



REPUBLIC OF KENYA



KENYA LAW
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**Khayeli v Kenya Commercial Bank Limited (Cause 803 of 2018)
[2024] KEELRC 2280 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2280 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 803 OF 2018
NJ ABUODHA, J
SEPTEMBER 25, 2024**

BETWEEN

FLORA KUSINA KHAYELI CLAIMANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Memorandum of Claim dated 28th May, 2018 and pleaded inter alia as follows: -
 - a. That on or about 12th June, 2007 the Respondent employed the services of the Claimant, where she was appointed as graduate trainee on probationary terms for a period of 6 months at a monthly consolidated salary of Kshs 32,000= which appointment was terminable by giving of 1 months' notice or 1 Months' salary in lieu of notice. That upon completion of her probation, the Claimant was duly confirmed in the position of a clerk effective 19th June,2008.
 - b. The Claimant averred that by a letter dated 5th July,2013 the Respondent promoted her to the position of Assistant Manager, Service Quality & Compliance Management Level A in-charge of Hurlingham Branch on probationary terms at monthly consolidated pay of Kshs 99,000=. That upon completion of her probation she was confirmed in the position of Assistant Manager Service Quality & Compliance Management Level A effective 21st March,2014.
 - c. The Claimant averred that she had stellar performance in the execution of her duties as per the terms of employment and over the years she had effectively executed her duties with due diligence, integrity and has had no record of any disciplinary case leading to her elevation to acting Manager service Quality & Compliance Management.
 - d. The Claimant averred that by a letter dated 11th July.2016 to her consternation she received a letter suspending her from duty for an unspecified period of time allegedly on account of unaccounted Reserve Cash totaling to Kshs 4,664,000 from KCB Bank, Ngara Branch. That



on 21st July,2016 by a letter of the even date she was invited to attend disciplinary hearing scheduled for the 26th July,2016.

- e. The Claimant averred that despite being served with a Notice to show cause the Claimant avers that the notice was too short as it contravened the provisions of *Employment Act*. That she attended the meeting where she was charged with 11 counts to her utter shock and disbelief. That she had limited or no time to prepare her defence if at all.
 - f. The Claimant averred that after presenting a detailed response to the accusations to the panel so convened, the panel reached a finding that she be dismissed from employment. That via a letter of 10th August,2016 the Respondent dismissed her from employment.
 - g. The Claimant averred that she appealed the decision dismissing her which Appeal meeting was held on 6th October,2017 and vide a letter dated 25th October,2016 the Respondent informed her that her appeal lacked merit and affirmed the Bank's position in summarily dismissing her.
 - h. The Claimant averred that at the time of her dismissal she was earning a basic salary of Kshs 131,663= per month and as such cannot secure a similar position anywhere locally particularly considering the reason given for her termination by the Respondent.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A declaration that the Claimant's dismissal from the Respondent's employment was unprocedural, unfair and unlawful and unconstitutional.

An order does issue reinstating the Claimant as the Respondent's Assistant Manager Service Quality & Compliance Management Level A, Ngara Branch.

In the alternative
 - b. 12 month's salary compensation for unfair termination
 - c. 3 month's salary in lieu of notice
 - d. Certificate of service
 - e. Costs of this Claim
3. The Respondent filed its Memorandum of Response and Counter Claim dated 21st May,2019 and averred inter alia as follows;
- i. The Respondent admitted the fact that the Claimant was appointed by the Respondent as stipulated by the Claimant in her claim and her suspension of 11th July,2016 on account of failing to account for reserve cash of Kshs 4,664,000= at the Respondent's Ngara Branch.
 - ii. The Respondent averred that the Claimant vide a letter dated 21st July,2016 was invited for disciplinary meeting on 26th July,2016 to show cause why disciplinary action should not be taken against her. That the disciplinary hearing was conducted on 2nd August ,2016 at the Respondent's premises and in attendance was the Claimant together with a representative by the name Pius Mtemwa, a staff at the Respondent's Kipande Branch.
 - iii. The Respondent averred that the Claimant responded to the charges as follows: -
 - a. Charge 1: She did not disobey proper instructions issued by the line manager. That she received the instructions not to access the vault after she had already accessed the cash from the vault.



