



**Waithira v Cooperative Bank of Kenya Ltd (Cause 205 of 2019)  
[2024] KEELRC 13180 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13180 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 205 OF 2019  
JK GAKERI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**CHARITY WAITHIRA ..... CLAIMANT**

**AND**

**COOPERATIVE BANK OF KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit vide a Memorandum of Claim filed on 2<sup>nd</sup> April, 2019 alleging unlawful, unfair termination of employment and non-payment of terminal dues and benefits.
2. The Claimant avers that she joined the Respondent in 2008 and was confirmed in 2012.
3. The Claimant's case is that she applied for a staff laptop loan on 4<sup>th</sup> January, 2017 and the sum of Kshs.99,180.00 was disbursed to the vendor, M/s Daphyl Enterprises on even date and received the laptop on 6<sup>th</sup> January, 2018, but it was not the model or make she needed and returned it to Daphyl Enterprises for replacement to HP Elitebook 2560P which she received on 20<sup>th</sup> January, 2018.
4. That the Respondent issued Circular No. 02/2018 on falsified chattels as security for personal loans and diversion of loans and converting them to cash and some vendors were suspended by the bank.
5. The Claimant alleges that she received the 1<sup>st</sup> notice to show cause on 18<sup>th</sup> May, 2018 Respondent and a second one on 17<sup>th</sup> July, 2018 and responded.
6. Both notices required an explanation of the sum of Kshs.53,000.00 the Claimant had received from one Raphael Wainaina Njeri.
7. It is the Claimant's case that she was invited for a disciplinary hearing, attended with a witness and was dismissed from employment vide letter dated 17<sup>th</sup> September, 2018.



8. The Claimant alleges that she was discriminated and her right to privacy was violated as the Respondent accessed her personal account and used the information for unauthorized purpose, investigated her personal business and the salary earned. That, other employees who committed gross misconduct remained in employment while others were reinstated.

9. According to the Claimant, the summary dismissal was unfair and unlawful.

The Claimant prays for

- i. A declaration that the termination of employment was unlawful and wrongful.
- ii. A declaration that her right to privacy was breached.
- iii. General damages and exemplary damages for violation of the right to privacy.
- iv. Damages for loss of employment.
- v. Compensation for unfair and unlawful termination of employment.
- vi. Certificate of service
- vii. An injunction to restrain the Respondent from harassing the Claimant or attaching her property under the guise of recovering monies loaned.
- viii. Service pay.
- ix. Costs of the claim and interest.

### **Respondent's Case**

10. The Respondent admits that the Claimant was its employee but avers that the Claimant applied for the staff laptop loan on 2<sup>nd</sup> January, 2018 not 4<sup>th</sup> January, 2017.

11. It also admits having paid Daphyl Enterprises Kshs.99,180.00 into account No. 01148642924600 on the 4<sup>th</sup> January, 2018 to enable the Claimant acquire a laptop.

12. That of the Kshs.99,180.00, the sum of Kshs.94,100.00 was credited into the account of Raphael Wainaina Njeri A/C No. 01125310369400 at the Respondent's bank by one Phyllis Ouna, the vendor and the sum of Kshs.53,000.00 sent to the Claimant's cell phone number 254725393255 on 5<sup>th</sup> January, 2018. That M/s Daphyl Enterprises, the purported vendor retained a sum of Kshs.5,080.00

13. The Respondent avers that following the discovery of the diversion of the loan investigations were conducted and the Claimant's employment was subsequently terminated for colluding with one Phyllis Tata Ouna of M/s Daphyl Enterprises to divert sum of Kshs.99,180 as a staff laptop loan and was thus dishonest and the alleged repayment of the sum of Kshs.53,000.00 by Raphael Wainaina Njeri was untrue.

14. It the Respondent's case that as a bank, it has unfettered discretion to scrutinize its customers' account so as to flag suspicious and/or fraudulent transactions and the vendor and Raphael Wainaina Njeri's accounts were in the bank and it had the right to access them.

