



**Oluoch v Standard Chartered Bank Limited (Cause E824 of 2023)
[2024] KEELRC 2246 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2246 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E824 OF 2023
JK GAKERI, J
SEPTEMBER 19, 2024**

BETWEEN

HELLEN AWUOR OLUOCH CLAIMANT

AND

STANDARD CHARTERED BANK LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit vide a Memorandum of Claim dated 2nd October, 2023 alleging unfair and unlawful termination of employment by the Respondent.
2. The Claimant avers that she was engaged by the Respondent as a Relationship Manager vide letter dated 25th February, 2016 on permanent and pensionable terms until retirement at Kshs.200,000/= per month and as at the date of dismissal it had risen to Kshs.260,530.75.
3. That she was deployed at the Respondent's Nakuru Branch and served diligently and was awarded a certificate of appreciation, award of excellence and had no cases of misconduct.
4. That the bad blood between her and the Respondent involved the resignation of Mr. Stephen Tajeu Moloji, a colleague.
5. That the Standard procedure of resignation was through people soft digital system where the line manager would call the employee to confirm the resignation but in this case it was alleged that Mr. Moloji tendered a physical letter of resignation to the line manager on 20th August, 2022 and was accepted by the Respondent.
6. The Claimant avers that Mr. Moloji could not and did not submit the resignation letter to her as she was not the line manager and they were in different Departments Sales and Operations and the Claimant was thus unaware of the resignation.



7. That although Mr. Moloi disowned the resignation letter, he was directed to leave the bank's employment on 22nd August, 2022.
8. It is the Claimant's case that an Employee Relationship Internal Fact Finding team (ER team) comprising Lorraine Adoli Oyombe and Grace Kanyiri was set up to look into the events leading to Mr. Moloi's resignation.
9. That by email dated 25th August, 2022, Ms Lorraine Oyombe requested the Claimant to write a statement on the discussions he had with Mr. Moloi at the back office on 20th August, 2022 and details of the transaction she was assisting Mr. Moloi to scan.
10. That the ER team was aware that Mr. Moloi had written a resignation letter on 20th August, 2022 and sought her confirmation and the Claimant responded on the same day explaining what he wanted Mr. Moloi to check and had to scan for him as he had no NCAP access.
11. That via email dated 26th August, 2022, Ms. Lorraine Oyombe asked for the same information requested earlier and the Claimant obliged and responded via email on even date but Ms. Oyombe sent another email of even date for further clarification and sent a link for a virtual call which the Claimant attended despite other commitments. That the video call was on the same issue and received the same response but was later accused of being unco-operative with the ER-team and found liable by the Disciplinary Team.
12. By email dated 1st September, 2022, the Claimant complained about the constant harassment by the ER team on the same issues but it stopped when Mr. Moloi sued in Nakuru ELRC Cause No. 5 of 2023 where he attached correspondence between the Claimant and the ER team to his pleadings and by email dated 30th January, 2023, Ms. Oyombe alleged that the Claimant had printed the attachments filed in Court and sought clarification on when the sharing took place, to whom and reasons why, an allegation the Claimant denied vide email dated 1st February, 2023 and no evidence was adduced to show that the Claimant shared the information with Mr. Moloi.
13. That the BOSM and M/s Oyombe had access to the correspondences.
14. The Claimant avers that the Respondent turned against her owing to her refusal to play ball against the former colleague.
15. That by letter dated 3rd February, 2022, the Respondent notified the Claimant of a disciplinary hearing scheduled for 14th February, 2022 under a team comprising Irene Kingori and Mr. Anthony Kilonzo to consider charges against the Claimant on;
 - i. Deliberate misrepresentation of facts to fact finders.
 - ii. Being unco-operative towards the investigation by failing to attend scheduled investigation meetings.
 - iii. Shared private internal confidential email correspondence, exchanged with the internal fact finder.
16. The Claimant further avers that hearing took place as scheduled but the panel was improperly constituted by 2 in lieu of 3 persons and its findings were thus null and void.
17. That the outcome of the hearing was communicated 17 days later contrary to the Respondent's Disciplinary Standard of 10 days.



18. That by email dated 25th March, 2023, Mr. Kilonzo queried an email the Claimant had written to Moloji on 25th August, 2022, after the hearing.
19. The Claimant avers that her summary dismissal was communicated vide letter dated 31st March, 2022 and informed of the right to appeal within 10 days yet the Disciplinary Standard had no specific duration and filed an appeal on 9th April, 2022 and before the Claimant could amend the grounds of appeal, the Head Employee Relations South Africa dismissed the appeal on the premise of defective grounds and a decision communicated vide email dated 28th April, 2022.
20. The Claimant characterises the summary dismissal as malicious, irregular and unlawful.
21. Finally, the Claimant avers that she had taken a loan facility worth Kshs.4,500,000/= in 2017 whose interest has been escalated to 14.5% from the staff rate of 6.5%.
22. The Claimant prays for;
 - a. A declaration that the disciplinary proceedings and dismissal was a sham, unfair, unprocedural, wrongful, unlawful and unjust.
 - b. Unconditional reinstatement or re-engagement at the same wage.
 - c. Payment of all outstanding salary factoring in annual increment due from 1st April, 2023 including bonus from the date of reinstatement.
 - d. Damages for loss of credit and integrity.
 - e. Interest on (iii) and (iv) above at Court rates.In the alternative;
 - f. 12 months' compensation after annual increment Kshs.4,492,800.00.
 - g. Bonus pay out for 2022 due on 31st March, 2023.
 - h. General damages.
 - i. Interest on (f) – (h) at 14% compound interest from time it accrued until payment.
 - j. Costs of the suit.

