



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v ABSA Bank Kenya PLC (Cause E065 of 2023)
[2024] KEELRC 2399 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2399 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E065 OF 2023
M MBARŪ, J
OCTOBER 1, 2024**

BETWEEN

THOMAS MACHARIA MWANGI CLAIMANT

AND

ABSA BANK KENYA PLC RESPONDENT

An employer hiring a private investigator to investigate an employee's private life is an infringement on the employee's right to privacy.

One of the glaring contested issues was whether an employer could hire a private investigator to look into the private life of an employee. The court held that the conduct of the respondent leading into the investigations of the claimant's private life in the context of matters ongoing at the workplace was not justified. No basis was given for such conduct. Engaging in private investigations and then failing to bring such matters to the claimant to address as an employee was not justified. His constitutional rights under article 31 were breached by the respondent.

Reported by Robai Nasike

Employment Law – employer - employee relationship – termination of employment – grounds for termination of employment – claim that employee's actions amounted to lapse in fiduciary duty and conflict of interest – whether the termination of an employee on grounds that employee's actions amounted to lapse in fiduciary duty and conflict of interest, was proper and justified – Employment Act (Cap 226), sections 35, 41, 43 and 45.

Constitutional Law – fundamental rights and freedoms – the right to privacy – the right to privacy of a person during investigation – collection of personal data and information unrelated to an employee's employment – where an employer hired a private investigator to collect personal data and information of an employee – whether the conduct of an employer that led to the investigation of the claimant's private life in the context of matters ongoing at the workplace was justified – whether an employer could hire a private investigator to look into the private life of an employee – Constitution of Kenya, article 31.

Jurisdiction – jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine an issue of defamation arising within a claim for wrongful termination – claim that a defamation was not within the jurisdiction of the Employment and Labour Relations Court – whether the Employment and Labour Relations Court had jurisdiction to determine a claim for defamation, arising in a suit on wrongful termination.



Brief facts

The respondent bank employed the claimant as a branch manager and then promoted him to a senior branch manager. On March 17, 2023, the claimant was issued with a notice of suspension. The suspension was because the claimant was involved in irregular unauthorized overdraft facilities advanced to some customers at the Nkrumah Road branch. Disciplinary proceedings commenced and upon conclusion, the claimant was issued with a letter of termination. The claimant was allowed a right of appeal.

The claim was that before the claimant's appeal could proceed for hearing, the respondent advertised for his position meaning that there was a premeditated position that he would not be successful. That resulted in unfair and unlawful termination of employment contrary to sections 41, 43 and 44 of the Employment Act. The claim was that the claimant's employment was terminated on grounds of nepotism and a witch hunt against him for raising questions touching on three senior employees who castigated and victimized him as per his email to the CEO. During the claimant's suspension, the respondent engaged a private investigator to look into his personal and private conduct and followed him in public, restaurants and pubs and also demanded to be supplied by different establishments with information in violation of his rights. That was contrary to the Constitution and the Employment Act and had caused the claimant to suffer public ridicule from reports circulated to the claimant's subordinates and the general public.

According to the claimant, while the claimant was the senior branch manager at Nkrumah Road, the branch realized a net profit of Ksh.1.2 billion for the year 2022 and owing to the said realized profits, he was entitled to a performance bonus of Ksh.2.3 million which the respondent deliberately failed to pay and instead levelled malicious accusations in an attempt to avoid paying the bonus. The claim was that the claimant worked for the respondent while earning a salary of Ksh.572, 760 per month which was to be increased to Ksh.647, 218 (13% increment) from January 2023. The respondent declined to effect the said increment and that the same should be awarded. The claimant stated that the termination of employment was without due process, the respondent had refused to pay terminal dues and the claimant was seeking the following; damages for defamation Ksh.5,000,000; damages for character assassination Ksh.5,000,000; unpaid bonuses for the year 2022 ksh.2,300,000; 12 months compensation Ksh.7,766,625.60; Notice pay Ksh.647,218; unpaid salary increments at 13% from January 2023 to May 2023 Ksh.373,294; Certificate of Service and costs.

Issues

- i. Whether the termination process undertaken by the employer was flawed amounting to an unlawful termination.
- ii. Whether the Employment and Labour Relations Court had jurisdiction to determine a claim for defamation, arising in a suit on wrongful termination.
- iii. Whether an employer could hire a private investigator to look into the private life of an employee.
- iv. Whether an employee was entitled to bonus that accrued and could have been awarded to him, for good performance, before the disciplinary proceedings were initiated.
- v. Whether an employee undergoing disciplinary proceedings was entitled to a salary increment awarded to all employees as part of implementation of the employer's policy.

Held

1. Termination of employment was allowed under the provisions of sections 35, 41, 43 and 45 where the employer issued notice upon the employee noting misconduct on the grounds of poor work performance, incapacity or capability. Upon the issuance of the notice, the employee must be allowed time to respond and attend to make his representations on the alleged misconduct.
2. The banking sector was sensitive and highly regulated through its policies and the Central Bank of Kenya. Breach of fiduciary duty extended to third parties and the conduct of the claimant justified the sanction taken and termination of employment. Similarly, certain positions such as a branch manager of a bank, attracted a high calling of integrity and financial probity. Once held, great responsibility and