15. That the staff laptop loan was subject to the Respondent's policies and was granted for a particular purpose and the termination of employment was fair and nothing is owed to the Claimant as she was paid one (1) month's salary in the lieu of notice and was a member of the NSSF.

The Respondent prays for dismissal of the Claimant's suit with costs.



## Claimant's Evidence

16. On cross-examination, the Claimant testified that she joined the Respondent on permanent terms vide letter dated 11<sup>th</sup> July, 2011 and was bound by the terms of the CBA between the union and the Respondent.
17. CWI admitted that the laptop she acquired from M/s Daphyl Enterprises was the security for the staff laptop loan. She also admitted that she knew Raphael Wainaina Njeri but did not know one Phyllis Tata Ouna's husband but knew Phyllis Ouna as she was on the bank suppliers panel having been introduced to her by Raphael Wainaina Njeri.
18. The Claimant admitted having received Kshs.53,000.00 from Raphael Njeri on 5<sup>th</sup> January, 2018 by Mpesa and further admitted that Phyllis Ouna received Kshs.99,180.00 as M/s Daphyl Enterprises on 4<sup>th</sup> January, 2018, sent Kshs.94,100.00 to Raphael Wainaina Njeri's account on 5<sup>th</sup> January, 2018 and Raphael sent Kshs.53,000.00 to the Claimant. The Claimant admitted that she was aware of the circular on misuse of loans facilities and investigations and was invited by Mr. Wambugu Macharia, the investigator, to explain receipt of Kshs.53,000.00
19. The witness admitted that Mr. Mwicigi worked in the same bank in Account Opening as was Raphael Wainaina Njeri, but denied having known that Mr. Mwicigi and Phyllis Ouna were married under African Customary law.
20. The Claimant admitted having written the undated letter on record explaining the transaction.
21. It was her testimony that she gave details of the laptop to the bank, changed the laptop after one (1) week but did not inform the bank and was aware that uttering a false document amounted to gross misconduct and was aware of the Respondent's staff manual from the date of employment.
22. CWI admitted that the change of the laptop amounted to a variation of the security the bank had, a fact she did not disclose.
23. It was her evidence that she was unaware of conflict of interest in the bank's Code of Conduct and Ethics.
24. The witness admitted that the contents of her response to the notice to show cause dated 21<sup>st</sup> May, 2018 contradicted her evidence in Court.
25. That when she ordered the laptop she was unaware of its physical location but trusted the supplier and it was supplied at Highlands Restaurant, Kimathi street and had no documentary evidence to show that Raphael Wainaina Njeri owed her any money.
26. The witness admitted having received two (2) notices to show cause, invitation to a hearing, attendance, signing the minutes and eventual termination letter.
27. The Claimant also confirmed that her letter of employment had entry and exit times and the Respondent did not communicate any changes and was aware of the bank's policy on overtime and that it was an arrangement between staff and management.
28. The witness admitted that she had not lodged any claim for overtime at all and further admitted having been a member of the Respondent's pension scheme and the NSSF and was paid Kshs.869,527.40 as pension as well as salary in lieu of notice and admitted being indebted to the bank.
29. CWI admitted that she was notified of the right to appeal but did not appeal the decision and could not fault the bank for arriving at a different decision on appeal filed by an employee.



30. The witness equally admitted that the documents held by the bank as collateral for the laptop were useless as she had a different laptop, a fact the bank was unaware of.
31. According to the Claimant, the bank accessed her personal business and mobile number but admitted that banks conduct customer appraisals on their financial status before loans are advanced and had an account with the Respondent which it could access.
32. On re-examination the Claimant testified that the sum of Kshs.53,000.00 from Raphael Njeri was a refund of the amount she had given him to clear a hospital bill and denied having diverted the staff laptop loan.
33. That she was unaware of the bank's Code of Conduct and Ethics as she had not been trained and was equally unaware of the fact that she had to notify the bank she had a different gadget.
34. The Claimant testified that she worked up to 6:00pm and was unaware of how to claim for overtime and feared appealing the dismissal from employment.
35. It was her testimony that the seller of the laptop had no physical place of business.

