination or dismissal once an employee pleads and demonstrates an unlawful termination or dismissal. It is submitted that the respondent has miserably failed to prove that it had any reasonable grounds for taking the disciplinary action and dismissing the claimant as it did. It is submitted that the telephone-line that the claimant applied in registering the concerned customer for mobile-banking is the one that was in the respondent’s data bank and if there was any error in that regard the same can only be attributed to the respondent and not to the claimant.
42. Further, it is submitted that while the complaint by the concerned customer is dated 16th October, 2020 the same was allegedly received and date stamped by the respondent on 15th October, 2020, a day before it was authored. It is submitted that the manager who allegedly received the said complaint and the customer concerned were not called as witnesses during the disciplinary hearing and also during the hearing of this cause in court.
43. It is submitted that the investigation report clearly admits that the telephone-line that the claimant applied in registering the concerned customer for mobile-banking indeed belonged to the said customer and as such any fraudulent activities in his account should not be attributed to the claimant as he allegedly applied due diligence and relied on the information available in the respondent’s database. It is submitted that RW1, the investigator, did not interview or record a statement from the claimant but instead he was interviewed by an Indian investigator from an independently hired firm.
44. It is submitted that the claimant was given 48 hours within which to prepare and attend the disciplinary hearing. It is submitted that the claimant was not invited to the hearing of the appeal. It is therefore submitted that the claimant was denied fair hearing as envisaged under Article 50 of *the Constitution*. In re-emphasizing the critical place of substantive and procedural fairness counsel cited Galgal Jarso Jillo V Agricultural Finance Corporation (2021) eKLR.
45. For the foregoing reasons, the court is urged to find in favour of the claimant and remedy him as per the reliefs sought.
46. On the other hand, counsel for the respondent submitted that the evidence adduced confirms that the claimant-initiated registration of the concerned customer for mobile-banking without the customer’s consent and failed to take all appropriate steps and keep records thereof. It is further submitted that this gross misconduct by the claimant exposed the respondent to a huge financial and reputational risk.
47. It is submitted that the disciplinary action against the claimant was undertaken following investigation that established prima facie evidence that the claimant was culpable of gross misconduct. It is submitted that the claimant was fairly and lawfully dismissed after he was subjected to due process in accordance with the law.



48. Counsel for the respondent identified the same issues for determination as those isolated by counsel for the claimant. In regard to the procedure applied by the respondent counsel cited Lydia Moraa Obara V Tusker Mattresses (2021) eKLR, Postal Corporation of Kenya V K. Tanui (2019) eKLR, and Godfrey Barasa Ochieng V Security Guards Services Limited (2022) eKLR emphasizing that Sections 41 and 45 of the Act were complied with by the respondent before, during, and after the dismissal.
49. In regard to substantive fairness counsel cited Denning MR in Leyland UK Limited V Swift (1981) on the application of the reasonableness test. It is submitted that the relationship of an employer and an employee is basically a contract and if the conduct of either party vitiates the contract, the other is legally and lawfully entitled to act and end the relationship as the respondent did in this cause.
50. It is submitted that had the claimant taken his work seriously and acted professionally and within the rules, regulations, and guidelines the dismissal should not have happened. It is submitted that the gross misconduct of the claimant resulted in the loss of the monies alluded to above which the respondent had to refund to the concerned customer.
51. It is submitted that the disparity between the date of the complaint by the customer and the date on which it was received in the bank, 16th October, 2020 and 15th October, 2020 respectively, is an apparent error that does not affect or diminish the substance of charges and allegations of gross misconduct on the part of the claimant.
52. The submissions on reliefs shall be considered in a succeeding part of this judgment.