- accountability was called for. As the branch manager, of the Nkrumah Road Branch, Mombasa, the claimant had bigger accountability beyond what his junior staff held.
3. The respondent bank was finance-sensitive and the position held by the claimant as branch manager was similar to that of a financial custodian and other valuables. Conflict of interest and lapse in the fiduciary duty bestowed on him was capable of affecting the financial position of the respondent and such breach and violation was capable of initiating fraudulent transactions.
 4. The claimant was called to account for his conduct and his responses were found unsatisfactory. He admitted to buying a housing unit from a customer without a proper sale agreement which was in conflict of interest and to failing to address irregularities concerning the allocation of excesses within his branch which was in breach of the lending procedures. The claimant was invited to a disciplinary hearing and failed to explain his conduct and hence found culpable of misconduct leading to termination of employment. The termination of employment was justified and the claimant was taken through due process.
 5. In employment law defamation took place when the employer publicized or caused to be publicized, statements which stigmatized the employee. The manner of dismissal and the negative publicity attached to the petitioner had the potential to damage his employability. Employment-related defamation was based on the old tort of defamation but with a new spin: the employee's injured or damaged employability and not merely the personal stigmatization must be compensated.
 6. Breach of privacy was contrary to article 31 of the Constitution. Even in employment, protection of the employee's privacy was imperative. Where there was a breach of an employee's privacy, an employer could not justify a position that the court lacked jurisdiction and then fail to address whether there was a need to collect personal data and information unrelated to the employment.
 7. Protecting privacy was necessary if an individual was to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justified the conclusion that it was a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life was demeaning not only to the dignity and spirit of the individual but also to the integrity of the society of which the individual was part.
 8. The conduct of the respondent leading into the investigations of the claimant's private life in the context of matters ongoing at the workplace was not justified. No basis was given for such conduct. The claimant was a senior employee of the respondent and whatever conduct he engaged in after office/work hours, where that was found contrary to his letter of appointment and workplace policy, recourse was to invite him to address the issues of conduct. Engaging in private investigations and then failing to bring such matters to the claimant to address as an employee was not justified. His constitutional rights under article 31 were breached by the respondent.
 9. In employment and labour relations, damages could be awarded to an employee under the provisions of section 12 of the Employment and Labour Relations Court Act. The demands of social justice must be weighed carefully, against the needs of economic development. Ultimately, the purpose of compensatory awards was not to punish errant employers, however egregious their decisions against their employees were; the objective was to ensure economic injury suffered by the employee, was adequately redressed.
 10. The claimant had served the respondent well until matters were brought to his attention through notice to show cause dated March 17, 2023. Internal investigations conducted revealed various breaches but that did not justify a violation of his privacy rights secured under article 31 of the Constitution. Considering the facts and similar case law, the general damages claimed at ksh.5, 000,000 was justified.



11. The policies applied by the respondent must protect both parties equally. On the one part, the subject policy required that upon the close of year, each employee enjoying a bonus for good performance should receive communication from the Regional Manager which the claimant received, stating that following his excellent performance, he had earned a bonus. That was related to the year 2022 way before disciplinary proceedings were brought to the claimant's attention. The announced bonus could not be negated after the fact of its communication. Disciplinary procedures were only initiated against the claimant through the notice to show cause dated March 17, 2023. Going back to sanction him and deny him a benefit accrued backwards and relating to his performance in the year 2022 was to engage in unfair labour practices. The claimant was entitled to the claim of Ksh.2, 300,000 in unpaid bonuses for the year 2022.
12. On the claim for salary increments at 13% from January 2023 to May 2023, the discretion not to award such payment upon the respondent was removed the moment a policy was issued that was known to all employees that such percentages were due. From March to May 2023 during the disciplinary process, the claimant was not in control of his employment. The time taken to address the workplace misconduct should not deny him the due benefits while employment subsisted. Submissions by the respondent that the salary increase was purely discretionary vis-a-vis the records and policies placed before the court were not correct.
13. Employment rights can be secured contractually, through workplace policies and practices and agreements. The claim of a 13% salary increase from January to May 2023 was justified at Ksh.647, 218. With respect to the Certificate of Service, best practice demanded that the employee should be cleared and the same issued under the provisions of section 51 of the Employment Act.

Claim allowed.

Orders

- i. *A declaration that there was a violation of constitutional rights;*
- ii. *General damages Ksh.5,000,000;*
- iii. *Unpaid bonuses for the year 2022 ksh.2,300,000;*
- iv. *Notice pay Ksh.647,218;*
- v. *Unpaid salary increments at 13% from January 2023 to May 2023 Ksh.373,294;*
- vi. *The claimant to complete clearance for issuance with a Certificate of Service;*
- vii. *Each party bears its costs.*

Citations

Cases

Kenya

1. *Agnes Murugi Mwangi v Barclays Bank of Kenya Limited* Cause 396 of 2010; [2013] KEELRC 910 (KLR) - (Explained)
2. *Coalition for Reform and Democracy (CORD) & Kenya National Commission on Human Rights (KNCHR) v Republic of Kenya & Attorney General* Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR) - (Explained)
3. *Daniel Musinga t/a Musinga & Co Advocates v National Nation Newspapers Ltd* Civil Case 102 of 2000; [2005] KEHC 3185 (KLR) - (Explained)
4. *DK Njagi Marete v Teachers Service Commission* Cause 379 [N] of 2009; [2013] KEELRC 575 (KLR) - (Explained)
5. *Evans Kamadi Misango v Barclays Bank of Kenya Limited* Cause 717 of 2010; [2015] KEELRC 1189 (KLR) - (Explained)
6. *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre, Nang'ole Wanjala & Nairobi City County Government* Constitutional Petition 410 of 2016; [2017] KEHC 9230 (KLR) - (Explained)