Respondent's case

23. The Respondent admits that the Claimant was its employee save for the allegation that she would be retained till retirement.
24. That annual salary reviews applied to all staff subject to productivity and at the sole discretion of the employer.
25. That the Claimant released confidential information to Mr. Moloji, a former employee of the Respondent.
26. That the Respondent received a written resignation by Mr. Moloji and accepted it.
27. It is the Respondent's case that the formation of the Fact Finding team was necessary to ascertain the attempts by Mr. Moloji to disown the resignation and questioning the Claimant was in order.



28. That the Claimant could not point out from the CCTV footage when the BOSM shouted at Mr. Moloji, explain why Mr. Moloji was showing other staff client instructions and why the instructions were handed over to the BOSM for stamping.
29. It denies having acted maliciously, victimized, harassed or intimidated the Claimant.
30. That Mr. Moloji who had already left the bank was using email correspondence between the Claimant and M/s Oyombe in his case and evidence was tendered to show that the Claimant was the one who shared the emails with Mr. Moloji.
31. The Respondent further avers that after the hearing, it learnt that the Claimant had sent emails to Mr. Moloji's external email with attachments but had attempted to recall it and Mrs Moloji had lodged a complaint that her husband and the Claimant had a close personal relationship.
32. That termination of the Claimant's employment was fair, procedural as lawful as she was heard and appealed the decision which was affirmed.
33. The Respondent avers that the Claimant filed a Reply to the Memorandum of Response dated 22nd March, 24 raising no new issues save that since the Respondent was a large organization, she could be redeployed.

Claimant's evidence

34. On cross-examination, the Claimant confirmed that she was dismissed from employment vide letter dated 31st March, 2023 for reasons therein stated namely; sharing of information with an employee of the Respondent, a former colleague in breach of confidentiality.
35. The Claimant admitted having known Mr. Moloji as a colleague.
36. That the email dated 1st September, 2022 from the Claimant to Oyombe was not shared with any other person.
37. That the emails came from the machine and admitted having printed it when the BOSM, Mr. Stephen Otieno Okech asked for details of the client's instructions.
38. That Mr. Moloji never asked the Claimant to print the emails and the BOSM never denied having asked for the printed instructions.
39. That the email dated 1st February, 2023 to Ms. Oyombe was clear on the emails shared.
40. That Mr. Moloji and the Claimant were at work on 20th August, 2022.
41. On the CCTV footage, the Claimant explained the offices of the persons seen on the footage and confirmed that they were discussing client's instruction received on 18th August, 2022 and gave it to Mr. Moloji to confirm the same digitally as he could not use the Claimant's computer but remained seated one hour later and left 3 minutes later.
42. The witness denies that the Mr. Moloji wrote his resignation letter when seated or what he was sharing with the BOSM or their discussion.
43. Carl is also seen on the footage in his office.
44. That the Claimant did not learn from the bank that Mr. Moloji had resigned.
45. The Claimant admitted that she received the email dated 14th February, 2023 inviting her for a hearing on Tuesday 14th February, 2023 and could attend with a colleague and attended with a Mr. Ojiambo.



46. That on 20th August, 2022, she did not have the physical instructions of the client.
47. The Claimant admitted that bonus was a discretionary variable and not an automatic payment and did receive confirmation of award.
48. That the letter dated 17th February, 2022 from the Head of Compensation & Reward Governance suspended the Claimant's 2022 year end proposals.
49. That since Mr. Moloji was not reporting to the Claimant, he could not submit his resignation to her.
50. It is the Claimant's testimony that the allegation that she printed and shared emails yet Mr. Moloji was not an employee of the bank then was untrue and the issue only came up after the hearing and no questions were asked about it.
51. CWII, Mr. Stephen Taju Moloji confirmed that he worked with the Claimant at the Nakuru Branch and left the bank on 22nd August, 2022 allegedly by way of resignation.
52. That he was requested not to disclose the person who availed the emails he is using in his case against the Respondent as the person was still an employee of the bank but not in Court, Mr. Stephen Okech.
53. That he was given print outs of the email.
54. The Claimant admitted that he was at work on 20th August, 2022 and identified himself on the CCTV footage as well as the Claimant.
55. That they had a conversation with the Claimant on his client, Mr. Kiyapi, who was at his desk on Thursday and asked for the Claimant who had assisted him and the Claimant brought the client's instruction to him and the GOP required a reference number where she wrote the number for the witness and scanned the document together with the reference number.
56. That he went to Carl's office who was in a meeting and then to the BOSM who stamped the same but did not sign.
57. That at minute 55, the witness was beside Mr. Stephen Okech's desk with a piece of paper and had a good working relationship with him.
58. That he had not seen any resignation by word of mouth or in writing.
59. On re-examination, the witness testified that he printed the scanned instructions.