V. Issues for Determination

53. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from both sides, by the Claimant (CW1) on the one hand, and RW1 and RW2 for the respondent on the other, and the submissions by counsel for both parties the court identifies the following issues for determination –
 - a. Was the claimant unfairly and unlawfully terminated or dismissed by the respondent?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

VI. Termination or Dismissal

54. The parties herein and their counsel have used and applied the above terms interchangeably. But is termination the same as dismissal in the technical sense of the two terminologies? My view is that there is a difference though dependent on the context and application. Technically, termination means coming to an end of an employment relationship for the reason that an employer no longer requires the services of an employee for tasks or duties at hand. Termination may be voluntary, involuntary, or by death. Redundancy is a classic example of involuntary termination. Loosely speaking, however, termination connotes that the employment relationship has come to an end or caused to come to an end. In that context, whether by effluxion of time, dismissal, resignation, abandonment, desertion, death, redundancy, or through whatever other manner, the employment relationship has come to an end.
55. Dismissal on the other hand connotes “termination” or coming to an end of an employment relationship at the instance of the employer founded on misconduct, poor performance, or other



personal factors on the part of the employee. Dismissal may be normal or summary. Summary dismissal occurs where an employee is terminated without notice or on shorter notice than agreed in the contract or as provided for in the law – See Section 44 of the Act. Applying the foregoing analysis to this cause, the court finds and holds that the appropriate term for application in this cause is that the claimant was dismissed by the respondent based on alleged gross misconduct.

56. The terms of engagement of the claimant by the respondent are not really in dispute. From about 2015 to 31st May, 2021 the claimant was an employee of the respondent as a branch sales and service executive and his last station was Kericho Branch. He was placed on suspension from October, 2020 to 31st May, 2021 when he was dismissed on allegations of gross misconduct as alluded to in the foregoing paragraphs of this judgment.
57. It is not in dispute that the claimant was dismissed vide a letter of dismissal dated 31st May, 2021 that was in the following terms –

Name: Hilary Chepkwony

Bank ID: 1374392

DATE: 31st May, 2021

Dear Hilary Chepkwony,

Notification of dismissal for Gross Misconduct

I am writing to confirm the outcome of the disciplinary meeting you attended on 24th February 2021 under the Group Disciplinary Standard. You chose not to be accompanied to the meeting.

Issues of concern

The purpose of the meeting was to consider the following issues of concern.

That on 12 September 2020 you registered a mobile number 254726867038 for mobile banking services without a valid request and documentation from the customer as stipulated in the process. That further, you failed to use a bank recorded line when calling the client Mr. Chepkok which has resulted in fraudulent transfer of Kes, 517,200 from the client's account between 12 September 2020 and 30th September, 2020.

At the hearing you were provided with the information obtained and given an opportunity to comment on it which you did.

Decision

Following consideration of all the available information, the bank has decided to terminate your employment for gross misconduct. The reason for termination of employment are set out below.

You admitted that the request was not done through a bank recorded line as required in Cause 8.2.1 Branch Operations Global Process Standards. Therefore, we have no record of any client request or documentation. You also failed to use good judgment, do the right thing and act responsibly since you did not adequately prepare for the client engagement by checking pertinent details like the age of the client and ignored the requirement to use the recorded line and went ahead to register them for mobile banking. This directly led to the client losing Kes.517,200.

This was a serious breach of your obligations such as to warrant dismissal with notice and without any further warnings.



Termination Date

Your dismissal from the Bank will be effective immediately (“Termination Date”). You will receive your salary and benefits up until the Termination Date, Subject to normal deductions in respect of income tax.

Right of Appeal

You have the right to appeal this decision. If you wish to appeal, you must submit your appeal in writing to the head of Human Resources, within a maximum of 10 working days of receiving this letter. You should state specific grounds for you appeal in full. Lodging an appeal will not delay the dismissal from taking effect, but, if you are subsequently reinstated, any lost a pay will be reimbursed.

Yours sincerely

Lorraine Oyombe

Employee Relation Manager

For and on behalf of Standard Chartered

Cc: Personnel File

58. Prior to the dismissal, the claimant was suspended from duty vide a letter dated 29th October, 2020 which in the material part stated that–

Issues of concern

Standard Chartered (the Bank) is currently investigating the following issues of concern.

1. PIN reset for Safaricom Mobile line belonging to our client, CHPTELMET CHEPKOK

We reserve the right to add further issues (as appropriate) in light of any information obtained during the investigation.

59. It is also settled through evidence that the claimant was not served with a show-cause letter at any point of the disciplinary process. There is also no contest that the claimant was dismissed as pleaded. However, the point of departure between the parties is whether the dismissal was wrongful and therefore unfair and unlawful as presented and argued by the claimant or whether the same was fair and lawful as per the position taken by the respondent.