### **Respondent's Evidence**

36. RWI, Mr. Duncan Wambugu confirmed on cross-examination that he was the security Manager at the bank and previously worked at the Director of Criminal Investigations (D.C.I) and Equity bank and conducted the investigation on suspected impropriety by the Claimant and others and filed a report recommending disciplinary action against the Claimant for misconduct.
37. That the Claimant testified having advanced a loan to Mr. Raphael Wainaina Njeri.
38. That he interviewed Raphael Wainaina Njeri but M/s Daphyl Enterprises, though available was unwilling to be interviewed.
39. The witness admitted that he had no Court Order to access the Claimant's call logs or her consent but questioned her about the bank account and accessed her bank statement.
40. That he attended the disciplinary hearing to explain matters to the team.
41. That the Claimant diverted Kshs.53,000.00 and the balance was unaccounted for and did not show how the cash was used.
42. On re-examination RWI testified that he only accessed the Claimant's Mpesa payment from the account of Raphael Wainana Njeri's account as he had sent the sum of Kshs.53,000.00 to the Claimant's mobile number 0725393255 but did not access her Mpesa statement and Daniel Mwicigi and Raphael Njeri were also under investigation.  
That he only accessed the payment itself.
43. RWI admitted having accessed the Claimant's bank a/c which was normal in banking to prevent incidences of irregularities to safeguard the bank and did not access any private conversation by the Claimant.
44. That the memo on diversion of funds was issued after the Claimant had taken the staff laptop loan.
45. That all staff had access to loans at special rates and there was no conflict of interest and it was a normal staff loan until the proceeds were diverted by the Claimant.
46. RWI testified that he was unaware that the Claimant was working overtime.



47. According to the witness, review and analysis of bank accounts did not require a court order.
48. The witness concluded by stating that the Claimant purported to acquire a laptop from M/s Daphyl Enterprises but the monies were repaid to her by Raphael Wainaina Njeri, a colleague working in the same bank.
49. RWII, Leah Kerich confirmed that the Claimant was serving in the clerical grade having worked since 2011 and admitted that certain employees retired as clerical staff.
50. RWI testified that the bank had records on overtime and the Claimant has not sought payment for any extra time worked but was unsure whether the Claimant had been trained on claiming for overtime.
51. That the bank had the right to access employee accounts but had no right to access private communication between staff.
52. That banks allowed customers to open accounts with it and the claimant completed the staff laptop loan form as required.
53. Finally, on re-examination the witness testified that the investigation revealed that the Claimant borrowed the sum of Kshs.99,180 for a laptop but diverted it to other uses.
54. That the Respondent had a policy on overtime and all employees are made aware of the same at the point of entry and are expected to familiarise themselves with the policies.
55. That staff are required to make a record and submit the same for approval and payment within the prescribed period.

#### **Claimant's Submissions**

56. On termination of the Claimant's employment, Counsel submitted that none of the grounds under Section 44 (4) of the *Employment Act* justified the Claimant's dismissal for receiving Kshs.53,000.00 from Raphael Wainaina Njeri as explained the reason for the transfer as she explained by RWI who rehashed what the Claimant told him during the investigation, and the investigator interviewed both Raphael Wainaina Njeri and the Claimant and RWI confirmed that the Claimant's loan application form was not forged.
57. Counsel argued that the amount borrowed was paid to M/s Daphyl Enterprises not the Claimant and she availed a computer at the hearing.
58. Counsel submitted that as there was no forged document on record or a false entry by the Claimant, the Respondent had no valid reason to terminate her employment as a staff loan was not an abuse of corporate opportunity.
59. Reliance was made on *Kenfreight (EA) Ltd V. Benson K. Nuguti [2019] eKLR*.
60. According to Counsel, the Claimant acquired a laptop and did not commit any offence and the Respondent failed to prove that the sum of Kshs.53,000.00 was not a refund of monies given to Raphael Wainaina by the Claimant.
61. Reliance was made on *Aseka V. South African Airways (Proprietary) Ltd [2024] KEELRC 20 (KLR)* on the burden of proof as well as *Hilda Wanjiku Waweru V Bidwood Suites Hotel Ltd [2020] eKLR*, to urge that a termination of employment is unfair if the employer fails to prove that it had valid reasons to do so.