Respondent's evidence

60. RWI, Mr. Stephen Okech confirmed that he saw Mr. Moloji's resignation letter but did not file a copy.
61. That from the CCTV footage, he could discern the letter he was given by Mr. Moloji and received it.
62. That Mr. Moloji was let off a day later and disputed the resignation and HR had to do a fact finding and they questioned many employees including the Claimant and the witness and Carl.
63. That on 20th August, 2023, the witness neither asked about the client nor print out or reference number and did not see the printed emails and the printer had no password and staff are free to print and pick the documents quickly on account of confidentiality.
64. RWI confirmed that he was not sure that the Claimant handed over the document to Mr. Moloji and could not confirm whether any other employee of the Respondent was investigated on the emails given to Mr. Moloji.



65. On re-examination, RWI testified that he received a resignation letter and stamped it and was not part of the investigation team.
66. That since Mr. Moloji disputed the resignation, it was logical to investigate the issue.
67. That he did not share any email or document with Mr. Moloji and it was not possible to tell when the Claimant printed the emails.
68. RWII, Mr. Anthony Kilonzo confirmed that he was the Employee Relations Representative (ER) and mentioned the membership of the Disciplinary Review Team (DR-Team) as per the Respondent's Disciplinary Manual and Irene Kingori was the People Leader.
69. That there was no head for a functional representatives as it was not mandatory and hearing took place on 14th February, 2023 and the charges were framed on the basis of the Investigation Report.
70. That the Claimant was notified of the hearing vide email dated 3rd February, 2023 and further allegations arose thereafter and it was possible to conduct further investigations.
71. RWII testified that some of the allegations had occurred before the investigation but had not been escalated to the DR-Team but they formed part of reasons for dismissal of the Claimant though not the sole reason.
72. That the Claimant refused to attend a meeting.
73. On re-examination, the witness testified that resignation on People's Soft was not mandatory, a text, call or letter were sufficient and an employer cannot decline a resignation.
74. That the Claimant admitted printing an email which was later used by Mr. Moloji in his case against the Respondent.
75. That the DR-Team is adhoc constituted on a case by case basis.
76. That the issue of sharing of emails arose after the DT Team hearing and it was communicated vide email dated 20th March, 2023 and there appeared to be an undisclosed relationship between the Claimant and Mr. Moloji.

Claimant's submissions

77. Counsel submitted that the Claimant's dismissal from employment was unfair and unlawful citing the sentiments of the Court in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR on the essentials on a fair termination of employment.
78. According to counsel, since the CCTV footage had no audio, it was difficult for the Respondent to conclude that the BOSM did not utter the words alleged and the Respondent failed to prove that CWII was writing a resignation letter and the Claimant's unco-operativeness was not demonstrated.
79. Counsel urges that no evidence was adduced to show that the Claimant shared confidential information with CWII as no witness testified on it or avail an email on the nature of their communication and CWII confirmed that he did not receive the email or print outs from the Claimant.
80. That the Respondent drew an inference on the assumption that the emails were printed from the Claimant's computer.
81. That the charges were trumped-up and were not serious as they were based on rumours and innuendos at the behest of the BOSM and the Branch Manager.



82. That the reasons for dismissal do not meet the threshold of Section 43 and 44 of the *Employment Act*.
83. On procedure, counsel submits that the DT Team comprised two persons only, the People's Leader and ER Representative and no functional representative and was thus improperly constituted.
84. Reliance was made on the sentiments of the Court in *Michael Sistu Mwaura Kamau V Ethics & Anti-Corruption Commission & 4 others* (2017) eKLR on the effect of an improperly constituted body to urge that the DR team was incapable of making a legally binding decision.
85. Counsel urges that under the Respondent's manual, the DR Team is constituted after the ER Team has completed investigations and or fact finding and the employees duty is to give an explanation on the issues raised.
86. That the Respondent's email dated 20th March, 2023 enquiring about the email to Mr. Moloi dated 25th August, 2022 was sent almost 6 months earlier.
87. That the Claimant responded and explained that she could share emails with clients or in the interest of the bank and the documents filed in Court by Mr. Moloi were not shared but printed.
88. However, the Claimant did not respond to the question on the alleged relationship with Mr. Moloi.
89. Counsel urges that the Respondent's email dated 20th March, 2023 was contrary to the Manual as the DR team was not permitted to make inquiries or investigate after the hearing and was thus unfair to the Claimant and the final decision was a nullity as post hearing investigation was a fresh allegation and charge and required a fresh hearing for the Claimant to respond.
90. Reliance was made in *Mary Chemweno Kiptui V Kenya Pipeline Company Ltd* (2014) eKLR on the essence of Section 41 of the *Employment Act*.
91. Finally, counsel faults the long delay in communication of the outcome of the hearing, 45 days after the hearing.
92. On reliefs, counsel urges that the Claimant was entitled to reinstatement as held in *Aggrey Lukorito Wasike V Kenya Power & Lighting Co. Ltd* (2016) eKLR.
93. That the Respondent is a multinational entity with over 1000 employees and the Claimant was not to blame and was dismissed at the behest of his Senior Colleagues and reinstatement was the most opportune remedy.