- b. Charge 2: She admitted that she was well informed about the cash management guidelines but she did not adhere to it by removing the cash from vault without a reserve cash out slip.
 - c. Charge 3: she admitted that the cash removed from the vault was not entered in to reserve cash Register and initialed by both custodians as required.
 - d. Charge 4: She admitted that she held the cash removed from the vault in a wooden cabinet contrary to the provisions of the operations manual and that was the practice at the Ngara Branch.
 - e. Charge 5: she stated that she was granted permission by the acting branch manager to attend to a sick child and that with her she had Kshs 252,000= in her handbag which she had withdrawn from her account.
 - f. Charge 6: she admitted that she did not scramble the combination to the vault as required under the operations manual on the advice of the acting branch manager.
 - g. Charge 7, 8 & 9: she stated that she did not falsify bank records vault entries to reflect a balancing position in the vault. That the cash register and the cash summary confirmed that the physical cash tallied with the T24online balance.
 - h. On the issue that the sum of Kshs 4,664,000.00 was not accounted for in the vault the Claimant insisted that she left the sum of Kshs 2,950,000= in the branch.
- iv. The Respondent averred that the Claimant was given an opportunity to be heard and having made the representations above the Respondent was not convinced by the explanation given by the Claimant during the disciplinary hearing as a result of which the Claimant was summarily dismissed vide the letter dated 10th August,2016.
 - v. The Respondent admitted that the Claimant appealed the decision to dismiss her on 19th August,2016 and on 25th October,2016 the Human Resource Manager communicated the appeal's committee decision upholding the disciplinary committee's decision to summarily dismiss the Claimant.
 - vi. The Respondent averred that there was a valid and fair reason to summarily dismiss the Claimant the reason being she was not able to account for reserve cash totaling to Kshs 4,664,000= That she was issued with a show cause notice, she attended disciplinary hearing and gave her version of the story. That a decision was made to summarily dismiss her which decision she appealed against but the appeal committee upheld the decision to dismiss her.
- 4. The Respondent raised its counterclaim and averred that the Claimant on or about 9th June,2016 failed, neglected and or recklessly performed her duties as a result of which the Respondent lost the sum of Kshs 4,664,000.00 which it holds the Claimant liable.
 - 5. The Respondent prayed for judgment; -
 - a. Against the Claimant for the sum of Kshs 4,664,000.00 together with interest at court rate from 9th August,2016 until payment in full.
 - b. Costs of the suit and interests at court rates.



Evidence

6. The Claimant's case was heard on 27th September, 2023 where the Claimant herein (CW1) testified on the same date and adopted her statement as her evidence in chief. CW1 testified that she was an employee of the Respondent and left as Assistant Service Quality and Compliance Manager. That she was invited for a disciplinary hearing on 26th July,2016 and that she was suspended on 11/7/2016.
7. CW1 testified that the notice for hearing was short and she requested if she could call witnesses who were still employees of the bank but they were scared of victimization. She asked if her lawyer could attend but it was declined. That she picked someone within the bank but was not comfortable with the witness because he was not objective. CW1 testified that she felt she was given short time to answer the charges. She felt she was not fairly heard.
8. In cross examination CW1 stated that her duties concerned taking balances and ensure cashiers were working smoothly. That she was to ensure cash in the vault was balanced and that there were two custodians of the vault and she was one of them.
9. CW1 confirmed that she was invited to a disciplinary hearing and the letter set out the charges. The hearing was scheduled at Kencom House on 26/7/2016 but was postponed to 2nd August,2016 after she requested for it to be postponed as her lawyer was not available. That she had a representative who was an employee of the Respondent.
10. CW1 confirmed that on 9th June,2016 some cash went missing at the branch which was subject of her prosecution. It was her evidence that she received instructions not to access the vault prior to the surprise check and that she received the notification after she had accessed the vault. That the procedure for accessing the vault was in the operations manual. That there was cash register to be filled whenever any money was removed from the vault.
11. CW1 confirmed that one is to fill a reserve slip before removing cash from the vault and that it had to be signed by the two custodians. That they did not fill the slip for that day and did not put it in the cash register. CW1 confirmed that it was the tradition of the branch to remove money and file the process later. The money was put in a mini-safe where the manager used to sit. It was her evidence that whatever they were doing was against the operations manual.
12. CW1 confirmed that leave was filed online but, in her case, she left without filing as she had an emergency of a sick child well known to the Respondent. It was further her evidence that they never broke the combination of the vault but left it open to enable the manager access the vault which was not the procedure. The branch manager was away the previous day they closed the vault which had a balance which tallied with the online balance.
13. CW1 confirmed that she never falsified any records and she became aware of the vault actual amounts after she was charged and had left the bank. It was however her evidence that the balances must tally all the time.
14. In re-examination CW1 clarified that they used customs where she worked as she had to be flexible. That she had permission to leave by branch manager who denied it at the hearing. That the money was counted in her absence. That on 8th the money tallied as they left and the other custodian was not present at the disciplinary hearing.
15. The first Respondent witness, acting manager (RW1) at that particular time in the Ngara Branch testified and she adopted her statement as her evidence in chief. She stated that her duties were to provide leadership in the branch. That she informed the Claimant of the surprise cash count to the