62. On the right of privacy, Counsel urged that every person had the right to privacy under Article 31 of *the Constitution* of Kenya and the exceptions under Article 24 only applied to offences of proceeds of crime, money laundering and financing terrorism. That RWI and RWII confirmed that the Respondent accessed the Claimant's account details and mobile communication without her consent.
63. Counsel submitted that the bank required express consent of the Claimant to access her bank account the fact that it holds the account notwithstanding.
64. On the reliefs, Counsel submitted that the Claimant was entitled to all as claimed and cited the decisions in *KBC V Geoffrey Wakio* [2019] eKLR and *GSN V Nairobi Hospital & 2 Others* [2020] eKLR for compensation and damages for breach of privacy respectively.

Counsel urged that non-payment of overtime was a continuous injury.

### **Respondent's Submissions**

65. As to whether the Claimant's dismissal from employment was procedural and lawful, Counsel submitted that it was as envisaged by the Respondent's staff manual and the provisions of the *Employment Act*.
66. Reliance was made on the Court of Appeal decision in *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR on the elements of a fair termination of employment to urge that the witnesses called by the Respondent laid bare what transpired from the moment the claimant applied for a staff laptop loan to the time of summary dismissal, including, the money trial and eventually the supposed vendor retained a paltry Kshs.5,080 which would appear to suggest that the funds were diverted contrary to the Respondent's manual and Code of Conduct and Ethics.
67. Similarly, the Claimant's response to the notice to show cause was found inadequate and she was subjected to a disciplinary hearing.
68. According to Counsel for the Respondent, termination of the Claimant's employment was procedural and lawful.
69. As regards the reliefs sought, Counsel submitted that since the termination of employment was valid, the claim for compensation is unsustainable as is the claim for pay in lieu of notice as the Claimant was paid.
70. Counsel submitted that the Claimant had not placed any material to demonstrate entitlement to overtime and was aware of the Respondent's policy on overtime.
71. Reliance was made on the decisions in *George Kariuki Ngugi & 2 Others V Brolaz Cast Arica Ltd* [2014] eKLR, *Thomas Sila Nzivo V Bamburi Cement Ltd* [2014] eKLR and *Daniel Otieno Ogunjo V Pendulum Entertainment Ltd t/a Treehouse Club* [2021] eKLR to reinforce the submissions.

### **Analysis and determination**

72. It is common ground that the Claimant was an employee of the Respondent effective 11<sup>th</sup> July, 2011 at a salary of Kshs.50,944.00 per month which subsequently rose to Kshs.1,880,052.00 per annum as of March 2017 when the Claimant was promoted to Supervisory Grade 2.
73. Equally not in contest is that the Claimant completed the Staff Loan Application Form for a laptop loan on 30<sup>th</sup> December, 2017 and it was approved on 4<sup>th</sup> January, 2018. The application heralded the separation between the Claimant and the Respondent about 9 months later.