7. *Josephine M Ndungu, Job Ireri, Billy Wellington Kinyua, Jane Wambui Gitau, Millicent Njoki Gitau, Hudson Lubanga Kadagi, Bwibo Adieri & Martin Anthony Njogu Kimemia v Plan International Inc* Cause 1859 of 2014; [2019] KEELRC 663 (KLR) - (Mentioned)
8. *Nadite, Celina & 19 others v National Police Service Commission* Petition Nos 11, 12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29 & 36 of 2018; [2019] eKLR (Consolidated) - (Explained)
9. *Naqvi Syed Qmar v Paramount Bank Limited & Attorney General* Cause 346 of 2014; [2015] KEELRC 114 (KLR) - (Explained)
10. *Violet Kadala Shitsukane v Kenya Post Savings Bank* Civil Appeal 295 of 2016; [2020] KECA 718 (KLR) - (Explained)
11. *Willie Kipkoech Langat v County Public Service Board, Kericho County, County Government of Kericho & Governor Kericho County* Cause E016 of 2021; [2022] KEELRC 164 (KLR) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 31, 43 - (Interpreted)
2. Employment Act (cap 226) sections 35, 41, 43, 44, 51- (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) section 12 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The respondent bank employed the claimant as a branch manager on February 14, 2019 at the Lavington branch, Nairobi and then promoted to a senior branch manager, at the Nkrumah Road branch, Mombasa on March 29, 2021.
2. On March 17, 2023, the claimant was issued with a notice of suspension signed on behalf of Doufold Odanga, regional manager by one Serah Muthui who is the branch manager, of the Nyali branch. This was a junior officer to the claimant.
3. The suspension was because the claimant was involved in irregular unauthorized overdraft facilities advanced to some customers at the Nkrumah Road branch. The suspension was for 30 days.
4. On April 14, 2023, the suspension was extended for 30 days. On May 2, 2023, the claimant was issued with a notice to show cause why his employment should not be terminated on the grounds that following his suspension, there was an investigation finding that there were irregular and unauthorized overdraft facilities advanced to bank customers under his leadership. On several occasions, he had violated the bank policies and procedures by engaging in irregular lending for two separate customers INO Safinah Petroleum and DM Kanyi. He was directed to file his response by May 8, 2023.
5. The claim is that the claimant submitted his response to the notice to show cause on May 4, 2023 upon which he was invited to the disciplinary hearing on June 7, 2023. The disciplinary panel was comprised of;
 - a. Gunilla Ouko, country representative head of sales;
 - b. Beatrice Mwago, head of retail;
 - c. Elkana Momanyi, digital credit;



- d. Fathiya Noordin, senior dealer;
 - e. Tabitha Mutwa, employee relations manager.
6. Following the disciplinary hearing which was virtual, the respondent supplied the claimant with draft minutes for his perusal and confirmation on May 17, 2023. These minutes did not capture the issues addressed during the disciplinary hearing and the claimant requested the respondent to make amendments but this was declined. On May 26, 2023, the claimant was issued with a letter terminating his employment. He was allowed the right of appeal which he filed on May 29, 2023.
 7. The claim is that before the claimant's appeal could proceed for the hearing, the respondent advertised for his position meaning that there was a premeditated position that he would not be successful. This resulted in unfair and unlawful termination of employment contrary to sections 41, 43 and 44 of the [Employment Act](#).
 8. There was an appeal hearing on June 7, 2023 and again, the minutes failed to capture what had been stated at the hearing and despite his protests, the respondent refused to make amendments. On June 16, 2023, the claimant was issued with a notice rejecting his appeal.
 9. The claim is that the claimant's employment was terminated on grounds of nepotism and a witch hunt against him for raising questions touching on three senior employees who castigated and victimized him as per his email dated March 20, 2023 sent to Arrie Rauttenbach, the CEO. During the claimant's suspension, the respondent engaged a private investigator into his personal and private conduct and followed him in public, restaurants and pubs and also demanded to be supplied by different establishments with information in violation of his rights. This is contrary to the [Constitution](#) and the [Employment Act](#). This has placed the claimant in public ridicule from reports circulated to the claimant's subordinates and the general public.
 10. The claimant is a man of good character with no criminal record and there was no previous warning letter. Following the publication of an incident which occurred in a hotel establishment, the claimant suffered character assassination and prayed for damages.
 11. Following investigations into an incident that occurred on April 6, 2023 in a hotel establishment, the respondent portrayed the claimant as a person of questionable character which amounts to character assassination which has cost him a career banker in banking institutions. The claimant is unable to secure new employment in the sector due to reputational damage. He has suffered career progression, and chances of employability. The respondent failed to give the claimant a fair hearing by refusing to capture the disciplinary minutes as they happened and rendering his appeal academic. There were no valid reasons leading to the termination of the employment and despite working diligently for the respondent from February 2019 to June 2023, his track record was not addressed.
 12. While the claimant was the senior branch manager at Nkrumah Road, the branch realized a net profit of Ksh 1.2 billion for the year 2022 and owing to the said realized profits, he was entitled to a performance bonus of Ksh 2.3 million which the respondent deliberately failed to pay and instead levelled malicious accusations in an attempt to avoid paying the bonus.
 13. The claimant worked for the respondent while earning a salary of Ksh 572, 760 per month which was to be increased to Ksh 647, 218 (13% increment) from January 2023. The respondent declined to effect the said increment and the same should be awarded.
 14. Termination of employment was without due process, the respondent has refused to pay terminal dues and the claimant is seeking the following;



