



**Adrian v Co-operative Bank of Kenya Limited (Cause 1792 of 2017)  
[2024] KEELRC 2812 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2812 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1792 OF 2017  
K OCHARO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**JOSEPH MINAINI ADRIAN ..... CLAIMANT**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Contending that at all material times he was an employee of the Respondent, and charging that he was summarily dismissed from his employment wrongfully/ unfairly, the Claimant instituted this claim against the Respondent via the Statement of Claim dated 23<sup>rd</sup> August 2017, seeking the following reliefs: -
  - i) The summary dismissal from employment was substantively and procedurally wrongful/ unfair.
  - ii) The Claimant be reinstated.
  - iii) The Claimant be paid the remainder of the contract being twenty (21) months and twelve (12) days amounting to Kshs. 1,847,312/= (21 months x 86,323/= plus 12/30 x 86,323/=)
  - iv) The Claimant be paid twelve (12) months gross salary compensation for suffering wrongful/ unfair dismissal amounting to Kshs. 1,035,876/= (12 months x 86,323/=).
  - v) The Claimant be paid for physical and emotional damages emanating from the inhumane treatment at the branch.
  - vi) The Respondent to pay the costs.



2. Through a Memorandum of Defence dated 26<sup>th</sup> February 2018, the Respondent resisted the Claimant's claim, asserting that he was summarily dismissed due to his actions that mounted to a conflict of interest and unjustified personal gain both of which were against its policy. Additionally, the Claimant was lawfully and fairly terminated from employment.
3. When this matter came up for the hearing of the parties respective cases, they had, adopted their witness statements filed herein as their evidence in chief and, the documents filed under their various list of documents, as their documentary evidence.

#### **Claimant's case**

4. The Claimant was first employed by the Respondent as a graduate clerk on 18<sup>th</sup> November 2013. Subsequently, he was employed on a two (2) years fixed-term contract on 18<sup>th</sup> May 2014. The Claimant's contract was renewed on 5<sup>th</sup> February 2016 for another 2 years and he earned a gross monthly salary of Kshs. 86,323/= as at the time of dismissal.
5. He was at all material times covered by a Recognition Agreement and a beneficiary of a negotiated Collective Bargaining Agreement between the Kenya Bankers Association Union, where the Respondent was a member and the Banking Insurance and Finance Union [ Kenya]. The Collective Bargaining Agreement provided for a disciplinary procedure on grounds of misconduct, under Clause A5.
6. Sometimes in 2014 there was a fraud case where the Respondent nearly lost two million shillings. His colleague deposited a cheque of two million but due to network error the customer's account was credited twice hence the Respondent's account was debited by two million.
7. When the customer attended the bank to withdraw, the Claimant paid out one million shillings with the approval of the then acting Operations Manager. The customer latter approached the bank and withdrew three million through another Teller leaving his account without money. This led to the Internal account which was the responsibility of the Operation Manager and Branch Manager to be overdrawn by two million. They had to give an explanation on this.
8. Notwithstanding the circumstances, the Branch Manager started blaming for the situation alleging that he was the first one to allow the customer make a withdrawal. All these was geared towards covering up for the Teller who paid the three million as she was her friend, and absolve the management for their failure to reconcile the account. He was asked to record a statement, which he did. The Operations Manager was subsequently issued with a warning letter. This fuelled the bad blood between her and him. Thereafter, the Operations Manager started being hostile to him and sometimes put him in embarrassing situations.
9. On 20<sup>th</sup> August 2015 the cash officer verbally assaulted him in the presence of the Operations Manager. She never intervened even after he asked her to. This culminated to an unprovoked physical assault. It is at this point that the Operations Manager in a biased way ordered him to go sit at the executive counter. When he asked to see the Branch Manager, the Operations Manager dashed to the Branch Manager before he could get there, and poisoned his mind. When he eventually got to the Branch Manager, the Manager rudely indicated to him that he could send him on compulsory leave and that the bank was able to continue with its operations with or without his presence.
10. Thereafter, he proceeded to Hospital and was subsequently issued with a P3 form which he forwarded to the Director-Human Resources. On getting back to work, he found that the Operations Manager had already closed his cash till and confiscated his stamp. However, contrary to her expectations, he was allowed to continue working. Eventually, but unjustifiably, he was issued with a show cause letter



and subsequently, verbal warning letter. Him, the victim was being blamed. He immediately asked for a transfer from the station to no avail.

