



**Wanjohi v Guaranty Trust Bank (K) Limited (Cause E655 of 2021)
[2024] KEELRC 13468 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13468 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E655 OF 2021
CN BAARI, J
DECEMBER 19, 2024**

BETWEEN

ZAVERIA NJERI WANJOHI CLAIMANT

AND

GUARANTY TRUST BANK (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this suit through a Memorandum of Claim dated 9th August, 2021, and filed before on 10th August, 2021. She seeks a declaration that her summary dismissal is unfair and unlawful, reinstatement to her previous position, payment of salaries and allowance lost as a result of the dismissal, amounting to Kshs.995,832/- compensation for wrongful dismissal, salary under payment and costs of the suit.
2. The Respondent entered appearance on 2nd September, 2021 and subsequently filed a Statement of Response dated 22nd September, 2021, wherein, it denies the Claimant's claim and pray that it be dismissed with costs.
3. The suit was first heard by Hon. Justice James Rika on 5th December, 2023, then 7th March, 2024, 25th June, 2024, and finally concluded on 7th October, 2024 by this Court. The Claimant testified in support of her case and the Respondent presented a Mr. Eliud Wainaina, the Human Resources Officer to testify in support of its case.
4. Both parties filed submissions in the matter.



The Claimant's Case

5. The Claimant's case is that she was engaged by the Respondent bank through an Agent Career Directions Ltd (CDL) with effect from 8th February, 2018, as clerical staff, which position was unionisable.
6. It is her case that after the filing of a suit under cause No. ELRC 28 of 2019, she was issued with another letter of contract by the bank with effect from 1st April, 2019, as Transaction Service Officer, a position that was also unionisable.
7. She states that she joined the Respondent bank in February, 2018, and was being underpaid since her salary was far below the CBA scales, and yet she was covered by the CBA.
8. It is her position that in accordance with the parties' CBA, a unionisable employee was supposed to earn Ksh.67,157 and a house allowance of Ksh.10,500 aggregating to a gross salary of Ksh.77,657, yet she was being paid a basic salary of Ksh.34,000 and a house allowance of Ksh.6000 aggregating to Ksh.40,000 creating a gross underpayment of Ksh.37,657 per month. She states that she was underpaid for a total of 13 months ($37,657 \times 13 = \text{Ksh.}489,541$) underpayment, and which has not been paid to date.
9. She states further that after one year, her salary was supposed to graduate to a basic salary of Ksh.72,874, and a house allowance of Ksh.11,800 aggregating to Ksh.84,674, yet she was being paid a basic salary of Ksh.63,356 and a house allowance of Ksh.10,500 amounting to a gross of Ksh.73,856, creating a further underpayment of $\text{Ksh.}10,818 \times 10 \text{ months} = \text{Ksh.}108,180$ and a grand underpayment Ksh.597,721.
10. It is her position that she had worked for the Respondent bank for a total of three (3) years without any cases of gross misconduct or serious neglect. She states further that she has no warning or caution letters in her file, and therefore she has had a clean record of service.
11. It is the Claimant's case that on 17th December, 2020, a Customer by the name Darshan Dipak Shah called the Respondent's bank branch through the bank's service line No. 0703048470, and being stationed at that position, received the call in her normal cause of work, when the customer requested her to know his account balance as at that date.
12. It is her case that after carrying out due diligence as to the caller's number, National ID number, Email address, Account History etc as required by the bank's Standard Operating Policies, and procedures (SOP) and KYC requirements, she gave the customer the account balance and dropped the call.
13. She states further that her main role in the branch was receiving and responding to customer's queries and complaints, informing customers of the bank's new products and services, treating customers fairly among others.
14. It is her further case that on 29th December, 2020, she was called upon by the Head of security Mr. Ben Shichenga to go to the Respondent's Head Office. She states that on the same day, she went to Head Office and met Mr. Ben Shichenga, in the company of Josephine and Emmanuel Macharia from Systems and Control department of the Respondent.
15. She avers that she was informed by the officers that there is a case of fraud which took place in the account of Darshan Dipak Shah, and was asked to explain and give any information (if any) as to why she accessed the customer's account on the 17th December, 2020. She states that she informed the investigating team that the customer had called the branch in normal cause enquiring about his account balances, and denied knowledge of any further information regarding the alleged fraud.