60. The jurisprudence from this court (ELRC) is now settled that for a termination or dismissal to be fair and lawful it must comply with the law. There are two components to this – substantive and procedural fairness and lawfulness. In substance, an employer shall not take disciplinary action against an employee without a lawful reason or cause. An employer has to have a genuine and reasonable ground for taking disciplinary action against an employee.

61. Section 43 of the Act provides as follows –

Proof of reason for termination

- (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.

62. Further, Sections 40, 44, 45, and 47(5) of the Act make provisions on what may qualify as a good and valid reason for termination or dismissal. In my understanding, the foregoing provisions place a burden on an employee to prove that wrongful, unfair, and unlawful dismissal or termination has occurred while an employer has to demonstrate, justify, and prove that the reason for the termination or dismissal was fair and lawful. In my view, there is nothing novel about these provisions as it amounts to each party proving the position taken.
63. The totality of the allegations by the respondent against the claimant that led to his dismissal is that he registered a customer, Chepkok Cheptelmet, for mobile-banking using an incorrect mobile telephone-line as a result of which someone else accessed the said customer's account and withdrew a sum of Kshs.517,100/=. In his letter of complaint dated 16th October, 2020 the said customer stated that his correct mobile telephone-line was 0726793995 yet the line used to access his account was 0726867038. The claimant's case is that he applied the correct line as per the database held by the respondent while the respondent's position is that the claimant applied the wrong line and failed to consult and or verify with the said customer.
64. Further, it is the respondent's case that the claimant did not keep records of the registration of the mobile-banking of the customer as required and more so a filled form duly executed by the customer. It is also stated that the claimant did not call the customer on official telephone-line as required to verify the necessary details.
65. It is on the basis of the foregoing evidence as contained in the investigation report that the claimant was suspended and the disciplinary process commenced.
66. It is not in dispute that the customer's account was penetrated and funds lost as alluded to above. It is also not disputed that the respondent repaid the money and hence suffered the loss and the attendant reputational risk.
67. The court has carefully gone through the minutes of the disciplinary hearing held on 24th February, 2021, which the claimant admitted in evidence that he read and approved, and therein the claimant admitted that he had made an error for not being careful in confirming and verifying the necessary details in registering the concerned customer for mobile-banking. He admitted that he did not verify the age of the customer who was over 90 as opposed to the fraudster who was only 23.
68. In my understanding, the claimant made several fatal errors in the approach that he took leading to the loss of the said funds. In my view, the claimant was negligent, careless, and reckless in his approach. Firstly, the claimant admitted that he used his personal telephone-line to contact the customer yet there was an official line that he was supposed to use for that purpose and if the same was not working he ought to have raised the issue with his supervisor and then get directions on whether he could use his personal line. As a result, the claimant's conversation with the customer was not recorded which recording should have confirmed or dismissed his allegation that he contacted the customer. Secondly, the claimant did not keep a record of the registration process including the filled form of request. The customer is said to have denied ever making a request for mobile-banking registration. Thirdly, the claimant as a professional failed to take appropriate steps in dealing with a 90 years old customer who, in my considered view, should not be confused with a 23 years old fraudster. The voice, the tone, the



speed, and the phone-use-etiquette, even in the era of play-acting, ought to have informed the claimant that there was need to summon the customer to appear in person for the registration of such a personal and financially risky service.