74. Evidence on record reveals that the Respondent's Human Resource Division suspected that employees were diverting laptop and furniture loans to other purposes and the Security Department was called upon to investigate.
75. The report signed by Edwin Karuri details how not less than 18 members of the Respondent's staff brazenly abused laptop and furniture loan facilities to access cheap funds from the bank using various reasons to access the cash paid or due to the alleged vendors, who in essence were mere conduits for the funds.
76. It is not in contest that the Claimant received and responded to two notices to show cause, was invited for a disciplinary hearing and attended in the company of Fredrick Savonge, charges were read out and particulars provided signed the minutes and her employment was terminated thereafter.
77. The Claimant did not fault the procedure she was taken through in any respect.
78. From the foregoing, the issues that commend themselves for determination are:
- i. Whether termination of the Claimant's employment by the Respondent was unfair and unlawful.
  - ii. Whether the Respondent violated the Claimant's right to privacy.
  - iii. Whether the Claimant is entitled to the reliefs sought.
79. On the 1<sup>st</sup> issue, Counsel for the parties have adopted opposing positions with the Claimant's Counsel maintaining that it was not only unfair but unlawful as the Claimant neither forged any document and explained the reason why Mr. Raphael Wainaina Njeri, a colleague, paid her Kshs.53,000.00 on 6<sup>th</sup> January, 2018.
80. According to the Respondent, the Claimant violated Respondent's Operating Manual, Business Code of Conduct and Ethics and the staff manual by colluding with a supplier to have an invoice issued for the diversion of a staff laptop loan.
81. It is common ground that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason to do so and employed a fair procedure.
82. In other words, a fair termination of employment is characterised by a substantive justification and a fair procedure as provided by the provisions of Sections 41, 43, 44, 45 and 47(5) of the Employment Act and as aptly captured in Walter Ogal Anuro V Teachers Service Commission [2013] eKLR and Naima Khamis V Oxford University Press (EA) Ltd [2017] eKLR.

### **Reason for termination**

83. The 1<sup>st</sup> notice to show cause accused the Claimant of diverting a staff laptop loan of Kshs.99,180 and thus acted dishonestly and in breach of trust.
84. In essence, the Claimant was being accused of having taken a staff laptop loan yet she did not intend to buy a laptop and thus breached the Respondent's Staff Manual and the Business Code of Conduct and Ethics.
85. In her response, the Claimant maintained that she bought a laptop and could avail it for verification and was aware that it was the security for the facility.



86. The Claimant's response is however, silent on why the vendor, M/s Daphyl Enterprises deposited a large portion of the loan in Raphael Wainaina Njeri's account and why she received Kshs.53,000.00 from Raphael Wainaina Njeri.
87. The second notice to show cause dated 11<sup>th</sup> July, 2018 was more detailed and focused on the movement of funds and the relationship with one Daniel Mwicigi, a colleague at the bank.
88. The letter also made reference to the response the Claimant had given to the investigator, that he had loaned Raphael Wainaina Njeri Kshs.53,000.00 in November 2017 and he was repaying the same.
89. In her response dated 18<sup>th</sup> July, 2018, the Claimant alleged that she had given Mr. Raphael Wainaina Njeri Kshs.53,000.00 to deal with an emergency hospitalization of a relative and denied that it was a loan.
90. It was the Claimant's testimony that the calls made to Daniel Mwicigi, were purely bank business and denied having refused to produce the laptop as it was in Loitoktok and the investigator did not request for it.
91. The letter of termination accused the Claimant of diversion of proceeds of a staff laptop loan granted by the bank and thus breached the trust reposed in her.  
Notably, the accusations against the Claimant remained constant.
92. The investigator's report as corroborated by the Claimant's letter to the investigator states that the Kshs.53,000.00 received from Raphael Wainaina Njeri was in repayment of a loan the Claimant had given to him in November 2017.
93. In her evidence, the Claimant confirmed, on cross-examination that the sum of Kshs.99,180.00 was disbursed to M/s Daphyl Enterprises on 4<sup>th</sup> January, 2018 for a laptop but on 5<sup>th</sup> January, 2018, the sum of Kshs.94,100 was deposited in the account of Raphael Wainaina Njeri admitted having received Kshs.53,000.00 from Raphael Wainaina Njeri RWI and confirmed the money trail to the Claimant.
94. In her defence the Claimant stated that she bought the laptop and gave the bank its specifications but changed it after one (1) week without notifying the bank or availing the particulars of the new gadget.
95. In her statement to the investigator, the Claimant indicated that she changed the laptop after two (2) weeks as it was not user friendly. The Claimant admitted in court that the change of the laptop was a variation of the security the bank had on the facility. In fact, she admitted that the particulars the bank had were worthless.
96. At the hearing, the Claimant used the same defence that the Kshs.53,000.00 from Mr. Raphael Wainaina Njeri was not a loan but monies he had given him to attend a fund raiser, the exactness of the amounts notwithstanding.
97. That she could not produce the laptop during investigation owing to the short notice which contradicted her response to the Notice to Show Cause dated 18<sup>th</sup> July, 2018 where she stated that the investigator did not request for its production.
98. It was her response that she did not have a receipt for the 1<sup>st</sup> laptop because she acquired a replacement which would appear to imply that the supplier requested for the original receipt in order to supply the replacement laptop, which in the Court's view, is highly improbable.
99. The Claimant admitted that she did not use the laptop at any point and did not deny that it had old files dating 2012 and 2016 and thus not new or worth the amount borrowed.