16. The Claimant states further that even after her explanation, on 7th January, 2021, she was served with a show cause letter to explain why she accessed the customer's account and why serious disciplinary action should not be taken against her, and which she accordingly explained vide her letter dated 8th January, 2021.
17. The Claimant states that she was invited for a disciplinary hearing on the 12th January, 2021, a meeting which was held virtually through Micro -Soft Teams and a Mr. Tom Odera was in attendance as her representative. That her representative was denied an opportunity to address the meeting citing the bank's policy that he was appearing in that meeting as a witness, and therefore he has no audience in the meeting.
18. That the union raised a complain to the Respondent which necessitated another disciplinary hearing 18th January ,2021 to give her representative an opportunity to address the panellists. She states further that the opportunity was not successful since the representative had network connection challenges, hence she asserts that she was dismissed without representation as required under Section 41 of the *Employment Act*.
19. It is her case that after the improper disciplinary hearing, she was served with a summary dismissal letter on 20th January 2021, which letter stated the reason for her dismissal as viewing the client's account three times before a fraudulent transaction on the account occurred.
20. That she appealed against the unfair/unlawful summary dismissal from employment and the appeal hearing was held on 2nd February, 2021 and Mr. Tom Odera was again in attendance as her representative. That the decision of the appeal hearing was communicated to her together with the minutes of the appeal on 17th February, 2021, rejecting all the grounds of appeal and upholding the earlier decision of summary dismissal.
21. It is the Claimant's case that her union reported the existence of a trade dispute to the Cabinet Secretary in charge of Labour as required by the Act, and that the dispute was accepted and a conciliator Ms. Alice Chonga appointed to endeavour to settle the trade dispute. She states that the Conciliator after hearing the parties prepared a report with her findings and recommendations.

The Respondent's Case

22. It is the Respondent's case that it formally employed the Claimant as a Transaction Services Officer through a letter dated 29th March 2019, which was effective from 1st April 2019. It states further that prior to this engagement, the Claimant was employed by Career Directions Limited (hereinafter 'CDL') as a teller through a letter of employment dated 7th January 2018 ,and was only seconded to the Respondent's premises.
23. It is the Respondent's position that the Claimant was not a member of the Banking Insurance and Finance Union (K), and neither was she an employee of the Respondent prior to 1st April 2019.
24. The Respondent states that it was not privy to the terms of employment between the Claimant and CDL, her former employer.
25. It states that the letter of employment dated 29th March 2019, provided that the Claimant's terms of service would be guided by the Respondent and the Collective Bargaining Agreement (CBA) in force at the time. It states that the CBA in force at the time was one dated 10th September 2019.



26. It is its case that Clause AB9 of the said Collective Bargaining Agreement provided that as an entry level employee, the Claimant was entitled to Kshs. 67,157.00 as the basic salary, but as provided under the letter of employment dated 29th March 2019, the Claimant was paid Kshs. 73,856.00 as basic salary.
27. The Respondent states that clause AB9 of the Collective Bargaining Agreement provides that upon completion of one (1) year in employment, the Claimant's salary would be as provided in the salary scale that was produced in evidence. It states further that clause AB12 stipulates that employee engaged on or before 30th June in any year, are only eligible for their first salary increment on 1st January immediately following, and as such, the Claimant's salary was eligible for review on 1st January 2020.
28. It is the Respondent's case that the Claimant's salary was graduated to Kshs.71,186.00 with effect from 1st January 2020 in line with the CBA. That the Claimant only had an additional house allowance of Kshs.11,800.00 as provided under the Co llective Bargaining Agreement indicated in her pay slip for the year, 2020 and the letter of salary increment dated 17th February, 2020.
29. The Respondent avers that the employer-employee relationship between the Claimant and the Respondent only lasted for a period of one (1) year and nine (9) months.
30. It is the Respondent's further case that the Claimant's job description included an obligation to comply with all department and bank policies, procedures and regulations, including Know Your Customer guide lines and Anti-Money Laundering (AML) procedures.
31. That an investigation into a fraudulent withdrawal made on a customer's account revealed that the Claimant had accessed and viewed multiple functions of the customer's account on the 17th December 2020, a few days before the fraudulent transactions were effected. The customer did not have any transaction on the account subject of the investigations on the said day that the Claimant accessed/ viewed it.
32. It is the Respondent's case that the Claimant indicated to the investigator that she could not recall why she viewed/accessed the account in question, and whether it was upon the Customer visiting the branch physically or through a call placed to the Branch. It states further that the CCTV footage did not show the Customer or any person related to the Customer visiting the Respondent's branch on the material day and that the Customer informed the Respondent that he did not call nor visit the branches in question on the 17th Decembe, 2020.
33. The Respondent states that from an assessment of the customer's call logs for 17th December, 2020, there were no calls placed to the bank from two of the customer's mobile numbers maintained in the bank system. That of the two (2) mobile numbers maintained in the Bank's system, one was confirmed to be the Customer's and the other was confirmed to be that of his mother. Further that the said call logs revealed that the Customer was on a phone call with his mother during the time the Claimant alleges the customer called her.
34. The Respondent states that subsequent to the findings of the investigations, the Claimant was issued with a Notice dated 7th January 2021 to show cause why disciplinary proceedings should not be taken against her for her role in the loss of funds in the Customer's account, and or failure to follow the set out procedures and guide lines while conducting her duties.
35. It states that the Claimant responded to the Notice to Show Cause with an explanation that the Customer had called her extension number on the 17th December 2020 and had requested for his account details and balance. It further states that the Claimant in her letter indicated that she identified the Customer through his phone number maintained in the Respondent's system under the