11. The manner in which he was treated at his place of work affected him health wise. He was diagnosed with post traumatic disorder.
12. The Claimant had joined Goodlife Sacco Limited (Fedha Microfinance Investment Limited) on 29<sup>th</sup> October 2014 and paid the membership fee of Kshs. 1,000, after which he invested Kshs. 65,000/= which was to earn him interest at rate of 8% per month. The Claimant withdrew his membership after four months and expected a refund of his money. This didn't happen, prompting him to demand for the refund through the Saccos' Nyahururu Branch, Manager. She was not helpful. She asked him to pursue the refund from the Saccos' Head Office or from whoever he gave the money.
13. On 4<sup>th</sup> December 2015 he received money KSHS. 100,000 from Jonathan Njenga [Credit Manager – Goodlife Sacco] holder of Account 011165015xxxxxx which he was depositing into his account which he was transferring from the Sacco's account. The official agreed. He informed the Operations Manager. He proceeded to issue him with a receipt as a sign of good faith.
14. After realizing that he had been paid, Manager of the above-stated branch of the Sacco wasn't happy. She complained to the Operations Manager. The latter encouraged her to do a formal complaint and even lay a report with the police. When he reached out to the official who had paid him the money to inquire why the turn of events, the official told him that it was as a result of instructions by the Respondent's branch manager. On 17<sup>th</sup> December 2015, the Nyahururu Branch Manager of the SACCO raised a Complaint. The complainant was not Jonathan Waithaka Njenga who voluntarily gave the money.
15. On 16<sup>th</sup> December 2015, he received two cheques from a customer. One of the cheques was for deposit and another for encashment by the Official Philip Maina Mwangi. The account from which the funds Kshs. 120,000 was to be withdrawn had a deficit of KSHS. 1000, as the balance therein was only KSHS. 119,000 to the credit. The Claimant asked the customer to deposit Kshs. 1,000/= so that the cheque would clear. The customer requested the Claimant to make the deposit and give him Kshs. 119,000/=. However, the customer did not sign on the back of the cheque but on the deposit voucher only because of the long queue. It was subsequently alleged that he only gave KSHS. 100,000 to the customer. The allegation wasn't made by Philip Maina but their Branch Manager, a stranger to the whole transaction. CCTV footage could clearly show that the customer picked the Kshs. 120,000.
16. Following the above incidences, on 7<sup>th</sup> January 2016, he was issued with a show-cause letter with three accusations against him. He responded to the letter. Subsequently, through its letter dated 13<sup>th</sup> January 2016, the Respondent invited him for a disciplinary hearing which was slated for 18<sup>th</sup> January 2016. The invitation letter was served on him on Saturday afternoon, whilst the hearing was slated for Monday.
17. During the Claimant's disciplinary hearing on 18<sup>th</sup> January 2016, he denied the accusations against him but was still summarily dismissed on 5<sup>th</sup> February 2016 for gross misconduct.
18. The reasons for his summary dismissal by the Respondent were not aligned Clause A5 of the Collective Bargaining Agreement.
19. The Claimant appealed against the summary dismissal on 16<sup>th</sup> February 2016. He states that he was however not invited for an appeal hearing but through a letter dated 22<sup>nd</sup> February 2016, he was informed that the appeal had been dismissed.
20. At the disciplinary hearing he had requested that the CCTV footage be viewed to no avail.



21. The Claimant also states that the working environment was hostile and he was assaulted by his supervisor on 20/08/2015.
22. The Claimant reported to his union, who then reported a trade dispute to the Ministry of Labour. The conciliator issued her report dated 6<sup>th</sup> March 2017 which he doesn't agree with.
23. Cross-examined by Counsel for the Respondent the Claimant testified that the Kenya Shillings sixty-five thousand that he received from the Official, Jonathan, was a refund of his deposit with the Sacco. He joined the Sacco on 29<sup>th</sup> October 2014. The Official attended the bank to deposit the money on 24<sup>th</sup> September 2015.
24. As regards the Kshs. 120,000 transaction, the customer came latter alleging that he had given him less money. Upon the allegation, the Claimant made a report to the supervisor and requested her to check his till and run the CCTV. In the evening the manager checked the till and confirmed that there was no overage.
25. In both the transactions he acted diligently.
26. He further testified that though he was given a show cause letter, he wasn't given adequate time to make a response thereto. Instead of the requisite 5 days, he was only given 2 days. Notwithstanding the short notice, he had to respond as the letter had set timelines.

