



**Banking, Insurance & Finance Union (BIFU) v Guaranty Trust Bank (K) Limited
(Cause E606 of 2022) [2024] KEELRC 1932 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1932 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E606 OF 2022
NZIOKI WA MAKAU, J
JULY 26, 2024**

BETWEEN
BANKING, INSURANCE & FINANCE UNION (BIFU) CLAIMANT
AND
GUARANTY TRUST BANK (K) LIMITED RESPONDENT

JUDGMENT

1. After failing to find a settlement through conciliation, the Claimant Union filed this suit against the Respondent Bank through a Memorandum of Claim dated 25th August 2022, seeking the following reliefs on behalf of its member Jemima Wambura Gathenya:
 - a. That the Honourable Court do find and declare that the summary dismissal of the Grievant Jemima Wambura Gathenya was unfair/ unlawful and thereafter invalid.
 - b. That the Claimant again pray to the Honourable Court to order the Respondent to reinstate the Grievant back to the position she was holding in the Bank and Branch before the termination without loss of employment benefits and seniority in service and status.
 - c. That the Claimant further prays to the Honourable Court to order for the payment of twelve (12) month's salary of Kshs. 1,302,348/- as compensation for having suffered an unfair and unlawful loss of employment.
 - d. That the Grievant finally prays for damages of Kshs. 1,500,000/- for having suffered humiliation, inability to provide food, clothing, medication, education and other basic needs to her young family members which the said family members have a Constitutional right to receive from a mother. Furthermore, there is no expectation to secure alternative employment.
 - e. Prayer for notice pay of Kshs. 108,529/- and leave pay.
 - f. Prayer for leave pay of Kshs. 11,130/-.



- g. Costs of this suit.
2. The Claimant's case is that the Grievant, a member of the Union, was in employment of the Respondent as a Teller from 22nd August 2013 and was therefore covered by the Collective Bargaining Agreement (CBA) between the Claimant Union and Kenya Bankers Association. That prior to the unlawful/unfair termination of her employment, the Grievant was issued with a Show Cause letter dated 27th October 2021, later invited to a Disciplinary Hearing on 4th November 2021 and finally dismissed summarily from employment of the Respondent Bank on 8th December 2021. That in summary, the Grievant was accused of three omissions and or commissions that is: failing to timely sort cash received from branches; failing to make repatriation requests for unfit/mutilated cash to CBK; and failing to confirm with the respective parties when the differences in CIT cash was reported.
 3. In reply, the Respondent filed a Memorandum of Response dated 13th April 2023 averring that the Grievant failed to carry out her professional mandate thus exposing the Respondent Bank to the loss of Kshs. 3,357,450/-. That it found the Grievant's response to the Show Cause letter unsatisfactory and thus invited her to a disciplinary hearing that was conducted virtually via Microsoft Teams and that the charges were read to the Grievant and she was granted an opportunity to make her representations to the Disciplinary Committee. That the Committee considered the Grievant's submissions and resolved that she had failed to provide sufficient explanation on the charges against her. The Respondent posited that consequently, the Grievant's employment was summarily dismissed thus giving rise to the present dispute.
 4. Claimant's Submissions
The Claimant submitted that the Grievant was working in the Respondent's Cash Management Center (CMC) department and was under supervision of a team leader. That the said department being a very sensitive one handling all cash coming in and out from all the branches and at the same time, repatriating all the unfit or mutilated notes to the Central Bank of Kenya, it was Audited by the Bank's internal auditors on monthly basis and supervised by way of regular surprise checks by the Bank's senior management. Furthermore, that the department was managed under the firm rule of dual custodianship and therefore under no circumstances would any employee be allowed to work without the involvement of a second person. The Claimant noted that the sorting of cash was the responsibility of the team leader and the Grievant would only be called upon to accompany him during the sorting exercise. It argued that it was therefore unfair and unlawful for the Respondent to accuse the Grievant for failing to sort out cash and yet the same was a shared responsible.
 5. It was the Claimant's submission that for the second charge, the Grievant's name and signature was not retained with the regulator (CBK) as the same was not her responsibility and that only the names and signatures of team leaders were known by the CBK by way of name, signature and code, for purposes of identification. As for the third charge, the Claimant noted that the evidence placed before this Court from both parties shows that there was no proof that any party reported a difference in the cash on transit (CIT). It argued that the Grievant was invited to disciplinary hearing to answer charges for responsibilities which were not relating to her and that the Respondent simply set her up for termination of her services. That consequently, the Respondent Bank had no reason(s) at all to summarily dismiss the Grievant, whose case was clearly witch-hunt and a constructive dismissal. On this submission, the Claimant urged the Court to adopt the position taken by the Court of Appeal in Civil Appeal No. 240 of 2018, Cooperative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya in which the Court of Appeal affirmed the position on the burden of proof for an employer and employee in matters of summary dismissal and unfair termination. The Claimant further submitted that it is a statutory procedural requirement under section 41 of the Employment Act,



2007 that, “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 that the employee understands, the reasons for which the employer is considering a termination.” That the Respondent failed the test of procedural requirement before the dismissal further because the fourth reason for the Grievant’s dismissal was not known to her before attending the hearing and preparing to defend herself as required by law. The Claimant urged the Court to be guided by the decision in ELRC Cause NO. 213 of 2015, Banking Insurance and Finance Union (K) v The Co-operative Bank of Kenya in which the Court analysed the provision of section 47(5) of the Employment Act, 2007 on the burden of proof for any complaint of unfair termination of employment or wrongful dismissal. Regarding the reliefs sought, the Claimant submitted that the Grievant was entitled to all the reliefs sought considering the evidence on record. That the charges levelled against the Grievant were mere allegations without any foundation or basis and that section 45(2)(a) and 47(5) of the Employment Act requires an employer, in mandatory terms, to have reasons for the termination as the same reasons must be valid. In conclusion, it posited that it is in the interest of justice that an employer is required by the law to have a justifiable reason(s) to dismiss an employee from employment.