- Customer's account details, but could not explain which number she verified before attending to the request.
36. That the Claimant's explanation was found unsatisfactory and was invited to appear before a disciplinary hearing and notified of her right to appear with a representative. It states that the Claimant's representative disrupted the hearing insisting on addressing the committee, when he was neither an employee, a shop floor steward or an Advocate.
 37. It states that the Disciplinary Committee resolved that the Claimant had failed to provide sufficient reasons for accessing/viewing the Customer's account multiple times on 17th December 2020, and resolved to summarily dismissed her through a letter dated 20th January 2021.
 38. That the Claimant's actions contributed, aided and abetted the fraudulent withdrawal of funds from the Customer's account. That the Claimant's actions were further found to be in breach of the Respondent's policies and standard operating procedures and amounted to gross misconduct.
 39. The Respondent states that the Claimant lodged an appeal, which was heard and the decision to dismiss the Claimant upheld, and was notified of the decision of the Appeals Committee vide a letter dated 17th February 2021.
 40. The Respondent prays that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

41. The Claimant submits that she suffered gross underpayment from the date of engagement to the date of summary dismissal and therefore the same underpayments become payable and the Claimant herein urges the court to award her accordingly.
42. It her submission that the intent and spirit of the show cause letter was vindictive and based on witch-hunt and vendetta by asking her why she accessed and viewed the customer's account, yet that was her primary function in the bank.
43. She submits that from the records before court, the customer was blocked from the bank's e-platform transactions since he had stayed for so long without using the account, and for such an account to be operational, it required to be activated, and such activation could only be done by senior bank Managers and definitely not in the position of the claimant.
44. The Claimant submits that the Respondent has completely failed to prove that the Claimant was in any way connected to the alleged fraudulent Mpesa withdrawals. She submits further that there is no evidence before this court that proves that the customer, Darshan Dipak Shah did not call the Claimant on 17th December 2020.
45. It is her submission that there is no evidence that proves that she aided and abetted the fraud, and that a reasonable employer would not have dismissed her. She submits that without such proof by way of evidence, the Respondent had no reason at all to dismiss her from employment.
46. She finally submits that she had committed no gross misconduct to warrant such a harsh punishment by an employer she had served so diligently without any cases of dishonesty.
47. It is her prayer that her claim be allowed.



The Respondent's Submissions

48. It is the Respondent's submission that the claim of under payment lacks merit and is unsubstantiated. It states that the Employment Letter provided that the Claimant's terms of service would be guided by the Respondent and the Collective Bargaining Agreement in force at the time.
49. It submits further that the CBA in force at the time was the one dated 10th September 2019, which provided Kshs. 67,157.00 as the basic salary, but that the Claimant was paid Kshs.73,856.00 per her employment letter, a figure above what she claims was her salary entitlement.
50. On whether the dismissal was lawful and fair, the Respondent submits that it was. The Respondent maintains that the Claimant's dismissal from employment was not only substantively fair since the Respondent had valid and fair reasons for terminating the Claimant, but also procedurally fair as the Respondent duly complied with the necessary procedures in dismissing the Claimant. Reliance was had to the holding in the case of Paul Otieno Okeyo v Consolidated Bank of Kenya Limited [2020] KEELRC 732 (KLR) (Nairobi Employment and Labour Relations Cause No. 1376 of 2015) to buttress this position.
51. It submits that the relationship between the Claimant and the Respondent is already strenuous, hence the efficacy of reinstatement would most likely impair any future prospective relationships not only between the Claimant and the Respondent, but also upon the other affected employees of the same employer and therefore, an order of reinstatement would not be practical. It had reliance in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR to support this position.