15.
 - a. Damages for defamation Ksh 5,000,000;
 - b. Damages for character assassination Ksh 5,000,000;
 - c. Unpaid bonuses for the year 2022 ksh 2,300,000;
 - d. 12 months compensation Ksh 7,766,625.60;
 - e. Notice pay Ksh 647,218;
 - f. Unpaid salary increments at 13% from January 2023 to May 2023 Ksh 373,294;
 - g. Certificate of service;
 - h. Costs.
16. The claimant testified that upon employment by the respondent, he was of exemplary performance which saw him rise to the position of senior branch manager, Nkrumah Road, Mombasa. He was however issued with a suspension on March 17, 2023 signed by his junior Serah Muthui instead of Doufold Odanga the regional manager. The suspension was on the grounds that he was involved in irregular and unauthorized overdraft facilities for some customers at the branch.
17. The claimant testified that he was accused of authorizing an overdraft for one David Mureithi Kanyi without proper collateral. The customer delayed in making payments for the loan facility. The collateral used was a building where the claimant purchased a unit and banked Ksh 500,000 and despite declaring his interest through the zone system he was accused of having a conflict of interest which was not the case. The purchase of the property was a year earlier on March 30, 2022 and he had a sale agreement as proof.
18. The second reason used to suspend the claimant was that he advanced Timothy Gachoka credit facility through the Credit team which was said to be erroneous. The transaction had been approved by another officer and the respondent claimed that there was excess lending contrary to policy.
19. The claimant responded to the notice to show cause and denied the allegations against him. There were two main allegations relating to a mortgage facility of Ksh 39.2 million to DM Kanyi and unauthorized excess lending to Safinah Petroleum. He noted that DM Kanyi applied for a mortgage loan facility and was advanced Ksh 39.5 million to be repaid over 180 months with a monthly instalment of Ksh 493,399 as per the offer letter dated 1st November 2021. The claimant noted that he had been introduced to DM Kanyi by two of his staff at the Nkrumah branch, Bashir Orok and Mary Mwaniki. Both had done background requirements on the loan facility including a risk assessment and on 19th June 2021, an offer letter was prepared. It was noted that the customer had been servicing his debt well without any collection challenges.
20. The claimant testified that on March 25, 2022, James Mureithi informed him that the loan facility could not be discharged as the rental security had not been sighted in the account. On March 29, 2022, Dunfold Odanga the regional manager requested that the respondent approve the disbursement despite not receiving the rental income from the customer who had committed to make deposits.
21. On the allegations that the claimant failed to advise DM Kanyi to channel the rental income into the ABSA account, he responded that the facility issued was to run from March 2021 to February 2036 and he was not aware that the customer was in arrears. The claimant was away for two months at the time.



- The bank procedure required that the matter be escalated to the collections and recoveries department under Philip Maweu followed by a formal demand letter to the customer.
22. The claimant testified that on his alleged engaging in unauthorized dealings with the customer, his deposit of Ksh 500, 000 into the account of the customer on 24 January 2022, was a top-up from his salary which he used to purchase a house from DM Kanyi. He made full disclosure before the purchase and had a sale agreement dated 26th January 2023. There was no conflict of interest and he had a right to purchase property.
 23. On the second allegation, the claimant testified that on January 10, 2023, he got a request from Safinah Petroleum for an excess of Ksh 4 million which he raised from his office while Felix Maingi was acting branch manager, Diani Branch. The customer request was approved by Peter Kamau, senior corporate credit manager, and Mary Mwaniki was to input the request for approval. On February 13, 2023 where it was alleged that the claimant sought an extension of excess approval for Ksh 4 million for 10 days before the due amounts were paid at Ksh 1.66 million against insufficient funds, the claimant had noted that Peter Kamau was away, hence he wrote to Alfred Mutuku on February 14, 2023 to review the customer account and the need for resolution of the excess limit by April 24, 2023 since the customer had serviced a similar facility and had paid up.
 24. On the payment of Ksh 1.66 million over the counter, the claimant noted that he was not aware of the payment and had directed his staff to address it by April 24, 2023. All other matters raised on this account were flagged out and before the claimant could address them, he was suspended from duty.
 25. The claimant also called Dunfold Odanga as his witness and testified that he was the immediate leader of the claimant and worked together while employed by the respondent. The claimant demonstrated exceptional performance and his integrity was beyond reproach.
 26. Mr. Odanga testified that the show cause letter issued to the claimant was signed by a junior employee working under the claimant and the same ought to have been signed by him as the regional manager or the directors. Owing to his refusal to cooperate with the respondent and to subject the claimant to disciplinary action leading to termination of his employment, the said notice was signed by a person reporting to the claimant and not him.
 27. Mr Odanga testified that during the suspension and disciplinary hearing he did not issue any notice and was not in agreement with the process. The contents of these letters and notices were pure malice and meant to destroy a young career that was flourishing at the time. Termination of the claimant's employment was based on malice and was not justified.

Response

28. In response, the respondent admitted that the claimant was employed as a senior branch manager, in Mombasa from March 29, 2021. Two customer accounts, DM Kanyi and Safinah Petroleum Limited were domiciled and operated from his branch, Nkrumah Road. The account of DM Kanyi was in arrears at the time the claimant was the branch manager. He deposited Ksh 500, 000 in the account on January 31, 2023. The account of Safinah Petroleum Limited was overdrawn in the sum of Ksh 1, 665,000 on February 27, 2023 by a transfer over the counter at Nkrumah Road branch.
29. The claimant was employed and issued with the letter of appointment and his employment was regulated under the Regulatory Compliance and Rules and key Policies, Procedures and Practices of the respondent, formerly Barclays and Barclays Africa Group.
30. Following internal investigations of customer accounts and leading status at the Nkrumah Road branch, the respondent discovered anomalies in the handling of some accounts. As relates to the



