



Kabue v Co-operative Bank of Kenya Ltd (Employment and Labour Relations Cause E6593 of 2020) [2024] KEELRC 2271 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2271 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6593 OF 2020
AN MWAURE, J
SEPTEMBER 20, 2024**

BETWEEN

LYDIA WANJIRU KABUE CLAIMANT

AND

CO-OPERATIVE BANK OF KENYA LTD RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 2nd December 2020.

Claimant's Case

2. The Claimant avers that she was employed by the Respondent as a Graduate Clerk in February 2005 and has raised through the ranks, her last posting being Relationship Manager, Nairobi Region, Cooperative Financial Services and Sacco Banking.
3. The Claimant avers that she worked diligently receiving promotions and commendations and additional responsibilities due to her leadership capabilities and no complaint was lodged against her in the period of her employment.
4. The Claimant avers that she was issued a notice to show cause letter (NTSC) on allegations of irregular diversion of staff loans and conflict of interest. She responded to the same and was invited for a disciplinary hearing.
5. The Claimant avers that after the purported disciplinary hearing, she was not assigned any duties which demoralised and frustrated her. Subsequently, she was dismissed from service without any justifiable reason.
6. The Claimant avers that she was not accorded a fair hearing during the hearing as the panel was biased and shifted the burden of proof to her against the principles of natural justice. Further, she was denied a chance to appeal the disciplinary panel's decision.



7. The Claimant avers that the Respondent was discriminative against her as no other employee involved in the transaction was asked to show cause, reprimanded, suspended or dismissed from employment yet they were beneficiaries of the transaction.

Respondent's Case and Counterclaim

8. In opposition to the Statement of Claim, the Respondent filed a Statement of Response and Counterclaim dated 25th February 2021.
9. The Respondent avers that the Claimant's employment was marred with negligence and fraudulent business dealings that occasioned it substantial losses as follows: Without consulting her immediate supervisor, the Claimant paid several 3rd party cheques between 12/3/2008 to 17/3/2008 occasioning the Respondent losses of Kshs 1,480,000. Exposing the Respondent to liability and losses by failure to ensure Magereza Sacco client account operated within the sacco link procedures leading to the overdrawing of Kshs 34,291,303.26. The Claimant between 2016 and 2018 orchestrated a scheme with former and current staff members through use of fraudulent property sale agreements by inflating the purchase price and diverting the loans back to its staff members.
10. The Respondent avers that vide an internal audit in 2018, it exposed the aforementioned fraudulent transactions involving the Claimant, ex bank staff members Mumbi Runji and Esther Muchira and one of its empanelled law firms Osando, Oganji & Tiego Advocates. These transactions bore the Claimant's name and signature and on 8/11/2018 she was issued a NTSC.
11. It's the Respondent's case that in her response dated 12/11/2018, she conceded to exposing the Respondent to financial loss and was therefore invited for a disciplinary hearing on 3/12/2018. The invitation informed her of her right to invite another staff member to be present. She opted not to invite a witness.
12. The Respondent avers that during the hearing, the Claimant elected to record an undated further statement with the security department which disclosed further fraudulent transactions in conflict with her designation at the Bank.
13. It's the Respondent's case that upon review of the agreement vis a vis the Claimant's statement of account, it identified several irregularities to its detriment. This led to issuance of a further NTSC and subsequent Claimant invitation for another disciplinary hearing for 21/01/2019.
14. The Respondent avers that prior to the hearing, the Claimant resigned vide a letter dated 18/1/2019. However, it declined to accept her resignation on account of the pending disciplinary issues against her.
15. The Respondent avers that it summarily dismissed the Claimant on 7/2/2019 on account of gross misconduct as a result of compromising its security, failing to disclose numerous conflicts of interest and breach of trust by participating and diverting staff proceeds for fraudulent purposes.
16. The Respondent avers that the Claimant was informed of her right to appeal but the appeal was declined as it did not raise any new evidence.

Counter claim

17. The Respondent avers that prior to her dismissal, the Claimant had taken out various loan facilities by virtue of her employment which became due and payable at prevailing commercial interest rates. As at 27/1/2021, the outstanding liabilities totalled to Kshs 3,602,003.94 consisting of residential property loan and car loan.



18. It's the Respondent's case that despite liaising with the Claimant, she has failed to work out a suitable payment plan of the loan. This shows she has no desire to settle the loan obligations in breach of her contractual loan.
19. The Respondent avers that the Claimant's racketeering activities resulted in the Respondent granting loans not fully secured as the value of the loans were twice that of security granted. This exposed the Respondent to damages amounting to Kshs 10,617,000 due to the Claimant's fraudulent inflation of the purchase price in the Agreements for sale.

Defence to Counter claim

20. The Claimant avers that she is amenable to settling the loan obligation but her financial status has drastically changed hence she is not in a position to settle within the agreed terms prior to her termination.
21. The Claimant avers that the loans of Kshs 10,617,000 were advanced to the Respondent's employees who are still in employment hence the same cannot be deemed unsecured.
22. The Claimant avers that she secured a loan to purchase a motor vehicle which was used as security, as a result of the default, the Respondent repossessed the vehicle and sold it by public auction. Therefore, she duly satisfied the loan obligation.
23. It is the Claimant's case that the 2nd loan facility was for the purchase of property known as LR No. Mavoko town Block 3/47939 & 47940. The Respondent has since advertised the sale of the property which had a charge as security. Therefore, the Respondent cannot pursue her for payment of the loan advanced to her after realising the security.
24. The parties filed their pleadings but none of them filed their submissions.