69. The only logically viable explanation of what the claimant did is that he negligently, carelessly, and recklessly called the wrong line, gave all the details of the account to a cunning fraudster who wittingly played along, and even gave the PIN for access of the funds. Indeed, the fraudster accessed the account and withdrew the funds alluded to above. Whether the claimant was a beneficiary of the funds is something that the respondent was not able to establish. What is true and correct, and the claimant owned and apologized for it during the disciplinary hearing, is that the claimant was negligent, careless, and reckless in execution of his duties for the foregoing reasons.
70. Applying the reasonableness test as set out in *Leyland V Swift* (Supra) and the subjective test in Section 43(2) of the Act the court finds and holds that the respondent had genuine and reasonable grounds for taking the disciplinary action as it did against the claimant. Banking is a very sensitive sector and the employees therein hold a fiduciary position of trust. It is unreasonable to expect a bank not to act against an employee whose commissions and or omissions cause financial loss or reputational risk as banks bank on trust from their customers for them to remain in business. The claimant was a seasoned banker of over ten years of service and the evidence herein points to his serious lack of professionalism, neglect of duty, and carelessness in the manner in which he handled the registration of the particular customer for mobile-banking. Uncharacteristic of a seasoned banker, the claimant failed his employer, the respondent, and he had to face the consequences thereof.
71. On procedural fairness, the court is of the view that the only misstep by the respondent is its failure to issue the claimant with a show-cause letter. However, each case is considered and decided on its own merits. A show-cause letter is the first step in a disciplinary process before the hearing and it is good practice for an employer to issue the same. A show-cause letter is supposed to inform an employee, with details and particulars, of the charges and or allegations facing him/her and requiring him/her to respond thereto in writing within a specified period before further action is taken. A show-cause letter is thus very pivotal as it gives an accused employee an opportunity to understand the allegations or charges against him/her in detail and allows an opportunity for him or her to respond thereto in writing.
72. Although the claimant was issued with a letter of suspension on 29th October, 2020 as alluded to in an earlier part of this judgment, the issue raised therein was that the claimant had allegedly reset the PIN of the concerned customer's mobile-banking un-procedurally. The letter of suspension stated that the respondent was free to raise other issues or charges upon conclusion of investigation. The next communication that the claimant received was a letter dated 22nd February, 2021 inviting him to a disciplinary hearing slated for 24th February, 2021. It is in this letter that the details of the alleged misconduct were spelt out. However, the claimant was neither requested to respond to the allegations against him in writing nor was he supplied with the investigation report which formed the basis of the charges and allegations against him.
73. While the claimant purportedly confirmed his availability to attend the hearing and indeed attended, the court is also concerned about the amount of time that he was given to organize, plan, and attend the hearing. Although the claimant did not raise an objection to the period of 48 hours given, my view is that the respondent hurried the process and no reason was given in court for such haste.
74. The total sum of all the foregoing is that while the respondent had genuine and reasonable grounds upon which to found disciplinary action against the claimant, the procedural steps taken were defective for lack of show-cause letter and an opportunity for the claimant to respond thereto, the too short



notice given to the claimant to attend the hearing, and failure to supply the claimant with the evidence gathered against him. Further, no witnesses were called, including the customer and the investigation officer, for the claimant to cross-examine them on their allegations and evidence.

75. While a disciplinary hearing is not a court trial that follows technical rules of procedure, there is an eternal need that such a hearing conforms with the basic tenets of rules of natural justice as propagated in various provisions of *the Constitution*, to wit Articles 47 and 50, the Fair Administrative Actions Act, and the various provisions in the *Employment Act* cited in the foregoing paragraphs.
76. While the respondent mustered and passed the substantive test, it failed in the cumulative procedural test – See *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, *Jane Nyandiko V Kenya Commercial Bank* (2017) eKLR, and *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (2017) eKLR.
77. The court has said enough in demonstrating that the claimant’s dismissal was wrongful only for the procedural unfairness and not for the substance. Otherwise, the claimant was due and bound for dismissal for his negligent and careless acts which amounted to gross misconduct under Section 44(4) (c) of the Act. It is so held and declared.