Analysis and Determination

52. The issues that crystallize for determination are:
 - i. Whether the Claimant's claim for underpayment is merited
 - ii. Whether the Claimant's summary dismissal was fair and lawful
 - iii. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant's claim for underpayment is merited

53. The Claimant's position in respect of the claim for under payment, is that she was on 7th January, 2018 employed by the Respondent through Career Directions Limited as a teller at a basic salary of Kshs. 34,000 and a house allowance of Kshs. 6,000. She states that on 1st April, 2019, she was issued a second appointment letter with a basic salary of Kshs. 63,356 and a house allowance of Kshs. 10,500.
54. Her assertion is that she was under paid by Kshs. 35,856 per month on the basis that she was unionisable and her terms of service were those provided under the CBA that was in force at the time of her employment.
55. Conversely, the Respondent contends that the Claimant was seconded to her service by an entity known as Career Directions Limited on 7th January, 2018, and that since she was not her employee, it was not privy to the terms and conditions of services between the Claimant and her then employer CDL.



56. The letter of appointment dated 7th January, 2018, appointing the Claimant as a teller, at Clause 1, defines 'employer' to mean Career Directions Limited. By this definition alone, it is clear that the Claimant was initially an employee of Career Directions Limited, outsourced to the Respondent.
57. Further, Appendix A of the CBA between Kenya Bankers Association and Banking Insurance and Finance Union, does not include Career Directions Limited as a member of the CBA so as to entitle the Claimant to benefit from the terms of the CBA.
58. I thus return that the Claimant's salary and house allowance entitlement in the period 7th January, 2018 to 30th March, 2019, was that provided under her employment letter of 7th January, 2018 with Career Directions Limited, and not the CBA. This thus goes to confirm that the Claimant's assertion of under payment during this period is unfounded, and her claim in this respect is found to lack merit.
59. In the appointment letter of 29th March, 2019, there is no doubt that the Claimant was appointed as an employee of the Respondent and thus entitled to benefit from the terms of the CBA. Under this appointment, her basic salary was given as KShs.63,356 and a house allowance of KShs.10,500 amounting to KShs.73,856.
60. The CBA as correctly submitted by the Claimant provides a basic salary of KShs.67,157 and a house allowance of KShs.11,800. A notch increment made vide a letter dated 17th February, 2020, increased the Claimant's basic salary to KShs.71,186. This by simple arithmetic translates to an underpayment of KShs.5,019 between 1st April, 2019 and December, 2019, since the increment that was made in accordance with the CBA was effective 1st January, 2020.
61. There was therefore no underpayment from 1st January, 2020 to the time of the Claimant's summary dismissal in 2021.
62. In conclusion, I hold that the Claimant was underpaid between 1st April, 2019 and 31st December, 2019, and is hereby awarded KShs. 45,000 being the amount of the under payment.

Whether the Claimant's summary dismissal was fair and lawful

63. A determination of whether or not a dismissal is fair is hinged on the employer's adherence to the twin requirements of procedural fairness and substantive justification. In the Case of *Walter Ogal Anuro v Teachers Service Commission Cause No.955 of 2011*, it was held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination, but also procedural fairness.
64. Courts have largely settled that for a dismissal to pass the procedural fairness test, an employer must meet the principles of fair hearing set out under Section 41 of the *Employment Act*, 2007. These principles are sacrosanct, and must be met irrespective of the employer's reason for terminating an employee. In the case of *Loice Otieno v Kenya Commercial Bank Limited Cause No.1050 of 2011*, it was held that summary dismissal even in the face of a fundamental breach of the employment contract or gross misconduct, must not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismisses an employee without a hearing will be falling a foul of Section 41(2) of the *Employment Act*.
65. The Claimant was summarily dismissed for gross misconduct. Specifically, the Claimant was dismissed for breach of the Respondent's policies by accessing/viewing a customer's account without sufficient reason or cause, and which actions was said to have contributed, aided and abetted fraudulent withdrawal of funds from the Customer's account.