100. Puzzlingly, the Claimant was accorded time to avail a statement of her KCB account but did not endeavour to do so yet it would have confirmed the source of fund she gave to Raphael Wainaina for the fund raiser or hospitalization of a relative.
101. From the evidence on record, it is apparent that the Claimant's contradictory explanation as to where she obtained the Kshs.53,000.00 given to Raphael Njeri and why she received a similar amount from him on the date she allegedly received the laptop from Phyllis Ouna creates the impression of a person desperately trying to wriggle out of an uncomfortable situation.
102. The fact that the Claimant did not inform the bank that she had changed the laptop and provide its particulars and did not avail it to the investigator and the one she had at the hearing was not new would appear to suggest that the Claimant's evidence is untruthful.
103. Relatedly the Claimant could not explain why she changed the laptop after one (1) week or two (2) weeks, yet she admitted at the hearing that she did not use it all and did not bother to notify the bank of the change and had no documentary evidence to demonstrate that she bought any laptop from Daphyl Enterprises.
104. Section 43(2) of the *Employment Act* provides that
- The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
- See *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*.
105. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR B. O. Manani J. stated that
- “...All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists”.
106. Finally, in *Kenya Revenue Authority V Reuwel Waitthaka Gitahi & 2 Others* [2019] eKLR, the Court of Appeal expressed itself as follows:
- “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 employee's services. That is a partly subjective test.”
107. The foregoing sentiments are fortified by the sentiments of Lord Denning in *British Leyland UK Ltd V Swift* [1981] IRLR 91 on the “band or range of reasonable responses test”.
108. The totality of the evidence before the Court is that employees of the Respondent routinely took staff laptop and furnisher loans through selected firms with a view to diverting the funds to other purposes.
109. The incentive appear to have been that the loans were given at very low interest rates and the application process was very easy as it involved completion of the application form and availment of an invoice.
110. The diversion of the loan in the Claimant's case in the Court's view was rather blatant.
111. For the foregoing reasons and guided by the statutory and judicial authorities cited above, it is the finding of the Court that the Respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant's employment on 17<sup>th</sup> September, 2018.



112. The fact that the Claimant had no verifiable evidence of why her supplier deposited part of the loan given to it to supply the laptop in Raphael Wainaina Njeri's account, and the Claimant received Kshs.53,000.00 from Raphael Wainaina Njeri, allegedly changed the laptop within two (2) weeks without the bank's authority or notification of the change, could not produce the laptop for verification by the investigator, had no receipt or credible evidence that she received a laptop from Phylis Ouna on 6<sup>th</sup> January, 2018, and could not show where the cash she gave to Raphael Wainaina Njeri came from, reduces the probative value of the evidence for want of verification and veracity.

### **Procedure**

113. As held in *Pius Madiafu Isindu V Lavingtone Security Guards Ltd* [2017] eKLR, Section 41 of the *Employment Act* prescribes an elaborate mandatory process which an employer is required to comply with in a termination of employment to guarantee procedural fairness.