VII. Reliefs

78. Having held that the claimant was wrongfully dismissed only for lack of procedural fairness the court shall now consider each of the reliefs sought as hereunder.
79. Prayer (i) is for a declaration that the termination of the claimant was illegal, unfair, unlawful, and un-procedural. As indicated in another part of this judgment, the claimant was dismissed. Further, the court has found and held that the dismissal was wrongful but only for the reason that the procedure adopted by the respondent in the disciplinary process was unfair for the reasons given above. For all that, a declaration is issued that the dismissal of the claimant was wrongful for procedural impropriety.
80. Prayer (ii) has several items. Prayer (a) is for damages for unlawful termination. The claimant did not testify on what damage if any he suffered as a result of the dismissal. His counsel did not submit on the same. However, the court understands this relief to mean that the claimant is seeking compensation for the dismissal that the court has found and held to have been wrongful. Unless specifically pleaded and proved, the loss that an employee suffers due to wrongful, unfair, and or unlawful dismissal or termination is the loss of salary or wages that he/she should have earned bar the termination or dismissal. It is the relief provided for under Section 49 of the Act.
81. The court has found and held that the claimant was the author of his misfortune. In fact, were it not for the procedural misstep committed by the respondent as elaborated elsewhere in this judgment, the claimant was lawfully due and bound for dismissal. The maximum awardable under this item is an equivalent of 12 months gross pay under Section 49(1)(c) of the Act. The award is at the discretion of the court and considering all what the court has said above, and more so the gross misconduct by the claimant, the court awards to him only two months’ gross pay as compensation in the sum of Kshs.291,000/= subject to statutory deductions. This award is based on the pleading and averment by the claimant in his statement of claim that his last monthly gross salary was Kshs.145,500/=.
82. Prayer (ii)(b) is for payment in lieu of notice. This prayer is allowed in the sum of Kshs.145,500/=.
83. Prayer (ii)(c) is for payment in lieu of annual leave. No details are given as to which annual leave this claim relates to and the claim is not liquidated or quantified. No evidence was adduced during the hearing on this issue at all. The claimant took this same casual approach to all the other listed items being (d) to (f). It is not enough for a party to plead and pray for a relief and expect the court to automatically grant the same. He who pleads shall prove (he who alleges must prove), that is the



law of evidence, unless the law shifts the burden to the other party or presumes on some facts or circumstances.

84. While Sections 10 and 74 of the Act place a burden on an employer to keep records of employment, the burden to avail such documents to rebut an allegation only arises where the pleadings are particular and specific. Where is the primary evidence by the claimant of the leave that he allegedly did not take? Where is the evidence that any providence fund existed to which the respondent was expected to remit funds into on behalf of the claimant? Where is the evidence that the claimant was entitled to any gratuity and what is the quantum thereof? How much bonus, if any, was the claimant entitled to and on what basis?
85. It was the legal duty and burden for the claimant to provide evidence and prove the foregoing. Interestingly and equally intriguing, the claimant's counsel submitted nil on the issues raised above. Counsel for the claimant simply stated that the claimant had proved his case to the required standard and as such he was entitled to the reliefs sought. That is a casual and dangerous approach to serious litigation. The claims in the reliefs were not quantified, no evidence was adduced in support of the same, no submissions were made in support of the same, yet the claimant expects the court to grant him the same? A court of law is an impartial umpire or arbiter and should not descend into the arena in aid or support of any of the combatants. Each party should and indeed shall prove its case to the required standards in accordance with the law and the claimant failed miserably in demonstrating that he is entitled to the reliefs herein. It is not enough for a party to plead its case and throw the same on the face of the court for the court to automatically grant the reliefs as sought. Pleading is only one step in litigation but the most vital part is proving the case and convincing the court that the party is deserving of the reliefs sought. In my considered view, the claimant failed in that duty. Consequently, prayers (ii) (c) to (f) shall fail and are hereby denied and dismissed.
86. Prayer (iii) is for an order of mandamus directing the respondent to issue the claimant with a certificate of service. Section 51 of the Act provides for this relief. Therefore, the respondent shall unconditionally issue and deliver to the claimant a certificate of service within 30 days of this judgment.

VIII. Costs

87. The claimant is awarded costs of the cause.

IX. Disposal

88. In disposal of this cause, the court issues the following orders: -
- a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful for lack of procedural fairness.
- b) The claimant is awarded a total of Kshs.436,500/= made up as follows –
- i. One month's salary in lieu of
noticeKshs.145,500/=
- ii. Compensation for wrongful
dismissalKshs.291,000/=
TotalKshs.436,500/=
- c) The respondent is hereby ordered to issue and deliver a certificate of service to the claimant within 30 days of this judgment.
- d) Costs of the cause to the claimant.



e) All the other reliefs are denied and dismissed.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26TH DAY OF JUNE, 2024

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DAVID NDERITU

JUDGE

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