- claimant, the account held by DM Kanyi was found to have an outstanding facility which had been taken over from other banks when he went into arrears where he had been in arrears.
31. Investigations revealed that DM Kanyi was granted an equity release facility of Ksh 39.2 million on May 30, 2022 but the account was soon flagged for loan arrears in breach of approval terms by way of rental income not channeled through the ABSA account. The claimant deposited Ksh 500, 000 into the customer's account on January 31, 2023 for loan arrears and as the manager he had committed to ensure that the customer would repay the loan facility in conflict of interest.
 32. Another customer was Safinah Petroleum Limited which had a short-term loan facility since May 2022 and had cash flow challenges but was being granted excess funds without due process.
 33. The investigations also revealed a breach of the bank SME procedure manual by the claimant concerning Safinah's account, in that he failed to ensure that the excess was paid 10 days before previous excesses were cleared. He failed to ensure that the customer refers stream code was properly undated and that a report on CCRS to the sanction for account in excess over 10 days for Ksh 4 million for 14 days.
 34. The conduct of the claimant was found in breach of the respondent's policies and guidelines. The Absa SME Banking Procedure Manual requires the manager to secure disbursements and streaming of codes which the claimant failed to address in the case of Safinah. The policy also requires proper account under SME portfolio management provisions.
 35. The Absa Way Code of Ethics, the same requires maintaining high ethical standards, honesty and staff to avoid conflict between personal interests and the interests of the bank.
 36. The claimant was taken through a disciplinary process following policy. On May 2, 2023, the claimant was issued with a notice to show cause and he replied on May 4, 2023. Through notice dated May 10, 2023, the claimant was invited to attend the disciplinary hearing with a representative of his choice but opted to attend alone. The hearing was conducted on May 16, 2023 and through notice dated May 26, 2023, the respondent terminated employment. The claimant filed an appeal which was addressed and found without good basis and dismissed.
 37. Termination of employment was justice and due process followed. The claimant was found to be in breach of bank policies and procedures and his responses were found unsatisfactory.
 38. The claim that there was character assassination due to the private investigations conducted by the respondent following a reported incident on April 6, 2023
 39. The advertisement for the position previously held by the claimant followed the termination of employment. He cannot justify a claim of pre-meditated breach of his rights. A disciplinary hearing was conducted and the claimant was invited to attend. His appeal was dismissed for failing to raise any substantial grounds.
 40. The performance of the Nkrumah Road branch does not provide a complete picture for the reasons that such a branch achieved success as a collective effort of many employees and this cannot be attributed to the claimant only. He violated various obligations and responsibilities as a senior officer and cannot justify the claims made.
 41. The claimant's salary and entitlement to increment is per the offer of promotion letter dated 24th March 2021 being Ksh 6, 192,000 per year. The contract of employment had no automatic increment clause. Any increment was at the discretion of the employer.



42. There was a fair disciplinary process and reasons leading to termination of employment were stated. He was in breach of bank policies and procedures. A copy of the Certificate of Service has since been issued but the claimant filed suit before he could collect it. The claim for damages for defamation or constitutional rights violation is not justified and is without evidence. The alleged unpaid bonus of Ksh 2.3 million for the year 2022 is discretionary and not an automatic right. Employment is terminated fairly and compensation is not due or notice pay and the suit should be dismissed with costs.
43. The respondent called three witnesses, Kennedy Olung'o, Generose Karimi Njue, and Vaslas Odhiambo.
44. Olung'o testified that he is an investigator employed by the respondent and did forensic audits in this case.
45. In March 2023 he was requested by the respondent to conduct investigations into an account held at the Nkrumah branch by Safinah Petroleum Limited following internal reviews which had revealed potential anomalies in the management and operations of the account. He made findings that;
 - a. The SME customer had an asset-based financing facility;
 - b. The customer was facing cash flow issues from January 2023;
 - c. Staff at the branch continued to grant excesses to the customer without following proper guidelines on excess management;
 - d. On February 27, 2023 a transfer of Ksh 1,665,000 was done over the counter at the branch against insufficient funds in the account;
 - e. The branch manager failed to ensure that the refer code system was renamed for proper excess management as required by the SME banking procedures upon the exit of the customer relationship manager or the monitoring and control officer;
 - f. For accounts in excess over 10 days, the relationship manager should have raised the required excess report on CCRS to the sanctioner as per SME banking procedures and no action was taken to ensure adherence to procedures in place.
 - g. There was an excess request on February 13, 2023 for Ksh 4 million for 10 days erroneously approved to mature on April 24, 2023 but this was not flagged or reported to CCRS after 10 days;
 - h. On March 13, 2023, the claimant requested a colleague, Gillian Karimi to issue a repossession order for the customer's vehicle while the asset-based Based Financing facility was not in arrears.
46. Olung'o testified that he filed his report dated April 11, 2023 with the respondent with the facts and without breach of confidentiality to third parties.
47. Njue testified that she is an investigator responsible for forensic audits within the respondent. In October 2022 she was requested to conduct investigations at the Nkrumah branch into the account held by DM Kanyi following initial internal reviews which revealed potential anomalies in the management and operations of the account.

The investigations revealed the following;