Respondent's submissions

94. By 9th September, 2024 when the Court retired to prepare this judgement, the Respondent had not filed submissions.

Analysis and determination

95. It is not in dispute that the Respondent employed the Claimant as a Relationship Manager effective 1st April, 2016 at Kshs.2,400,000.00 per annum and served diligently as evidenced by a Recognition Certificate and Certificate of Appreciation from the Respondent for outstanding performance in 2021.
96. It is equally common ground that the Claimant's woes started after the alleged resignation by Mr. Moloi, a colleague in Operations (back office) who had an office near the Claimant's and who spent consideration length of time at the Claimant's desk on 20th August, 2022 as evidenced by the CCTV



footage availed in Court. While the Respondent alleges that Mr. Moloji resigned by a written notice drafted on 20th August, 2022, the Claimant maintains that she was unaware of the resignation, after all she was not Mr. Moloji's Line Manager and he was not obligated to bring his resignation to the Claimant's attention.

97. The Claimant denied having seen the alleged resignation letter on 20th August, 2022.
98. Strangely, although the BOSM, Mr. Stephen Okech confirmed on cross-examination that Mr. Moloji handed the letter to him and he stamped it and it was scanned to the Branch Manager, the Respondent did not avail a copy to buttress its allegation.
99. The foregoing allegation is exacerbated by the fact that the CCTV footage availed by the Respondent as evidence of what transpired on 20th August, 2022 has no audio and attempts to explain what transpired appear theoretical as positions, movements or papers are explainable in multifarious ways.
100. The Court found the footage unhelpful in the Respondent's attempt to explain what transpired on that day.
101. Although the question as to whether Mr. Moloji resigned from employment or not is not before this Court for determination, it is crucial because it heralded the concatenation of events which culminated in the Claimant's dismissal from employment 7 months later.
102. This is because after Mr. Moloji contested the alleged resignation on 20th August, 2022, the Respondent constituted an Employee Relationship Internal Fact Finding team (ER Team) comprising Ms Oyombe and Grace Kanyiri to unearth the truth.
103. RWI confirmed that the ER team questioned all staff including himself. He also justified the investigation on the ground that Mr. Moloji had disowned his alleged resignation.
104. Contrary to the Claimant's averments, the Respondent cannot be faulted for having constituted the ER team to investigate the alleged resignation.
105. The Respondent was objectively searching for the truth.
106. It is common ground that the ER team approached the Claimant and sought her response on the issue of Moloji's resignation.
107. It is unclear as to when the first or initial communication was made and what it required the Claimant to do as the Respondent did not file the Claimant's statement on the issue.
108. From the emails on record, it is clear that M/s Oyombe contacted the Claimant on Tuesday 23rd August, 2022 and had a discussion about the events on 20th August, 2022.
109. The email requested for a written statement on the discussions and transaction they were handling with Mr. Moloji and the Claimant did as requested.
110. By email dated 26th August, 2022, M/s Oyombe invited the Claimant for an on-line meeting on 1st September, 2022 for further clarification. This is the meeting which precipitated the Claimant's email on 1st September, 2022 at 11.53 am.
111. Vide email dated 1st September, 2022 to M/s Oyombe, the Claimant makes reference to a call about the discussion the Claimant had with Mr. Moloji on 20th August, 2022. She also makes reference to a meeting she had attended despite her busy schedule and had responded in writing as requested.



112. The pith and substance of the email is the Claimant's displeasure with the incessant enquiries by M/s Oyombe on the issue of her dealings with Mr. Moloji on 26th August, 2022.
113. The Claimant, however, explains what the discussion with Mr. Moloji was about (Mr. Kiyapi) who had sought a standing order which forced him to go to the bank twice and had formally complained about the treatment he had received from bank staff which was attached to the email.
114. The email is self-explanatory.
115. The last paragraph sums it all.
116. Clearly, the email does not indicate that the Claimant would not attend the meeting notwithstanding the fact that she felt that she had given all the details the team wanted from her and had done so willingly.
117. Although the Respondent did not file a copy of the ER teams Investigation or Fact Finding Report, it is clear as admitted by the Respondent's witnesses and notification of Disciplinary hearing dated 3rd February, 2023 that the charges against the Claimant were based on the findings of the ER-team.
118. However, the Respondent did not issue a formal notice to show cause setting out the specific charges the Claimant was supposed to respond to.
119. This is essential as it informs the employee the specific case he/she was facing. The Claimant was unaware of the charges until she was invited for the hearing.
120. The forgoing scenario would perhaps explain why the DR-team identified and enquired about an issue which according to the team arose after the meeting, yet the email in question was dated 25th August, 2022 when the ER-team was still on a fact-finding mission.
121. It is not in contest that the Claimant's employment was summarily terminated vide letter dated 31st March, 2023 and the appeal was unsuccessful.
122. The Claimant contests the separation variously.
123. The issues for determination are;
 - i. Whether the summary dismissal of the Claimant was unfair and unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
124. Concerning the summary dismissal, it is common ground that for a separation to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with a fair procedure.
125. The provisions of Section 41, 43, 44, 45 and 47(5) of the Employment Act are explicit on these requirements.
126. Put in the alternative, the employer is required to demonstrate that it had a substantive justification for the termination and conducted it in accordance with a fair procedure as held in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR* as well as *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*.