6. Respondent's Submissions

It was the Respondent's submission that the issues for determination are crystallized from the requirement for both substantive and procedural justice. It relied on the Court of Appeal case in CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR wherein the Court stated that the court considers both the procedural and substantive justice. That further in the case of Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Limited [2014] eKLR (Industrial Cause No. 782 of 2011), Rika J. stated that section 43 and 45 of the Employment Act 2007 requires the employer to establish valid and fair reason or reasons for termination and sections 41 and 45 require that the decision is made following a fair procedure. The Respondent argued that the Grievant’s termination from employment was premised on section 44(4)(c) of the Employment Act, that is, an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly, as a matter that may amount to gross misconduct. That the reasons for the Grievant’s dismissal were clearly set out in the Summary Dismissal Letter dated 8th December 2021, in compliance with section 41(1) of the Employment Act. According to the Respondent, in examining the justifiability and validity of the said reasons for the Grievant’s dismissal, it is noteworthy that it was the duty of the Grievant, as an officer in the CMC Department in conjunction with the Team Leader, to verify, count and pack/wrap the cash in designated notes per bundle. It maintained that money was found missing from its cash holdings after conducting a cash verification and the Grievant was an officer in the said department. Moreover, that the Grievant conceded that the CMC staff, i.e. the Team Leader and herself, had operated on trust, instead of adhering to the SOPs that called for dual-custodianship principle. It was the Respondent's submission that it ends therefore that the summary dismissal and the reasons advanced for the same were valid and justifiable and cannot be termed as malicious whatsoever. It invited this Court to apply the principle of the 'range of reasonable responses test' in finding that the reasons advanced for the termination of the Grievant were valid and justified per the decision of Court of Appeal in the CFC Stanbic Bank Limited case (supra). Additionally, the Respondent submitted that the Grievant was also accorded due process in the termination of her employment. It noted that section 41(1) & (2) of the Employment Act provides for notification and hearing before termination of employment on grounds of misconduct. It fronted that the Grievant was indeed notified of the disciplinary allegations against her, informed of the specific charges against her and asked to give a written explanation. That the Grievant was subsequently invited for a disciplinary hearing in writing via an email, which informed her of her right to have a



witness and disclosed the date, time and place of the hearing. It noted that the content of the Minutes of the Grievant's Disciplinary Hearing dated 4th November 2021 is not disputed by the Claimant and/or the Grievant and that her summary dismissal letter gave the reasons for the termination as previously expounded herein. On this issue of procedural fairness, the Respondent relied on the authorities of *Nita Sangari Baldev v Milly Glass Works Limited* [2019] eKLR and *Consolata Kemunto Aming'a v Milimani High School* [2019] eKLR, wherein this Court dismissed claims for unfair termination where the respective claimants had been summarily dismissed under section 44(4) of the *Employment Act*.

7. The Respondent submitted that in view of the foregoing, the Claimant/Grievant is not entitled to the prayers sought and the Claim must fail in its entirety. It argued that the Claimant is seeking prayers that are conflicting and at complete cross-purposes because on one hand the Claimant seeks Reinstatement, Compensation for unfair termination and General Damages at the same time. It further argued that the Claimant has not demonstrated any reason as to why the Grievant's termination was wrongful and unfair and thus failed to discharge the burden of proof required of it under section 47(5) of the *Employment Act*. That in the circumstances, a declaration for unfair and/or wrongful termination cannot be made and/or compensation awarded in the circumstances. On the issue of General Damages, the Respondent submitted the same cannot be awarded by this Court and relied on the holding of the Court of Appeal in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR wherein the Court overturned an award by stating that,

“On the issue of the quantum of damages awarded the superior court was not justified in awarding general damages in respect of an alleged breach of a contract of service. By so doing, the superior court overlooked a long line of authorities cited to it by the appellant counsel touching on this well trodden area of law. In our view, the respondent's entitlement in the circumstances was six months' salary in lieu of notice and only for the reason mentioned above that there was a violation of the contract of service because the appellant did not sufficiently explain the apparent overlap of the membership of the Staff Committee and the Board.” [Emphasis by Respondent]

The Respondent concluded that the Court ought to dismiss the claim brought on behalf of the Grievant by the Claimant with costs.

8. The Grievant was dismissed after a hearing at which she was accused of misdeeds leading to the loss of money. She was a member of the team involved in preparation of cash for repatriation to Central Bank of Kenya. It was alleged that she was a joint custodian with the head of the Unit and together they did not properly conduct the affairs of the unit leading to losses. The issue of non-verification of the funds bundled for repatriation came about after a customer discovered the cash he was given at the Branch was not properly bundled. Whereas there were other employees who had been guilty of malfeasance, the Grievant cannot hide behind the fact that the cashier made a monumental mistake in giving cash which had not been verified. She cannot claim she is innocent. The Grievant had a duty to ensure the money that was due for repatriation to CBK was properly counted and where necessary sealed for delivery to CBK. It is escapism and not realistic in a matter where joint custodianship is applicable. The Grievant had failed to execute her role as required leading to losses for which the Respondent was correct in holding her responsible for. As such, her claim before this court was not merited and ought to be dismissed as I hereby do. Suit dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024



NZIOKI WA MAKAU
JUDGE