- a. The loan account had a history of repayments falling into arrears month-on-month but a single bulk repayment of Ksh 1,488,500 cleared the September to November 2023 repayments. At the time of investigations, the loan account was in arrears of two months;
 - b. The claimant as branch manager gave his commitment to the approvers that he would ensure the customer would channel his rental income through his Absa account but the commitment did not materialize;
 - c. The claimant made a cheque deposit of Ksh 500, 000 into the customer account on January 31, 2023, it was reversed with a counter withdrawal followed by a cash deposit. This payment was done at the time the customer was struggling with loan repayments and hence the deposit by the claimant was used to clear the mortgage arrears;
 - d. The claimant explained his conduct that he had purchased a house from the customer but the land agreement had several discrepancies and the copy filed had not been properly executed.
48. Njue filed her report dated April 26, 2023 stating the facts without breach of confidentiality to the third parties involved.
 49. The respondent called Odhiambo who testified that he is the head of employment relations and wellness with the respondent and conversant with the matter. On January 16, 2019 the claimant was employed as a branch manager in Nairobi and on March 24, 2021 he was promoted to branch manager, Nkrumah branch.
 50. Under the letter of appointment, clause 4 bound the claimant under the regulatory compliance and dealing rules to comply with all legal and policies of the respondent. The respondent also places various internal policies and guidelines to regulate the conduct of employees including the Absa Way Code of Ethics of October 6, 2020 and the Absa SME Banking Procedures Manual.
 51. All employees are expected to familiarize and comply with these policies and ensure they maintain high ethical standards, be honest and avoid conflict of interest.
 52. Odhiambo testified that from October 2022 to March 2023 internal reviews and investigations of operations at the Nkrumah branch revealed a breach of policies and procedures concerning two accounts of DM Kanyi and Safinah Petroleum Limited. The account held by DM Kanyi had outstanding facilities which had been taken over from other banks and remained in arrears while the account held by Safinah had a short-term loan facility since May 2022 and despite having cash flow issues, the customer continued to receive more excesses.
 53. Internal investigations revealed a breach of the bank SME procedures on the part of the claimant who failed to ensure the excess to Safinah's account was paid within 10 days and also failed to ensure that the customer refers stream code was properly updated despite these issues, he was given an excess of Ksh 4 million for 14 days.
 54. Investigations revealed that in the account of DM Kanyi the customer was granted an equity release facility of Ksh 39.2 million on March 30, 2022 but the account was flagged for loan arrears and breach of approval terms by way of rental income not being channeled through the Absa account. The claimant deposited Ksh 500, 000 in the customer account on 31st January 2023 to cover the loan arrears and as the manager he had committed to ensuring that the customer made rental deposits but this was not done.
 55. Under the bank policy, the claimant was required to file a C-Zone form notifying the respondent of the potential conflict of interest posed by his dealing with the customer but he neglected to do so.



56. Odhiambo testified that the respondent invited the claimant to show cause following the investigations which revealed serious breaches of the policy and procedures and his explanations were found not satisfactory. He was invited to attend a disciplinary hearing and again his representations were found unsatisfactory leading to termination of employment through notice dated 26th May 2023. He was paid his terminal dues including;
- a. One-month notice pay;
 - b. 15 days accrued leave days for the year 2023;
 - c. A certificate of service.
57. The claim for the unpaid bonus is discretionary or based on contractual obligations which were not in the claimant's contract. Bonus is only due to an employee who is not under investigation or subject to a disciplinary hearing under the policy.
58. Salaries were reviewed based on the policy and discretion of the employer. Following termination of employment, the claimant received all terminal dues and the suit should be dismissed with costs.
59. At the close of the hearing, both parties filed written submissions which are taken into account and the issues which emerge for determination are;
- Whether there was unfair termination of employment;
- Whether there was a breach of constitutional rights;
- Whether the remedies sought should be issued.
60. Termination of employment is allowed under the provisions of sections 35, 41, 43 and 45 where the employer issues notice upon the employee noting misconduct on the grounds of poor work performance, incapacity or capability. Upon the notice, the employee must be allowed time to the respondent and attend to make his representations as held in the case of *Willie Kipkech Langat v County Public Service Board & 2 others* [2022] eKLR and in the case of *Josephine M. Ndungu & others v Plan International Inc.* [2019] eKLR.
61. Through notice dated 26th May 2023, the respondent terminated the claimant in his employment because he engaged in irregular and unauthorized overdraft facilities advanced to bank customers at the Nkrumah Road branch under his leadership. The claimant violated the bank policies and procedures by engaging in irregular lending for two separate customers INO Safinah Petroleum and DM Kanyi.
62. The respondent gave the claimant the particulars of the grounds for termination of employment.
63. On the allegations that the claimant engaged in irregular advancing of loan facility to DM Kanyi, the details were that;
- a. He supported the loan application of Ksh 39.2m which was disbursed exceptionally on account of his commitment to Leadership that he would ensure the customer channeled his rental income through the Absa account and ensure the loan was repaid to completion but the claimant failed to follow through and the client failed to pay the loan leading to arrears.
 - b. There were inconsistencies in the responses given and the claimant resulted in blaming junior employees but the records demonstrated he was dishonest;
 - c. Investigations revealed that the claimant had single-handedly handled the customer contrary to due process;