Analysis and Determination

25. Having considered the pleadings, affidavits and submissions, the issues for the Court's determination are:
 - a. Whether the Claimant's employment was unlawfully and unfairly terminated.
 - b. Whether the Claimant is entitled to the reliefs sought
 - c. Whether the counterclaim is merited.

Whether the Claimant's employment was unlawfully and unfairly terminated

26. Section 45 (2) of the *Employment Act*, Cap 226, Laws of Kenya states:

“ 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 employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”



27. For termination of employment to pass the fairness test, an employer must prove it is based on a valid and fair reason and in accordance with fair procedure.
28. It's the Respondent's case that it summarily dismissed the Claimant's on 7/2/2019 on account of gross misconduct as a result of compromising its security, failing to disclose numerous conflicts of interest and breach of trust by participating and diverting staff proceeds for fraudulent purposes.
29. From the evidence adduced in court, the Respondent issued the Claimant with a NTSC dated 8/11/2018 which clearly stated the allegations against her based on an internal audit conducted. The NTSC was inclusive of the documents the Respondent relied upon to justify the allegations.
30. As per the notice to show cause letter dated 8th November 2018 the respondent informed the claimant that she entered into a sale agreement to sell residential plots No. Mavoko Town Bock 3/52536 to a staff by the name Charles Onyango Ochiti. The purchase price was Kshs 1.5 million which was disbursed through a law firm of Onsanda Ogonji & Tiego advocates. The lawyer transferred kshs 535,000/- to her account number. The respondent states the sale was financed at kshs 1.5 million by the bank and a difference of kshs 935,000 was utilised back to the claimant.
31. She was also charged of conflict of interest in that she sold some plots to staff members and the same were financed by the bank. She participated in activities that compromised the activities of the employer in her personal business.
32. The response of notice of show cause the claimant by her letter dated 12th November 2018 claimed she was acting on behalf of a chama and that she opted out of the said chama. She says that she then exited from the chama and did not sell the plots to the staff any more. She says the signatures in the conveyancing documents are not her signatures.

The respondent invited the claimant to a disciplinary meeting by their letter dated 27th November 2018 and she was informed to invite a witness of her choice. The disciplinary meeting took place on 21st January 2019. She confirmed she was comfortable to appear for the disciplinary meeting without a representation.

In the meeting she reiterated that the money was of a chama Muiya group which was not registered and so she used her name. She admitted that her actions could have caused a conflict of interest and she apologised. She signed the minutes of the disciplinary proceedings.

At the same time the claimant tendered a resignation dated 15th January 2019 but the same was rejected on the basis of the ongoing disciplinary process.

33. Against this background, it is evident that the Respondent has substantive justification to dismiss the Claimant as its internal audit revealed that she was involved in fraudulent transactions and conflict of interest by: -Without consulting her immediate supervisor, the Claimant paid several 3rd party cheques between 12/3/2008 to 17/3/2008 occasioning the Respondent losses of Kshs 1,480,000. Exposing the Respondent to liability and losses by failure to ensure Magereza Sacco client account operated within the sacco link procedures leading to the overdrawing of Kshs 34,291,303.26. The Claimant between 2016 and 2018 orchestrated a scheme with former and current staff members through use of fraudulent property sale agreements by inflating the purchase price and diverting the loans back to its staff members.
34. The Claimant was unable to disprove these allegations during the disciplinary hearing or adduce any evidence to the contrary. She claimed that the conveyancing agreements did not have her signature and yet she did not prove she reported forgery of her signatures. It is criminal offence and if her signature



was forged she ought to have taken action hence the court finds the respondent had a valid reason to terminate the claimant summarily.

35. The second limb to affirm whether the summary dismissal was fair, the same must have been done in accordance to the due procedure set out under Section 41 of the *Employment Act* which states: -

“(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.”

36. The Claimant was invited for the disciplinary hearing vide letters dated 27/11/2018 and 15/1/2019 which clearly stated the charges against her were as per the NTSC which also had the documents and evidence relied upon. She was informed of her right to tender documentary evidence and be accompanied by another member of staff.

37. From the minutes of these disciplinary hearings duly signed by the Claimant to confirm attendance, the Claimant chose to be unaccompanied and was clearly given an opportunity to defend herself and subsequently file an appeal when she was aggrieved by the disciplinary panel’s decision. Therefore, the summary dismissal was in accordance with fair procedure.

38. The court therefore is satisfied that the respondent passed the twin tests set out in the case of *Walter Ogal Anuro vs Teachers Service Commission Cause No 955 of 2011* which provides that:

“for termination to pass the fairness test it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.”

39. The respondent succeeded in establishing he had a valid reason to summarily dismiss the claimant from her employment and had complied with the mandatory process to hold disciplinary process. The claim for unlawful and wrongful termination is therefore not proved and the same is dismissed accordingly.

Counterclaim

40.

(a) The respondent is praying for kshs 3,602,003/94 as outstanding loan due to the respondent as at 27th January 2021 plus interest at 14% until payment in full.

(b) Also they are praying for kshs 10,617,000 as exemplary damages for breach of respondents bank staff manual and business code of conduct and penalties of unjust enrichment.

(c) The court has this to state on the loan advanced to the claimant which she does not dispute that: parties agree on the dues after disposing of the securities to wit the motor vehicles and the pieces of lands used as security by the bank being LR No Mavoko Town Block 3/7939



& 47940. The parties will then come up with a settlement plan of any outstanding amounts within 90 days from today's date. Mention on 18/12/2024 to give progress report

- (d) As for the exemplary damages of kshs 10,617,000/- the respondent has not proved how the claimant is liable to the same and is difficult to make a generalised award of such a huge amount without any support. That limb of counterclaim is therefore denied.

41. Court orders that each party to meet their respective costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF SEPTEMBER, 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