### **Respondent's case**

27. The Respondent presented one witness, Leah Kerich, Head of Employee Relations to testify on its behalf. The witness stated that the Claimant was employed as a Graduate Clerk on a two-year contract effective 18<sup>th</sup> November 2013 to 17<sup>th</sup> November 2015, which was further renewed from 18<sup>th</sup> November 2015 to 17<sup>th</sup> November 2017. The Claimant was posted to the Respondent's Nyahururu Branch until his summary dismissal on 5th February 2016.
28. The Respondent received a complaint from one of its customers, Jonathan Njenga, who operated Account No.011035015xxxxxx at its Nyahururu branch that on 4th December 2015, the Claimant served him as a teller. He received KSHS. 100000 to deposit into the account of this customer but instead deposited KSHS. 65000 to his own account purporting it to be a recovery of his external debt. This put the Respondent's reputation to serious erosion. Further, the action amounted to conflict of interest as his interest conflicted with that of the Respondent.
29. On 7th December 2015, police officers from Nyahururu police station visited the Respondent's Nyahururu branch while carrying out investigations into the matter. The Claimant admitted his action of depositing the customer's money into his account. He agreed to and indeed did deposit the Kshs. 65,000/= into Jonathan Njenga's account, to avoid criminal charges.
30. On 16<sup>th</sup> December 2015, Good Life SACCO Society Limited, one of the Respondent's customer, sent a complaint letter to the Respondent's Nyahururu branch manager. In the letter, they highlighted that on 16<sup>th</sup> December 2015, a representative of their member presented to the Claimant a cheque for Kshs. 120,000/= for encashment, but the Claimant only gave the representative KSHS. 100,000/=. Further, the Claimant failed to obtain the signature of this representative during encashment of the cheque as proof of receipt of Kshs.120,000/=.
31. Investigations by the Respondent confirmed the allegations that were raised in the complaint letter as true.



32. Resultantly, the Claimant was issued with a show cause letter dated 7<sup>th</sup> January 2016, with three charges against. He responded to the letter. The Claimant was then invited to a disciplinary hearing on 18<sup>th</sup> January 2016 via the letter dated 13<sup>th</sup> January 2016.
33. The disciplinary panel established that the Claimant contravened provisions of the Respondent's, Business Code of Conduct & Ethics, and Staff Manual Section 10.9 [vi, vii, xv & xxv], which amounted to gross misconduct. As a result, he was summarily dismissed from employment on 5<sup>th</sup> February 2016, for diverting funds belonging to the Respondent's customer, Jonathan Njenga by depositing KSHS. 65,000 into his own account, and was unable to justify why he paid a cheque of KSHS. 120, 000 despite noting that the account had insufficient funds. He further failed to ensure that the customer signed for the payment as required thereby putting his integrity to question.
34. The Claimant appealed against the dismissal on 18<sup>th</sup> February 2016. His appeal was considered and found to be without merit. The verdict on the appeal was communicated to him via the letter dated 22<sup>nd</sup> February 2016.
35. The Claimant's benefits were then computed and KSHS. 1, 077.70 credited to his current A/C No. 01125501589200. The Claimant's certificate of service is also ready for collection.
36. The Claimant reported a trade dispute through the Union upon which the Conciliator recommended that the Claimant's Summary Dismissal should be converted to termination of employment and subsequently, the Claimant was then to be paid one month's salary in lieu of notice.
37. The dismissal of the Claimant was substantively justified, and the process to the dismissal was procedurally fair.
38. Cross-examined by Counsel for the Claimant, the witness stated that at the material time, the Claimant was the only Teller at the Respondent's Nyahururu Branch. The account into which the amount was deposited belonged to the Claimant. The amount was supposed to be deposited into the customer's account.
39. The report by the Head of Security dated 30<sup>th</sup> December 2016, was received at the Respondent's Head Office on 4<sup>th</sup> January 2016. The report by Philip Maina was received on 4<sup>th</sup> January 2016. The Manager's report was done on 31<sup>st</sup> December 2015.
40. There was a complaint by Mr Jonathan Njenga, but the Respondent might have not lodged it in court.
41. The report by the Head of Security did recommend that Kshs. 19,000 be deducted from the Claimant's benefits. The computation of benefits document tendered in evidence by the Respondent shows that the deduction was made.
42. The incident relating to the KSHS. 120,000 allegedly occurred on 16<sup>th</sup> December 2015. However, the Customer didn't make any report till 17<sup>th</sup> December 2015. No explanation was given why the report wasn't made on the same date.