vault. That the Claimant was the chief custodian and she agreed to it but later asked if it could be done the following day.

16. RW1 testified that the Claimant came to the back office while she was at the vault claiming she had lost her keys and that the Claimant never asked for permission to leave from her. There was about 10 million in the vault. The previous balance was shown as Kshs. 15 million. It was her evidence that she did know the cause of the shortage and the Claimant ought to be held accountable for the loss.
17. In cross examination RW1 confirmed that there were two people who used to access the vault at any given time. The Claimant and another called Purity had access at that particular time. She stated that the permission to leave came from her but the Claimant never asked her for permission and she was not aware the Claimant had a sick child. She further stated that the customs can be there but bank policies must be followed.
18. In reexamination RW1 clarified that the Claimant never asked for permission to leave and she was the main custodian.
19. The Second Respondent witness (RW2) testified on 31st October,2023 and stated that he was the Head of employees relations in the Respondent company and adopted his statement and Respondent's documents as his evidence in chief.
20. RW2 testified that the Claimant could not account for Kshs. 4,664,000 which was supposed to be in the vault but it was not. She was suspended on 11.7.2016 and invited for disciplinary hearing. The Claimant however asked for more time as she had a criminal case hearing. The hearing took place on 2nd August ,2016 instead of 26th July,2016.
21. RW2 testified that the Claimant attended the hearing with a representative of her choice. It was further his evidence that surprise checks were done to ensure the integrity of the cash collected and the amount in the vault. The amount which was in the vault was Kshs 10,764,09450 and the amount which could not be accounted was the Kshs 4,664,000= The Disciplinary Committee recommended dismissal in line with the policy.
22. RW2 testified that there were valid and fair reasons for the Claimant's dismissal since the Claimant could not account for the shortfall yet it was her duty.
23. In cross examination RW 2 confirmed that the Claimant was dismissed over the unaccounted cash which was lost on the day of the surprise check on 862016. That the records were banked and reconciled daily but did not have records for 6 and 7th June but had records for 8th June since the previous days were not in dispute.
24. RW2 confirmed that the details of the accusations were in the investigation report which was before the court. That they did not have the bank register in court because it was a sensitive document hence cannot be produced. He attended the disciplinary hearing and signed the minutes. That the Claimant brought her representative who was an employee of the Respondent and the Claimant was also at liberty to bring a representative who was to be an employee of the Respondent and not any other.
25. In reexamination RW2 clarified that a representative could be another employee or shop floor representative. That the employee might have picked the minutes before he signed. That fabrication entails entering a wrong record or not entering it. That vault balance was around 10 Million while the ledger balance was around 15 million hence the discrepancy. That Vault register was a sensitive document whose use was restricted. That the discrepancy was realized on 862016.