114. The essential elements of procedural fairness have been articulated in legions of decisions including *Postal Corporation of Kenya V Adrew K. Tanui* (Supra) cited by the Respondents Counsel where the Court of Appeal identified four elements namely; explanation of the grounds of termination in a language understood by the employee, reasons for which the employer was considering termination of employment, entitlement of the employee to the presence of another employee of his choice during the explanation of the grounds of termination and hearing and considering any representation made by the employee and the person chosen by the employee.

115. A panoramic view of the evidence on record reveals that the Respondent complied with the requirements of Section 41 of the *Employment Act* as the Claimant was aware of the grounds on which the Respondent was considering termination of employment, the grounds were read out to her at the hearing in the presence of Mr. Fredrick Savonge, the colleague the Claimant had chosen and had been notified of the right to be accompanied by a colleague.

116. Finally, the Claimant and the colleague made representations which the panel considered in making the decision.

117. As adverted to elsewhere in this judgment, the Claimant did not vociferously assail the procedure employed by the Respondent other than alleging that she was not allowed to read the minutes yet she signed and gave some explanation on the minutes. Based on the evidence on record the Court is satisfied that the Respondent acted in accordance with the provisions of Section 41 of the *Employment Act*.

118. In the upshot, it is the finding of the Court that the termination of the Claimant's employment by the Respondent was neither unfair nor unlawful.

119. On violation of the Claimant's right to privacy, the Claimants Counsel contended that the Respondent accessed the Claimant's bank account details and mobile communication without her consent.

120. The Respondent's Counsel did not submit on this issue.

121. Significantly, other than the generalized allegations made in paragraph 16 of the memorandum of claim that "the Respondent violated the Claimant's rights of privacy by breaching confidentiality duty" and that it accessed the Claimant's "personal account" and used the information for "illegal and improper purpose" and "investigated the Claimant's personal business as to how he spent the loan, the written witness statement is silent on the alleged violation of the right to privacy.

122. It is thus unclear to the Court which personal account of the Claimant was accessed by the bank without consent or court order or the "personal business" investigated.



123. Concerning utilization of the staff laptop loan, the transaction was between the Claimant and the bank and the facility was extended by the employer to its employee on favourable terms to enable her acquire a laptop and it was the business of the bank to know how the loan was utilized since it was given for a particular purpose, as using it otherwise would amount to abuse of the facility.
124. The Court finds it disingenuous for the Claimant to allege that the bank violated her right to privacy by investigating how its money was utilized.
125. The bank had given the money for a particular purpose and its record indicated as much and had to satisfy itself that it was applied accordingly.
126. The Claimant's mobile number came up because a portion of the Kshs.94,100 deposited in Raphael Wainaina Njeri's account found its way to the Claimant's Mpesa account.
127. RWI testified that he accessed the Claimant's communication records from the bank system which has details on who talked to whom in the office and the Claimant admitted that the conversations she had with Raphael Wainaina Njeri were work related as he was in BOS. RWI testified that he did not access any private conversation by the Claimant.
128. The other question to be answered is whether a bank is required to obtain customer's consent or court order before viewing the customer's bank account.
129. It is trite law that a banker customer relationship is contractual in nature based on trust and imposes obligations on both parties.
130. Although a banker is bound to maintain secrecy or confidentiality of the customer's account and dealings, the duty applies in relation to 3<sup>rd</sup> parties not to the banker and the duty is subject to several qualifications including where it is necessary to protect the bank, as was the case in the instant suit where the bank was investigating suspected improprieties by the Claimant and other employees.
131. Banks are obligated by law to remain vigilant to ensure that customers do not use their accounts for improper purposes, and suspicious transactions are routinely investigated.
132. In the Court's view, the Respondent did not require the Claimant's consent to access her bank account as she was its employee and borrower and the loan would be repaid using the employee's salary.
133. Section 107 of the *Evidence Act* provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
134. Section 109 provides that;

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.
135. Without adducing any evidence of the "personal account" accessed by the Respondent bank and when, "personal business" investigated or the private conversation accessed, it is the finding of the Court that the Claimant has failed to prove that the Respondent violated her right to privacy guaranteed by Article 31 of *the Constitution* of Kenya.