### **Analysis and Determination.**

43. I have carefully considered the pleadings herein filed by the parties, the evidence presented by them, and the submissions by their Counsel, and the following principal emerge for determination;
  1. Whether the Claimant was wrongfully dismissed/unfairly terminated.
  2. Whether the Claimant should be awarded the reliefs as sought.



## Whether the Claimant was wrongfully dismissed/unfairly terminated

44. Where a Court is called upon to interrogate the fairness or otherwise of termination of an employee's employment, or summary dismissal of an employee from employment, the Court then has to consider to statutory aspects, procedural and substantive fairness. Where both of these or any of them is absent in the termination or summary dismissal, the termination or dismissal shall certainly be found to be unfair.
45. Section 45 of the *Employment Act*, dictates that no employer shall terminate the employment of an employee unfairly. Sub-section 2 thereof provides that termination of employment by the employer is considered unfair if it isn't founded on a valid and fair reason[s], and arrived at through a fair procedure.
46. Section 41 of the *Employment Act*, 2007 sets a mandatory procedure that must be followed by an employer intending to terminate an employee's employment. There is firm jurisprudence that the procedure provided in this section of the law in mandatory and non-adherence to its dictates shall only lead to one result, the termination or summary dismissal shall be rendered unfair.
47. Addressing the foregoing position of the law, the Court of Appeal in the case of Pius Macha Isundu v Lavington Security Guards Limited [ 2017] eKLR

“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on employers in matters summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43]-prove that the reasons are valid and fair [section45]-prove that the grounds are justified [ section 47[5], among other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and hearing before termination.”
48. The Respondent's Counsel submitted that the Respondent complied with the provisions of the law as regards procedural fairness. The Claimant was of a contrary view.
49. It is not in dispute that the Claimant was an employee of the Respondent with a valid employment contract. The issue is whether the Claimant was wrongfully summarily dismissed from employment by the Respondent. According to the Respondent, the Claimant was issued with a show cause letter which informed him of outcome of the investigations that were conducted by the Respondent, and the accusations against him. He responded to the show cause letter, clearly admitting indiscretion on his part. His explanation being unsatisfactory, he was summoned for a disciplinary hearing on 18<sup>th</sup> January 2016 vide a letter dated 13<sup>th</sup> January 2016 to defend himself. In the invitation letter, he was informed of his right of accompaniment. He attended the hearing unaccompanied. He was heard on his defence which was considered before a decision was taken by the Respondent.
50. It bears repeating that the procedural fairness contemplated in Section 41 of the Act, has three ingredients; the notification - the employer must inform they employee that they intend to take action against him or her and the grounds the basis thereof; the hearing- the employer must accord the employee adequate opportunity to make representations on the grounds and; the consideration; the employer must consider the representation[s] made by the employee and or the person accompanying him before taking a final decision.
51. I have considered the material placed before me; the notice to show cause letter which in my view, clearly and elaborately set out the accusations against the Claimant; his detailed response that was received by the Respondent on 12<sup>th</sup> January 2016; the invitation letter dated 13<sup>th</sup> January 2016, which expressly,



referred to the earlier correspondence on the disciplinary matter, informed him, that the charges against him were as put forth in the show case letter and, of his right of accompaniment per Section 41 of the Employment Act; and his Counsel's submissions that true, the Claimant was heard, and find a challenge to understand what ingredient according to the Claimant was wanting in the process that culminated his dismissal from employment. In my view, all the ingredients were present. Resultantly, I hold that the summary dismissal was procedurally fair.

52. Section 44 of the Employment Act, 2007 provides for when summary dismissal can occur, thus;

“ 1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term

2 .....

3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employer has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

53. It is not in contest that what happened here was a summary dismissal. However, whether or not the conduct of the Claimant was one that fundamentally breached his obligations arising under the contract, I shall delve into, shortly hereinafter.

54. Sections 43 of the Act, places upon the employer an obligation to prove the reason or reasons for the termination of an employee's employment whenever there is a dispute regarding the termination. Where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45 of the Act.