Reason for termination

127. The Notice of Disciplinary Hearing dated 3rd February, 2023 accused the Claimant of;



- i. Misrepresentation of facts and making false statements to the ER-team to mislead them on the incident of 20th August, 2022.
 - ii. Being unco-operative on 1st September, 2022 for failing to attend a scheduled investigation meeting but attended after the people's leader interviewed.
 - iii. May have shared private internal and confidential email correspondence exchanged with internal fact finders between 25th August, 2022 and 1st September, 2022 with an external party without bank authority and may have breached the Code of Conduct and the Information and Cyber Security Policy.
128. The 1st and 2nd charge relate to the ER-team while the last was a "may" i.e not confirmed or supported by any evidence.
 129. Puzzlingly, the summary dismissal letter is similar to the notification of the disciplinary hearing as the Claimant was convicted on all the charges.
 130. During the disciplinary hearing, the Claimant recapitulated the events of 20th August, 2022 to Mr. Anthony Kilonzo and Irene Kingori who constituted the DR-team. The Claimant explained that on the material day, she sought to confirm from Mr. Moloi whether the instructions of Dr. Kiyapi had been acted on to conclusion, being a sensitive client, having been mishandled by other bank staff.
 131. That she scanned the EOPs and gave it to Mr. Moloi to Index in EOPs and conclude the process and she had no EOPs. Only Mr. Moloi could confirm the same and did not have the physical instruction on 20th August, 2022 but Mr. Moloi had to write the information down on a piece of paper, went to the BOSM to confirm on the EOPs and came back to the Claimant's desk for her to check on the EBBS.
 132. The Claimant's representative wondered why the meeting was discussing another employee's resignation yet he gave the same to the bank not the Claimant but Mr. Kilonzo explained that it was because the Claimant's story was different from what they had presumably received from the ER-team report.
 133. The Claimant also wondered why the Respondent wanted her to confirm that the Claimant resigned yet two unidentified witnesses had confirmed the resignation.
 134. In the Court's view, it is discernible that the DR-team wanted the Claimant to confirm the findings of the ER team and nothing else made sense to them. It is clear that their minds were already made up.
 135. On being unco-operative, the Claimant explained the context of the email dated 1st September, 2022 to M/s Oyombe, that she was working on a major event alone and the meetings were taking a lot of her time having responded to the same in writing and having had a discussion with M/s Oyombe and a video call with the team.
 136. It was not unreasonable for the Claimant to wonder why after three encounters with her responses, the DR-team still wanted further clarification.
 137. In the Court's view, the email dated 1st September, 2022 detail the circumstances as the Claimant perceived them and was not rude as she had targets to meet, a fact the ER-team was aware of.
 138. At any rate, the Claimant attended the meeting and cannot be said to have been unco-operative.
 139. On sharing of confidential data, the Claimant admitted having printed the client's instruction for the BOSM and did not share any document with Mr. Moloi.



140. That the Claimant printed her conversation with Oyombe to share with the BOSM as they had the reference number.
141. The Claimant admitted that she printed and shared the communication between her and M/s Oyombe with the BOSM and did not share the same with anyone else.
142. The DR-team found the Claimant's account of events inconsistent with the CCTV footage and that Mr. Moloji was not holding a document containing the clients details as the transaction was concluded on 18th August, 2022 yet the Claimant explained that on 20th August, 2022, her aim was merely to confirm that the instructions had been effected having handled the client (DR. Kiyapi) before.
143. The DR-teams findings on the resignation of Mr. Moloji ought not to have been a basis on which the parties separated.
144. On the alleged shouting by the BOSM, and contrary to the DR-team finding that CCTV footage did not reveal it, it is common ground that the CCTV footage had no audio and more significantly the Claimant's email merely states that "... I heard the BOSM who is always loud telling staff to resign..." and she saw the BOSM "walk to the cubicle shouting".
145. The BOSM did not deny that he shouted as alleged and the CCTV was of no assistance in ascertaining what the actors may have discussed or stated on that day.
146. Relatedly, neither RWI nor RWII denied that the Claimant could hear the BOSM speaking while in her office.
147. Was the Claimant uncooperative?
148. Having attended several sessions on the issue and responded in writing as requested by M/s Oyombe's team, there is no evidence to prove that the Claimant was unco-operative.
149. In fact, she attended all the meetings called by the ER-team and appeared co-operative.
150. Even if she had missed the meeting slated for 1st September, 2022, that would not have been sufficient to characterise her behaviour as unco-operative in light of her overall conduct.
151. Reference to being busy is in the Court's view not callous nor heartless. It is dependent on the circumstances of each case.
152. The email was a forthright response to the invitation by M/s Oyombe.
153. Finally, on sharing of confidential information, the DR-team found that having admitted that she printed email communication between herself and M/s Oyombe, for the BOSM on request, the Claimant shared the same with external parties and in particular Mr. Moloji.
154. That the Claimant had shown willingness to breach the bank's confidentiality policy on two occasions, namely; 21st March, 2023 and 25th August, 2022.
155. In the latter, an email to Mr. Moloji after he had left the bank, the Claimant did not disclose the contents of the email or why she sent it from her bank email address.
156. In the former, which was a response to the DR-teams email after the hearing, the Claimant threatened to share confidential email correspondence with Mr. Moloji's wife.