66. There is no denying that the Claimant was issued with a show cause letter specifically stating the charges against her and the requirement for her to respond. She admitted responding to the show cause and further being invited and having attended a disciplinary hearing together with a representative of her choice.
67. The Claimant's sole contention in respect of the procedure employed in her dismissal, is the contention that her witness was not allowed to address the disciplinary committee handling her case. Section 41 of the [Employment Act](#), 2007 states thus: -
- “(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
68. In my view Section 41 simply put, entitles an employee to the presence of a fellow employee during a disciplinary hearing. Nothing supports the assertion that the presence of a fellow employee or shop floor steward is for purposes of representing the employee. The purpose is for them to witness the handling of the process.
69. In the Nigerian Supreme Court decision in BA Imonikhe v Unity Bank PLC S.C 68 of 2001 it was held:-
- “Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken, satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”
70. In any event, an attempt to allow the Claimant's representative to address the disciplinary committee failed on account of his poor network connection. It is further evident that the same representative appeared as the Claimant's witness during the hearing of the appeal.
71. I would therefore be slow to fault the procedure on this sole basis, and I return that the Respondent in summarily dismissing the Claimant adhered to the tenets of procedural fairness.
72. The second limb in determining fairness in a dismissal, is the question of substantive justification. The employer has a legal and evidential burden of proof of reasons for termination where an employee alleges that dismissal lacked sound legal justification per Sections 43, 45(2) and 47(5) of the [employment Act](#), 2007.
73. The provisions of Sections 43, 45 and 47, obligates an employer to establish the validity or correctness of the reasons for termination, but only after the employee has discharged the burden by proving that he/she was indeed dismissed, and that the dismissal was unlawful.
74. The Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR stated:-
- “That, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the



reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

75. The Respondent’s argument is that the Claimant’s job description included an obligation to comply with all department and Bank Policies, Procedures and Regulations to include Know Your Customer guidelines and Anti-Money Laundering (AML) procedures. It argues further that the Claimant breached these obligations and by extension her contract of service by accessing/viewing a customer’s account without sufficient reason or cause.
76. It further states that the Claimant in her response to show cause letter indicated that she identified the Customer through his phone number which is maintained in the Respondent’s system under the Customer’s account details, but could not explain which number she verified before attending to the request.
77. On her part, the Claimant states that there is no evidence that proves that she aided and abetted the fraud, and that a reasonable employer would not have dismissed her. She submits that without such proof by way of evidence, the Respondent had no reason at all to dismiss her from employment.
78. The Claimant listed her role in verifying a customer’s details as follows:-
- i. Ask the customer to provide the account number.
 - ii. If the customer does not have the account number with them at the moment of the call, ask the customer to provide the full names as on ID and the ID number.
 - iii. Search for the account number using function B23ACCC0.
 - iv. Determine if the person calling is a signatory or authorized agent for balance inquiries as below
 - v. Confirm the number calling or email is the one maintained in the core banking system.
 - vi. Probe the customer further using the details displayed to be certain that he/she is the right person to access financial information from the account. That one can use date of birth, phone number, alternate phone number (if any including other signatories), postal address, email address, KRA pin No, Mother’s Maiden name etc.
79. It is therefore telling that the Claimant by her admission could not explain the number(s) she verified before attending to the request for information relating to the customer’s account which ended up being the subject of fraudulent dealings.
80. It is similarly not realistic that a bank employee would access a customer’s account not once, not twice, but three times in one day and not recall why there was a need to do so.
81. In Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR, the Court affirmed that: -
- ‘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’.



82. Further in *Josephine Ndirima v Medecins Sans Frontiers Belgium* (Cause 454 of 2022) [2022] KEELRC 3814 (KLR) (19 August 2022) (Ruling), the court held that an employee who deliberately goes out and acts in breach of the employer's policy cannot avoid the sanction issued, including summary dismissal as required under Section 44(3) of the Act.
83. In the end, I reach the conclusion that the Respondent summarily dismissed the Claimant based on fair, reasonable and justified grounds. The dismissal is both procedurally and substantively fair.

Whether the claimant is entitled to the remedies sought

84. The Claimant sought a declaration that her summary dismissal is unfair and unlawful, reinstatement to her previous position, payment of salaries and allowance lost as a result of the dismissal, amounting to Kshs. 995,832/-, compensation for wrongful dismissal, salary under payment and costs of the suit.
85. All the reliefs sought herein, are only tenable upon a finding of a wrongful dismissal. With the finding that the Claimant was fairly and lawfully dismissed, all the reliefs sought must fail.
86. In whole, the Claimant's claim partly succeeds in the following terms:
- a. That the Claimant's dismissal was not unfair.
 - b. That the Claimant be paid Kshs.45,000 on account of salary underpayment
 - c. That the claim having partly succeeded, each party shall bear their own costs.
87. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 19TH DAY OF DECEMBER, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odero present for the Claimant

Mr. Kitala h/b for Mr. Mwangi Respondent

Ms. Esther S- C/A

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