- d. On January 31, 2023 the claimant unprocedural and under unclear circumstances made a cash deposit of Ksh 500,000 from his staff's current account into the customer account which was used to repay the mortgage arrears in the customer account;
 - e. Contrary to laid down guidelines, the claimant engaged in unauthorized dealings with the customer and failed/ignored to make full disclosure to management on the potential conflict of interest in his dealings with the customer.
96. Concerning the grounds that the claimant did unauthorized overdraft facilities advanced to Safinah Petroleum, the particulars were that;
- a. On February 13, 2023 the claimant asked for an extension of excess approval of Ksh 4 million for 10 days and before it was paid, on February 27, 2023 a transfer was made over the counter for Ksh 1.66 million against insufficient funds in the customer's account. The claimant failed to ensure that previous excesses were cleared before granting new excess per the procedure;
 - b. On March 3, 2023 the customer's short-term loan matured increasing the account excess balance to Ksh 7,977,261 in addition to the earlier excess as per the 10 days request and this was not reported to the CCRS per procedure;
 - c. The customer was allowed to open a new personal account on March 1, 2023 to facilitate the ABF payment which was in arrears and possibly avert reprocessing of ADF as well to abandon the overdrawn CBSA;
 - d. While it was expected that the claimant understood the guidelines and processes of recoveries, on March 13, 2023, without a reasonable cause he initiated the issuance of a repossession order for the customer's vehicle while the ADF was not in arrears thus exposing the respondent to litigation;
 - e. The claimant was careless in the performance of his duties by failing to ensure that the customer refer stream codes were properly updated as required by the process who should have been responsible for the excess requests and management of the account;
 - f. By the careless lending, the claimant failed his fiduciary duty to the bank, exposing it to a potential loss of Ksh 7,966,261 and hence the respondent lost confidence in the claimant.
97. On the allegations made against the claimant, indeed, he had the right to own property and to enjoy his constitutional right under article 43 of the *Constitution*. However, as an employee of the respondent, being a senior officer and branch manager, the claimant was privy to internal dealings between the respondent and third parties such as DM Kanyi who had a bank facility and was required to service his Ksh 39.2 million loan facility through rental deposits for the secured mortgage. However, the customer had arrears and the claimant opted to buy a unit and made a deposit of Ksh 500,000 on 31 January 2023 while the customer account was in arrears.
98. Whereas the respondent had a policy on how to recover loan repayments that were in arrears, for the claimant to transact with the customer or a defaulting loan repayment customer, he was bound under the policy on conflict of interest. The requirement to submit his C-Zone form on conflict of interest was a contractual requirement which he failed to address.
99. The claimant testified that he filed the conflict of interest form in the C-Zone system and the same is in the custody of the respondent, but this evidence is negated by the fact that the alleged sale agreement for the purchase of the unit from DM Kanyi was taken through a forensic audit by Ms Njue and found to have several discrepancies. Fundamentally, it lacked execution by an advocate to authenticate the



transaction. It was not a proper sale agreement. It cannot support or justify the claimant's transaction with DM Kanyi. The policy on conflict of interest existed to secure the claimant against undertaking transactions that potentially tainted his employment while the respondent was secured from insider trading to its detriment.

100. In this case, the court finds there was a conflict of interest specifically addressed under Clause 9.9 of the Absa Way Code of Ethics. Under the terms and conditions of employment, the claimant was in breach of this code.
101. On the Safinah account, the claimant was the overall officer at the Nkrumah branch as the manager. The staff under him were overall reporting to him. Shifting blame to these officers is contrary to the letter of appointment giving the claimant overall leadership at the branch.
102. The claimant testified that he was aware that on January 25, 2023 the customer, Safinah sought a second excess approval of Ksh 4 million to be paid in 14 days. These transactions were not cited in the CCRS. Further on February 13, 2023, the excess was extended for 10 days and before being paid up on February 27, 2023 a transfer over the counter for Ksh 1, 665,000 was done against insufficient funds in the customer account. Moreover, the excess allowed for 10 days was noted as due on April 24, 2023 whereas it had been granted on February 27, 2023.
103. As the overall responsible officer for activities in the Nkrumah branch, the claimant cannot blame the SME department or that he was not conversant with the policies to be applied. Ultimately, the directions by the claimant to Gillian Karimi to issue a repossession order for the customer's vehicle on 13th March 2023, while the asset Financing facility was not in arrears, this act, confirms that he was well versed with the matter and running of the account(s) of Safinah. The claimant cannot extricate himself from responsibility and the fiduciary duty held as the branch manager for the respondent. Such conduct exposed the respondent.
104. the court finds the claimant liable for his conduct in failing to undertake his duties properly and as required by the employer.
105. It is acknowledged that the banking sector is sensitive and highly regulated through its policies and the Central Bank of Kenya. Breach of fiduciary duty extends to third party and the conduct of the claimant justified the sanction taken and termination of employment.
106. Similarly, certain positions such as a branch manager of a bank, attract a high calling of integrity and financial probity. Once held, great responsibility and accountability is called for. As the branch manager, of the Nkrumah Road branch, Mombasa, the claimant had bigger accountability beyond what his junior staff held. In the case of *Celina Nadite & 19 others v National Police Service Commission* [2019] eKLR the court held that where an employee fails to give a proper account of his financial probity and integrity, the employer is allowed under the provisions of section 43 of the *Employment Act* to lawfully terminate his employment. In the case of *Violet Kadala Shitsukane v Kenya Post Savings Bank* [2020] eKLR the court of Appeal in addressing a similar matter held that;

Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment. ...



107. In this case, the respondent bank is finance-sensitive and the position held by the claimant as branch manager is similar to that of a financial custodian and other valuables. Conflict of interest and lapse in the fiduciary duty bestowed on him is capable of affecting the financial position of the respondent and such breach and violation is capable of initiating fraudulent transactions. This is noted in the case of *Agnes Murugi Mwangi vs. Barclays Bank of Kenya Limited* (2013) eKLR and *Evans Kamadi Misango v Barclays Bank of Kenya Limited* (2015) eKLR where the court held that;

... In the business of handling other people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face. The Claimant's conduct fell below this standard and I find that the Respondent had a valid reason for terminating her employment

108. In this case, the claimant was called to account for his conduct and his responses were found unsatisfactory. He admitted to buying a housing unit from a customer without a proper sale agreement which is in conflict of interest and to failing to address irregularities concerning the allocation of excesses within his branch which is in breach of the lending procedures. The claimant was invited to a disciplinary hearing and failed to explain his conduct and hence found culpable of misconduct leading to termination of employment.

109. In this case, termination of employment was justified and the claimant was taken through due process.

110. On the claims made, the reasons leading to termination of employment address, each claim should be addressed on the merits. Any terminal dues owed to the claimant and based on the law should be assessed and addressed accordingly.

111. Upon the termination of employment through a notice dated 26th May 2023, the respondent offered to pay notice pay. However, there is no record of this payment. The sum of Ksh 647, 218 is due in notice pay.