157. Section 43(2) of the *Employment Act*, 2007 provides that;

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

158. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR, B.O. Manani J. stated as follows;

“In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists”.

159. In addition, in *Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal held thus;

“The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant’s services.

That is a partly subjective test.”

160. The foregoing sentiments are consistent with the so-called band or range of reasonable responses test as explained by Lord Denning MR in *British Leyland (UK) Ltd V Swift* (1981) I.R.L.R 91 on a reasonable employer.

161. Did the Respondent have a reasonable basis to genuinely believe that it had a reason or reasons to terminate the Claimant’s employment?

162. Regrettably, the Court is not so persuaded on account that;

i. Although the Respondent’s ER-team comprising M/s Oyombe and Grace Kanyiri investigated the contested resignation of Mr. Moloji, no report was provided on what the team found. Having received statements from several members of staff and discussed the issues with the Claimant on at least 3 occasions before and after she gave a written explanation.

As discernible from the evidence, the Claimant’s account on what transpired on the material day (20th August, 2022) was consistent.

ii. It is decipherable that the DR-Team found the Claimant untruthful because she did not confirm the statements of two unnamed witnesses that the Mr. Moloji resigned on 20th August, 2022, vide a written notice, which puzzlingly, the Respondent could not avail.

As adverted to elsewhere in this judgment, the resignation of Mr. Moloji heralded the Claimant’s woes and the fact that she could not confirm that he did so did not ameliorate the situation.

iii. The charge of being unco-operative may have been included because despite discussing the issue 2 times with M/s Oyombe and availing a written statement, the Claimant had stubbornly “refused” to tell the ER-team what it was looking for, that Mr. Moloji resigned.

The court finds the charge diversionary.



- iv. As regards sharing of confidential email correspondence, the charge as mentioned elsewhere was “may have shared” as opposed to the Claimant shared.

It is clear that no allegation on sharing of confidential information had been made prior to the notification of the hearing slated for 14th February, 2023.

The charge made reference to email communication between 25th August, 2022 and 1st September, 2022 but none of the emails or contents were disclosed.

The charge lacks sufficient basis as it has no supportive data or particulars.

163. Was the Respondent on a fishing expedition? Perhaps.
164. This is aptly explained by the DR-team’s letter to the Claimant dated 20th March, 2023 informing the Claimant that investigation was still on-going (after the hearing) and they had discovered that the Claimant sent an email to Mr. Moloji dated 25th August, 2022 and the DR-team wanted to know its contents and the Claimant responded vide email dated 21st March, 2022, a response the DR-team deemed unsatisfactory.
165. During the hearing, Mr. Anthony Kilonzo, in response to Mr. Edwin Ojiambo’s query was emphatic that the DR-team was not an investigation team. He retorted at page 60 of the Respondent’s trial bundle
- “You know Edwin, on our part we are not investigating. We are not doing investigations . . .”
166. Paradoxically, the DR-team became an investigator after the hearing and relied on the investigation to convict the Claimant on the ground of having shared confidential emails with Mr. Moloji which he used in support of his case against the Respondent filed at the Employment and Labour Relations Court, Nakuru.
167. The DR-team inferred that since the Claimant admitted that she printed the emails for the BOSM, she did not print them for him but for purposes of availing them to Mr. Moloji as evidence.
168. However, the Respondent made no attempt to prove how, where and when the sharing of the emails took place including whether the Claimant retained copies of the emails.
169. Noteworthy, the Claimant denied having shared any confidential information with Mr. Moloji who in his evidence in Court disclosed that he obtained the copies from a serving employee of the Bank but whom he could not name for fear of victimization.
170. Instructively, the Respondent made no effort to rule out other employees who were part of the email communication to zero on the Claimant, which would have been easier.
171. At least two other employees had access to the emails and may have printed and availed them to Mr. Moloji.

Procedure

172. That the procedural requirements prescribed in Section 41 of the *Employment Act*, 2007 are mandatory in termination of employment, requires no belabouring. See *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*.
173. The specific precepts of procedural fairness have been articulated in several decisions such as *Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR*, and are; explanation of the grounds in a language understood by the employee, entitlement of the employee to a representative of his choice