## Reliefs

136. As regard the reliefs sought, the Court proceeds as follows;



### **i. Declaration**

137. Having found that termination of the Claimant's employment was neither unfair nor unlawful, the declaration sought is unmerited and is declined.

### **ii. Declaration on right to privacy**

138. Having found that the Claimant has failed to evidentiary demonstrate that her right to privacy was violated by the Respondent the declaration sought lacks merit and is declined.

### **iii.**

139. General damages and exemplary damages for breach of the right to privacy

140. Having found as above, the claim for general and exemplary damages is unsubstantiated, is unsustainable, and it is declined.

### **iv. Compensation for unfair termination of employment**

141. Having found that the Respondent had a valid and fair reason to terminate the Claimant's employment and did so in accordance with a fair procedure, the prayer for compensation is unsustainable and it is dismissed.

### **v. Injunction to restrain the Respondent.**

142. This prayer was unsubstantiated by evidence and is dismissed.

### **vi. Service pay**

143. It is common ground that the Claimant was a member of the National Social Security Fund (NSSF) and the Respondent's pension scheme, facts she admitted on cross-examination. She further admitted having been paid Kshs.869,527.40 by the Respondents pension scheme.

144. The claim for service pay is disqualified by the provisions of Section 35(6) of the [Employment Act](#).

### **vii. Damages for loss of Employment**

145. This claim lacks particulars and is for dismissal.

146. The [Employment Act](#) does not recognize the remedy of damages for loss of employment nor do the provisions of Section 12 of the [Employment and Labour Relations Court Act](#).

147. The claim is dismissed.

### **viii. Overtime**

148. Under paragraph 20(c) of the Memorandum of Claim, the Claimant identified overtime but did not pray for payment under paragraph 24.

149. Paragraph 20(c) states that the overtime claimed is Kshs.4,860,960.00 for 10 years.

150. Puzzlingly, the Claimant's written witness statement dated 6<sup>th</sup> March, 2019 is silent on the reporting and exit times.

151. Equally, the statement makes no reference to the overtime claimed and when it accrued, including why it was not claimed during the subsistence of the employment relationship.



152. On cross-examination, the Claimant confirmed that she was aware of the Respondent's policy on overtime and admitted that her reporting and exit times did not change at any time.
153. The Claimant wants the Court to believe that she worked overtime for (2) hours every day from the date she was employed to the date of termination of employment and made no effort to claim or follow up her dues and with no supportive evidence.
154. The computation on record also assumes that the Claimant worked every day of the week, month and year for 10 years.
155. Intriguingly, the Claimant did not allege or claim that the Respondent had the requisite records and issue a notice to produce in support of her claim. Without any scintilla of supportive evidence, the claim remains an allegation or assertion and nothing more.
156. It is trite law that he who alleges shoulders the burden of proving the allegations made as provided by Section 107 of the *Evidence Act* and restated in legions of decisions including Peter Gitirau Munya V Dickson Mwenda & 3 Others [2014] eKLR where the Supreme Court laid it bare that;
- “The person who makes such allegations must lead evidence to prove the fact, she or he bears the initial burden of proof which she or he must discharge. The legal burden in this regard is not just a notice behind which any party can hide. It is a vital requirement of the law.
- On the other hand, the evidential burden is a shifting one and is a requisite response to an already discharged initial burden. The evidential burden is the obligation, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue”.
157. The Claimant's prayer for overtime lacks particulars and supportive evidence and it is accordingly dismissed.

#### **ix. Certificate of Service**

158. The Claimant is entitled to a Certificate of Service by dint of Section 51 of the *Employment Act*, if the same has not been issued.
159. Flowing from the foregoing, it is clear that the Claimant's suit against the Respondent is for dismissal and it is accordingly dismissed with no orders to costs.
160. Certificate of Service to issue within 30 days, if it has not previously been issued.
161. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 21<sup>ST</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

DRAFT

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