Claimants' Submissions

26. The Claimant filed written submissions dated 14th February, 2024. On the issue of whether there were sufficient grounds for the Respondent to terminate the Claimant's employment, counsel submitted that the decision to terminate the Claimant was pegged on no evidence but speculations bereft of any justification and the process of arriving at the same was flawed. That the Respondent's averments were fraught with generalities that did not in any way implicate the Claimant in the alleged loss.
27. On the issue of the process followed by the Respondent the Claimant relied on section 47(5), 43, 45 and 41 of the *Employment Act* to submit that the Respondent did not discharge its burden to prove grounds for termination. That the Respondent did not substantiate the grounds during the hearing.
28. Counsel submitted that the process leading to the Claimant's termination was flawed because she was accorded 5 days to prepare and answer to 11 charges against her and that her response to the charges was never taken into account. Counsel relied on the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and *Another* on both substantive and procedural fairness and submitted that the procedure was marred with illegalities that rendered the entire process a sham.
29. Counsel also relied on the case of *National Bank of Kenya v Samuel Nguru Mutonya (2019) eKLR* on just and equitable decision by employer to terminate employee.
30. On the issue of whether the Respondent's counterclaim was merited counsel submitted that no evidence was led to implicate the Claimant of the alleged loss and the same was raised as an afterthought to frustrate the Claimant's main claim. That the same lacked merit and should be dismissed with costs to the Claimant.

Respondent's Submissions

31. The Respondent filed its written submissions dated 24th February, 2024 and on the issue of whether the Respondent had a valid and lawful reason to terminate the Claimant's employment counsel submitted that the Claimant neglected and/or recklessly performed her duties as a result of which the Respondent lost the sum of Kshs 4,664,000= . That the termination of the Claimant's employment was premised on the investigation report dated 19th July, 2016 on the theft of the stated amounts.
32. It was the Respondent's submissions that after the investigations it became apparently clear that the Claimant was negligent in the manner that led to the loss of the funds and that an employee may be summarily dismissed for gross misconduct for doing or omitting to do any of the things set out in Section 44(4) of the *Employment Act*.
33. The Respondent submitted that it had substantial justification for the termination of the Claimant's employment. Counsel relied on the case of *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others (2019) eKLR*. and further that the Claimant occasioned the Respondent a loss which the Investigation Report revealed and had a reasonable and sufficient grounds to act against the Claimant. Counsel relied on the case of *Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR*.
34. On the issue of whether the termination of the Claimant's service was in accordance with a fair procedure, counsel submitted that a fair procedure is one that affords the employee a fair hearing before termination. Counsel relied on section 41 of the *Employment Act* and submitted that the Claimant was given a fair hearing to the extent that when she requested for the disciplinary hearing to be rescheduled from 26th July, 2016 it was allowed and the hearing rescheduled to 2nd August, 2016 and she attended with a representative. She appealed the decision but the appeals panel affirmed the decision to dismiss



her. With regard to the procedure employed, the Respondent relied on the case of *Elijah Aggrey Atsali v Nairobi City Water & Sewerage Company* (2015) eKLR.

35. On the issue of whether the Claimant is entitled to the reliefs sought counsel submitted that the Claimant was not entitled to the reliefs sought because her dismissal was lawful and within the confines of the *Employment Act* and that the Respondent incurred a loss of Kshs. 4,664,000= due to the Claimant's negligence hence her claim should be dismissed while allowing the Respondent's counter claim.
36. Counsel submitted that reinstatement would not be applicable to the Claimant since the time lapse since she was dismissed while relying on the case of *Kenya Chemical and Allied Workers Union v National Cement Company Limited* (2014) eKLR.
37. On the issue of whether the Respondent is entitled to the reliefs sought in the counter claim, counsel submitted that the Respondent was entitled to the same as it holds the Claimant liable for the loss of the Kshs 4,664,000= for recklessly and negligently performing her duties. Counsel relied on the case of *Liberato Manga Kivanga v Prime Bank Limited* (2018) eKLR while praying for judgment to be entered in favour of the Respondent as prayed in the counter claim.