- during the explanation and calling and cross-examining witnesses and hearing and considering the representation made by the employee or his representative.
174. It is common ground that the Respondent did not issue a notice to show cause nor require the Claimant to respond to any particular allegations.
 175. It is equally not in dispute that the Respondent investigated the alleged resignation of Mr. Moloi and discussed the issue with the Claimant severally even after she responded in writing.
 176. The Claimant encountered charges in the notification for the disciplinary hearing dated 3rd February, 2023 and was accorded sufficient time to prepare for the hearing and was notified of the right to be accompanied by a colleague and attended with one Edwin Ojiambo.
 177. It is not in contention that although the Respondent's ER-team investigated Mr. Moloi's resignation and the resultant report formed the basis of the charges against the Claimant, the Respondent did avail a copy to the Claimant or the Court and as adverted to elsewhere in this judgment, the Claimant was faced with a fiat accompli as no new evidence was availed by the panel which appeared to have the investigation report and which the Claimant had no opportunity to rebut.
 178. During the hearing, Mr. Anthony's retort that they had a different story from what the Claimant was telling was itself revealing.
 179. Availment of relevant information, materials or evidence in possession of an employer and which it proposes to use in prosecuting an employee is a constitutional imperative as it implicates the right to fair hearing.
 180. See *Mereru V Taita Chemicals Magadi Ltd (2023) eKLR*, *Postal Corporation of Kenya V Andrew K. Tanui (Supra)* where the Respondent/Claimant was not given a copy of the investigation report and documents prior to the hearing.
 181. See also *Regent Management Ltd V Wilberforce Ojiambo Oudo (2018) eKLR* where the Court of Appeal was satisfied that the 5 minutes given to the Respondent/Claimant to peruse the documents was inadequate.
 182. In this case, it is clear that the basis of the charge, prosecution and conviction was not availed to the Claimant.
 183. Similarly, the Respondent denied the Claimant the right to cross-examine witnesses who contradicted the Claimant's story as the ER-team appear to have found. Their evidence was thus not tested yet the Respondent relied on it, hook, line and sinker. Strangely, neither the witnesses nor their statements were undisclosed or availed.
 184. Denial of the Investigation Report and an opportunity to cross-examine contrary evidence derogated the Claimant's right to fair hearing as envisioned by law.
 185. The foregoing sentiments are fortified by the sentiments of the Court of Appeal in *BATUK Unit Kenya V Mutahi (2023) eKLR* as follows;

“ . . . The witnesses were nonetheless not availed. It is clear that the Respondent was not given the opportunity to question his accusers at any point. The veracity of the statements used to terminate his long career was never tested . . . ”
 186. Finally, the Claimant faults the procedure employed by the Respondent on the premise that the Disciplinary Review Team was not properly constituted and thus its decision was a nullity.



187. The Respondent's Disciplinary Manual states that;
- “DRs are conducted by a Disciplinary Review team (DR-team) which often includes
- i. Your People Leader or when prohibited by local law or inappropriate due to certain circumstances, a different colleague as determined by ER
 - ii. An ER representative, and
 - iii. Other functional representative and/or a note taker when required”.
188. Clearly, the membership of the DR-team is three (3). The only optional person is the note taker.
189. In this case, the DR-Team on 14th February, 2023 comprised Mr. Anthony Kilonzo, the Employee Specialist (ER) and Irene Kingori team leader.
190. The team had no functional representative.
191. On cross-examination, RWII, Mr. Anthony Kilonzo retorted that;
- “There was no need for a functional representative. According to me the functional representatives are not mandatory.
192. For unexplained reasons, the witness opted to interpret the Respondent's Manual in a manner consistent with what the Respondent had done by having a DR-team of 2 people as opposed to 3 as per the Disciplinary Manual.
193. As regards the legal status of an improperly constituted body, the Claimant's counsel relies on the Court of Appeal decision in *Michael Sistu Mwaura Kamau V Ethics and Anti-Corruption & 4 others (Supra)* in criminal matters to urge that since the DR-team was improperly constituted, its decision was not binding.
194. In *Republic V Chuka University Ex Parte Kennedy Omondi Waringa & 16 others (2018) eKLR*, Aburili J. stated as follows;
- “A tribunal or administrative body that makes its own rules must be prepared to adhere to those rules regulating execution of its business and where it fails to do so, then the Court will not hesitate to intervene to declare the actions or failure to adhere to those rules ultra vires.
- It is those rules and regulations that confer lawful authority on the Respondent University to discipline students who err. A tribunal or body whether it be judicial or quasi judicial must not vary the scope of its powers and duties as a result of its own errors or conduct of others. (See *Republic V Kenya Revenue Authority ex parte Aberdare Freight Services & others (2004) 2 KLR 30*). Courts would not be rubber stamps of decisions of administrative bodies that fail to adhere to their own rules and procedures regulating their own businesses, failure to which the Court will intervene. Failure to adhere to the rules and regulations is evidence of bad faith. In *Re Hardial Singh & others (1979) KLR*, it was held inter alia that administrative bodies must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them”.
195. Case law is consistent that a decision made by an improperly constituted body or tribunal is a nullity. See *Republic V Kirinyaga University College & 2 others Ex parte Isaya Kamau Kagwima (2015) eKLR*,



Republic V The Communication Appeals Tribunal & others (2011) eKLR, Republic V University of Nairobi Ex parte Michael Jacobs.

196. In Republic V Chuka University Ex Parte Kennedy Omondi Waringa & others (Supra), the Court quashed the decision of the University because the Disciplinary Committee was improperly constituted.
197. By parity of reasoning as the Respondent's Disciplinary Review Team was not constituted in accordance with the Respondent's Disciplinary manual, its decision was a nullity.
198. In determining whether it was just and equitable for an employer to terminate the employment of an employee under Section 45(5), the Court is enjoined to consider inter alia the procedure adopted by the employer in reaching its decision including handling of any appeal by the employee, which the Respondent did in this case, conduct and capability of the employee upto the date of termination of employment, employer's compliance with statutory requirements, previous practices of the employer in such matters and any warning letters.
199. Juxtaposing these principles to the circumstance of this case, the irresistible conclusion is that the termination of the Claimant's employment was unfair for want of a substantive justification and procedural propriety.