55. Section 44[4] of the Act, provides the actions and inactions on the part of an employee that may amount to gross misconduct so as to justify a summary dismissal of an employee. However, it is pertinent to point out that the list therein isn't exhaustive. An employee can be summarily dismissed on account of a ground outside those in the catalogue for as long as it has the characteristics such as I will demonstrate shortly hereunder.

56. It was the Respondent's case that the Claimant's acts and omissions that were in issue, during the investigations, at the notice to show cause level, and disciplinary hearing amounted to gross misconduct under its Human Resource Manual. I have carefully considered the stipulations of Clause 10.9 thereof, and take the view that infractions thereunder that could justify summary dismissal are aligned to those under Section 44[4] of the Act. The Respondent was particular of the sub-clauses that were breached, vii, viii, xv,& xvii which provides;

“ Any of the following offences on the part of an employee shall constitute gross misconduct and /or serious neglect to justify summary dismissal; -

vii. If an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer's property in that he/she steal, illegally appropriates for her or himself, illegally or improperly uses or illegally destroys, damages or deals with or uses property of the Bank in such a manner that it may be or is detrimental to the Bank.



- viii. If established or found guilty of misappropriation of any funds or property belonging to the Bank or belonging to any party having business with the Bank or its subsidiaries.
  - xv. If any employee approves by either signing or facilitating approval of any payments without following the established Bank procedures.
  - xvii. if it is established that an employee has engaged in private business for monetary or commercial gain or behaviour which is in conflict with his /her position in the and which is likely to negatively affect his /her productivity in his/ her duties in the Bank.”
57. The Claimant didn’t deny that he deposited KSHS. 65,000 that was meant to be deposited in a customer’s account. The customer denied having authorized/ allowed the deposit. I am not persuaded by the Claimant’s version that there was authority from the customer to do so. I am not convinced that a customer who allowed such a transaction could turn around and make the transaction a subject of, a police report, and a complaint to the Claimant’s employer. In my view, the Claimant without authority took the money and deposited it as such, to recover the deposit that he had made to the Sacco.
58. Further, the Claimant did not deny that it was required of him to have the customer who withdrew KShs. 120,000 signs for the withdrawal. To me this cannot fit any description besides negligence on his part in the manner he conducted his duty.
59. It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in Section 44[4] of the *Employment Act*, or its Human Resource Policy. An employee’s misconduct doesn’t inherently justify summary dismissal unless it is “so grave” that it intimates the employee’s abandonment of the intention to remain in employment.
60. In *Laws v- London Chronicle Limited* [1959] 2 All L.R, 285, at 287, the Court stated;
- “Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show t the servant to have disregarded the essential conditions of the contract of service.”
61. Whether an employee’s misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances. In *Mckinley vs- B. C Tel* [2001] 2 S.C.R 161, the Canadian Supreme Court held;
- 29. When examining whether an employee’s misconduct justifies his or his or her dismissal, Courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.
  - 39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee’s behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and



whether it violated the “essential conditions” of the employment contract or breaches an employer’s faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.”

62. I have carefully considered the infractions by the Claimant, the industry in which the Claimant was working, the business space within which the Respondent was operating, the relationship between him and the Respondent, and conclude that his conduct was one which could breach the faith of any reasonable employer, in the shoes of his employer, in him. Further, the behaviour, violated the duty of trust and confidence that was owed by him to the Respondent. With this, I find that the Respondent had valid and fair reasons to summarily dismiss the Claimant from employment.

**Whether the Claimant should be awarded the reliefs as sought**

63. Having found that the summary dismissal was both procedurally and substantively fair, there cannot be any basis to grant those reliefs sought that are tied to the claim for unfair dismissal.
64. Workplace harassment is real and it should be stymied at all costs. Where workplace harassment is claimed and proved, the Court will certainly award damages, the extent of which, will be determined by; the effect of the harassment on the employee affected, the type of the harassment, the length of the harassment, condonation by the employer of workplace harassment, if any, and presence or absence of an anti-workplace harassment policy. The tragedy of this matter is that Claimant didn’t expressly anchor his Claim on workplace harassment.
65. He sought for compensation for physical and emotional damages emanating from an alleged inhumane treatment at his place of work. However, he didn’t place forth any medical documents to support the allegation he suffered post traumatic disorder. Without this vital evidence, his claim under this head fails.
66. In the upshot, the Claimant’s claim herein is dismissed. Each party to bear its own costs.

**READ SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY NOVEMBER OF 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of

The Claimant-In person.

No appearance -for the Respondent.