Determination

38. The court has reviewed and considered the pleadings, testimonies, submissions and Authorities relied on by both parties and comes up with two main issues: -Aa. aa.
 - a. WhetherWhether the Claimant's dismissal from employment was unfair and unlawful
 - b. Whether the parties are entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful

39. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of failure to account for reserve cash of Kshs 4,664,000= by performing her duties negligently and recklessly which resulted in to loss to the Respondent. The Claimant was first suspended on 11th July, 2016 to enable the Respondent undertake its investigations. The Respondent gave the Claimant a show cause letter which was also the invitation letter to disciplinary hearing. The letter contained the charges against the Claimant.
40. It is now established that in order for a termination to pass the fairness test, there must be both substantive and procedural fairness. This was the principle established in *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR among other cases.
41. On substantive fairness the Respondent is under duty to prove and justify the reasons for the termination as per section 47(5) of the *Employment Act* while the Claimant under the same section has to prove that indeed she was unfairly terminated. Further, section 43(2) of the *Employment Act* provides that the reasons for the termination must be fair and valid and that which the employer believed to have existed at the time of termination.
42. In the instant case the main ground for the termination of the Claimant's employment was failure to account for reserve cash of Kshs 4,664,000=. This was the same charge in the suspension letter and the Notice to show causeinvitation letter to the disciplinary hearing. The charges were supported by an investigation report dated 19th July,2016 which held the Claimant liable for the loss as the main custodian of the vault. The Claimant admitted that she was a custodian of the said vault and that she removed the money without following the necessary policy manual and procedures of filing the cash



- out slip, the register or the dual authorization and that she held the money in a mini-safe against the bank's policies and claimed that it was the custom in the Ngara branch.
43. The Respondent's witnesses during hearing stated that even if that was the custom in the branch the Claimant had to follow the laid down bank policies. That the Claimant's negligence caused the Respondent the above loss. The Claimant left the vault open and left the company premises without the permission of the branch manager who denied ever giving her permission to attend to her sick child or ever knowing she had a sick child in the first place. The Claimant responded to all the allegations against her and which responses the respondent found not satisfactory.
 44. The business of banking is a highly sensitive one as it involves handling cash belonging to customers some of whom have deposited their entire lifetime savings in the bank for safe custody. Extreme prudence, caution and security must therefore be exercised at all times. From the evidence presented before the Court both by the claimant and the respondent, it is apparent that the claimant was very casual in the way she handled her work at the bank. In her own evidence she admitted that what she did was not in accordance with the cash handling procedures provided by the respondent but a "custom" at Ngara Branch. It was strange that the claimant would leave such a high security place such as the vault open and claim to have been given leave to attend to her sick child. Something her manager denied during the trial. The claimant's conduct as came out in evidence smacked of complicity and knowledge about the missing cash prior to the surprise check. From the foregoing the Court finds and holds that the Respondent had fair and valid reasons to terminate the Claimant service and that the termination was done in accordance with a fair procedure.
 45. With respect to the Respondent's counterclaim, it was in evidence that the claimant when she left the bank had Kshs. 252,000= in her handbag which she claimed she had withdrawn from her account. No evidence was produced to show such withdrawal. Although not obliged to explain, but the circumstances of this case made it reasonable to require the claimant to disclose the purpose of the withdrawal and now that she was unable to provide the evidence of the withdrawal.
 46. The investigation report revealed that cash was found in the possession of the Claimant and a teller who facilitated debiting of her account after she left the bank premises. This court also notes the Claimant's conduct of escaping through the mantrap when called upon for the surprise check. The respondent has therefore reasonably proved to the required standards that the claimant caused or was responsible for the loss of the sums claimed in the counter-claim and hereby enters judgment as prayed.
 47. In conclusion the Court finds the claimant's claim without merit and hereby dismisses the same with costs. The Court however enters judgment against the claimant in the sum of Kshs 4,664,000= in favour of the respondent.
 48. The respondent shall further have costs of the suit.
 49. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division.