Appropriate reliefs

a. Declaration

200. Having found that the termination of the Claimant's employment by the Respondent fell short of the legally prescribed threshold, the declaration sought is merited.

b. Unconditional reinstatement or re-engagement

201. Reinstatement is one of the reliefs provided by the provisions of Section 12(3)(vii) of the [Employment and Labour Relations Court Act](#), 2011 read with Section 49(3)(a) of the [Employment Act](#) and analogous to other reliefs under Section 49 of the [Employment Act](#), the remedy is not automatic.
202. See the sentiments of Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union & 3 others (2014) eKLR.
203. It is discretionary and the Court is enjoined to rely on the relevant parameters under Section 49(4) of the [Employment Act](#) in exercising its discretion.
204. In this case, the Claimant has expressed her wish to remain in the employment of the Respondent on account of the appeal and prayer of reinstatement or engagement.
205. The Claimant contributed to the summary dismissal by placing herself in circumstances in which the Respondent doubted her ability to maintain confidentiality and use of language which may be construed as callous depending on the recipient.
206. Second, the Claimant had served the Respondent for a period of almost 6 years which is not long.
207. Third, the Claimant hoped that she would remain an employee of the Respondent until retirement at the age of 60.
208. Fourth, on exceptional or unique circumstances, none have been demonstrated for the Court to qualify the common law principle that specific performance is not available in contracts of service.



209. The Claimant tendered no evidence to show that reinstatement or re-engagement was the most appropriate relief in the circumstances.
210. Since the Respondent is a bank, it behooved the Claimant to demonstrate that the Respondent still retained trust and confidence in her ability to continue serving as its employee.
211. Needless to underscore, banking business is based on trust of staff and the institution itself. A bank must trust its staff and the public must have trust in both.
212. The Court is not persuaded that the Claimant still retains the Respondent's trust as it had prior to 20th August, 2022.
213. Another critical parameter for consideration is practicability of recommending reinstatement or re-engagement.
214. In *Kenya Airways Ltd V Aviation & Allied Workers Union & 3 others (Supra)*, Murgor JA stated:

“In *New Zealand Educational Institute V Board of Trustees of Auckland Normal Intermediate School (1994) 2 ERNZ 414*, the New Zealand Court of Appeal stated:

“Whether . . . it would not be practicable to reinstate (the employee) involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is no uncommon for this Court or its predecessor, having found a dismissal to have been unjustified to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.

Practicability is capability of being carried out in action feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences”.

215. In the words of Maraga JA (as he then was) stated as follows;

“Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.”
216. The Court is guided accordingly.
217. In the instant suit, the Court is of the view that having regard to the circumstances in which the Claimant left employment and having regard to the nature of the Respondent's business, reinstatement is not an efficacious relief in the circumstances and is declined.

c. Payment of all outstanding salary from the date of reinstatement

218. Having found that the remedy of reinstatement does not commend itself for issue in the circumstances, this relief is unsustainable as it is a consequence of reinstatement and is disallowed.



d. Damages for loss of credit and integrity

219. It is unclear to the Court what this remedy entails as the Claimant adduced no evidence to prove entitlement to the damages prayed herein.

The prayer is declined.

e. 12 months compensation

220. Having found that the termination of the Claimant's employment by the Respondent was unlawful, the Claimant is entitled to compensation under the provisions of Section 49(1)(c) of the [Employment Act](#) subject to the provisions of Section 49(4) of the Act.

221. In determining the quantum of compensation, the Court has taken the following into consideration;

- i. The Claimant expressed her wish to remain in the Respondent's employment by lodging an appeal and praying for reinstatement or re-engagement.
- ii. The Claimant was an employee of the Respondent for about 6 years which is not long.
- iii. The Claimant expected to remain an employee of the Respondent till retirement at the age of 60.
- iv. The Claimant had no recorded instances of misconduct.
- v. The Claimant contributed to the termination of employment by placing herself in circumstances which gave the Respondent reason to doubt her trust and ability to maintain confidentiality.

222. In the circumstances, the Court is satisfied that equivalent of 6 months gross salary is fair compensation, Kshs.260,000 x 6 = Kshs.1,560,000.00.

f. Bonus pay out for 2022 due on 31st March, 2023

223. This is a claim for special damages which ought to be specifically pleaded and strictly proved. The Claimant has not provided particulars for this claim least of all the amount being prayed.

224. The Claimant's employment contract provided for discretionary variable compensation but made no reference to bonus pay out and such payments were discretionary and were based on individual performance, performance of the business and the group among other parameters.

225. The claim lacks supportive evidence and is declined.

g. General damages

226. The Claimant adduced no evidence to demonstrate entitlement to general damages and on what account.

227. The claim lacks particulars and supportive evidence and is dismissed.

h. Costs

228. Under Section 12(4) of the [Employment and Labour Relations Court Act](#), 2011, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

229. In other words, costs are discretionary as held in innumerable decision of Courts.



230. In this case, the circumstances justify the award of costs of this suit to the Claimant.
231. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment by the Respondent was unlawful.
 - b. Equivalent of six (6) months' salary Kshs.1,560,000.00.
 - c. Costs of this suit.
 - d. Interest on (b) above at Court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