112. On the findings above, termination of employment was found justified, and compensation is not due.

113. On the claim that there was defamation of the claimant by the respondent following the publication of his matters following an incident on April 6, 2023, the claimant's case is that the respondent hired private investigators to follow him and submit a report. The response is that this court lacks jurisdiction to hear defamation claims. The need to follow up on the claimant on his engagements after work was not given context vis-a-vis the issues at hand relating to his work conduct.

114. Defamation in employment is prohibited. In the case of *Naqi Syed Omar v Paramount Bank Limited & Another* [2015] eKLR the court held that;

In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Petitioner had the potential to damage his employability. ... In employment-related, defamation is based on the old tort of defamation but with a new spin: the employee's injured or damaged employability and not merely the personal stigmatization must be compensated.

115. It is not contested that through email dated March 20, 2023, the claimant wrote to Arrie Rauttenbach, the CEO on issues he noted as victimization and nepotism. This was not addressed and instead, while on suspension, the respondent engaged a private investigator into his personal and private conduct and followed him in public, restaurants and pubs and also demanded to be supplied by different



establishments with information in violation of his rights. The use of such data collection is not stated in the response. The witnesses called by the respondent only addressed the issues of internal investigations.

Breach of privacy is contrary to article 31 of the *Constitution*.

116. In the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR the court defined privacy of the person to include;

The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information. In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy.

117. Even in employment, protection of the employee privacy is imperative. Where there is a breach of an employee's privacy, an employer cannot justify a position that the court lacks jurisdiction and then fail to address where there was a need to collect personal data and information unrelated to the employment. The rationale is addressed in the case *Coalition for Reform and Democracy (CORD) & 2 others v the Republic of Kenya & 10 others* [2015] eKLR where it was held that;

Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual but also to the integrity of the society of which the individual is part.

118. The conduct of the respondent leading into the investigations of the claimant's private life in the context of matters ongoing at the workplace is not justified. No basis was given for such conduct.

119. The claimant was a senior employee of the respondent and whatever conduct he engaged in after office/work hours, where this was found contrary to his letter of appointment and workplace policy, recourse was to invite him to address. Engaging in private investigations and then failing to bring such matters to the claimant to address as an employee was not justified. His constitutional rights under article 31 were breached by the respondent.

120. In the case of *Daniel Musinga t/a Musinga & Co Advocates v Nation Newspapers Limited* [2006] EKLR, the court in awarding the Plaintiff Kshs 10, 000,000 damages for defamation stated;

the court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum, as will compensate him for the wrong he has suffered. An award of damages must cover injured feelings, the anxiety and uncertainty undergone during the court trial.

121. In employment and labour relations, damages can be awarded to an employee under the provisions of section 12 of the *Employment and Labour Relations Court Act*. The parameters to be considered in my view is aptly addressed in the *DK Njagi Marete v Teachers Service Commission* [2013] e-KLR whether the court emphasized the need for proportionality and fairness in evaluating the suitability of



employment remedies. The demands of social justice must be weighed carefully, against the needs of economic development;

... Ultimately, the purpose of compensatory awards is not to punish errant employers, however egregious their decisions against their employees be; the objective is to ensure economic injury suffered by the employee, is adequately redressed.

122. The claimant had served the respondent well until matters were brought to his attention through notice to show cause dated March 17, 2023. Internal investigations conducted revealed various breaches but this did not justify a violation of his privacy rights secured under article 31 of the *Constitution*. The facts weighed and similar case law addressed, general damages claimed at Ksh 5,000,000 is hereby found justified.
123. The claim for character assassination is addressed as above. Context is also given that the claimant has mitigated his loss of employment by securing new engagements and self-employment initiatives.
124. On the claim for bonuses for the year 2022 at Ksh 2,300,000 The respondent contested the same on the basis that under the policy, this was discretionary and that where the employee was subject to investigations, such was not payable. The policies applied by the respondent must protect both parties equally. On the one part, the subject policy required that upon the close of year, each employee enjoying a bonus for good performance should receive communication from the supervisor which the claimant received from Dunfold Odanga that following his excellent performance, he had earned a bonus. This related to the year 2022 way before disciplinary proceedings were brought to the claimant's attention. The announced bonus cannot be negated after the fact of its communication. Disciplinary procedures were only initiated against the claimant through the notice to show cause dated 17th March 2023. Going back to sanction him and deny him a benefit accrued backwards and relating to his performance in the year 2022 is to engage in unfair labour practices.
125. The claimant is entitled to the claim of Ksh 2, 300,000 in unpaid bonuses for the year 2022.
126. On the claim for salary increments at 13% from January 2023 to May 2023, the discretion not to award such payment upon the respondent is removed the moment a policy was issued that was known to all employees that such percentages were due. From March to May 2023 during the disciplinary process, the claimant was not in control of his employment. The time taken to address the workplace misconduct should not deny him the due benefits while employment subsisted. Submissions by the respondent that the salary increase was purely discretionary vis-a-vis the records and policies placed before the court are not correct.
127. Employment rights can be secured contractually, through workplace policies and practices and agreements. In this case, the court finds the claim of a 13% salary increase from January to May 2023 justified at Ksh 647, 218.
128. On the Certificate of Service, best practice demands that the employee should clear and the same issued under the provisions of section 51 of the *Employment Act*.
On costs, the claims addressed above, each party bears its costs.
129. Accordingly, judgment is entered for the claimant against the respondent in the following terms;
 - a. A declaration that there was a violation of constitutional rights;
 - b. General damages Ksh 5,000,000;
 - c. Unpaid bonuses for the year 2022 Ksh 2,300,000;



- d. Notice pay Ksh 647,218;
- e. Unpaid salary increments at 13% from January 2023 to May 2023 Ksh 373,294;
- f. The claimant to complete clearance for issuance with a Certificate of Service;
- g. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 1ST DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

