



**Wambua v Stanbic Bank Kenya Limited (Cause 1487 of 2018)  
[2023] KEELRC 491 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 491 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1487 OF 2018  
AN MWAURE, J  
FEBRUARY 28, 2023**

**BETWEEN**

**JACINTA WAMBUA ..... CLAIMANT**

**AND**

**STANBIC BANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim dated the November 1, 2018 claiming unlawful and unfair termination. She says she was as from August 2017 up to the time of termination the Respondent's PA to the CEO earning a salary of ksh 251,250.

**Claimant's Case**

2. The Responded according to her conducted an unlawful and irregular disciplinary proceeding on the 26/2/2018 and by a letter of April 20, 2018 the Respondent maliciously and unlawfully terminated the claimant's employment. She then submitted her appeal against the dismissal on the 26/4/2018 which was rejected on the June 7, 2018.
3. She further says that failure to secure VISA for one Mr Greg Brackenridge was not occasioned by the claimant's fault or negligence but because Mr Brackenridge did not provide the requisite documents within the expected/reasonable time. It is stated that the email communication between the claimant and Mr Brackenridge point to the fact that the decision to dismiss the claimant was unilaterally made by Mr Brackenridge and the purported disciplinary process was a smokescreen and or intended to rubberstamp the dismissal.
4. The claimant further contends that the said Mr Brackenridge exemplified and visited racial discrimination against her. The work that Mr Brackenridge demanded of the claimant exceeded her official duties and assignment and or were outside her duty but she went out of her way to get the assignment accomplished. The claimant avers that for the nine years that she worked she never received



any reprimand or warning in relation to her performance. The claimant further says she was never accorded adequate opportunity to defend herself and as a result she has suffered great loss and damage especially to her career as a Personal Assistant and she stands to suffer more damages.

5. The claimant prays for the following;
  - a. A declaration that the termination was unlawful and unfair
  - b. Reinstatement to her previous employment, position, job group without loss of any benefits.
  - c. Salary arrears for the entire period that the claimant has been out of employment
  - d. Damages for wrongful and/or unlawful dismissal as particularized
  - e. Costs of the suit plus interests.

### **Respondent's Case**

6. The Respondent filed a response to the memorandum of claim and denied having conducted unlawful and irregular disciplinary proceedings and/or maliciously and unlawfully terminating the claimant's employment as alleged in the statement of claim. The Respondent avers that the claimant was legally and fairly terminated following acts on her part which constituted gross misconduct. The claimant was afforded a fair disciplinary hearing as required under the [Employment Act 2007](#) and as provided for in the Respondent's human Capital Policy.
7. The respondent further states that as the termination of the claimant's employment was proper and was made pursuant to the express terms contained in the employment contract and the [Employment Act 2007](#) and therefore there cannot be any conceivable cause of action against the Respondent.

### **Claimant's Evidence**

8. Claimant witness Jacinta Wambua gave sworn testimony and stated that she worked with the Respondent as from 2009 to 2018. She joined the Respondent as a receptionist and was promoted over the years and at termination she was the PA to the regional CEO. She said she was terminated from employment and was accused of having been negligent as she failed to get a Visa for her boss to go for Christmas holiday in 2017. The personal trip was not part of her job description. She was given documents on the December 11, 2017 to process Visa and tried to get Visa for Malta and Germany. She says if she was given enough time, she would have processed the Visa.
9. On cross examination, she said that it was her duties to organise all trips for the CEO and there was no complaint from the CEO on the way she organised the CEO's diary. She was acting Person Assistant and she had never been given warning. She says she received an email on December 28, 2017 asking her for Notice to Show Cause which she did not respond to as she was on leave. She stated that she responded on the 12/1/2018. The CEO had sent her an email on the 23/8/2017 informing her that he wanted a UK Visa and he sent her the requirements (list) for the Visa. She processed the UK Visa on the 23/8/2017 but could not do everything. The communication of 24/8/2017 is on the laptop that was taken away.
10. Claimant said that she was given sufficient notice before the hearing but was already suspended. After the hearing she was heard and terminated then given opportunity to appeal. She did appeal and decision on dismissal was communicated. She mentioned that she was paid nothing at termination. She also told court there were racial verbal insults against her and nobody can testify against the regional CEO so she has no witness. On re exam, she said the regional CEO gave her his documents for Visa processing



late and she did an email to the Czech Dept of Visa but had no control of issues of dates in the Visa departments. She had organised 30 trips for the CEO and the last trip was on a personal visit.

### **Respondent's Evidence**

11. Respondent's Witness Spencer Sawe gave sworn testimony and said that she is the human capital business partner with the Bank and adopted the witness statement dated the 6/7/2022 as her evidence in chief. She said amongst the claimant's duties was organising for travel details of the Regional CEO, visa processing, flights, hotel bookings which were also part of her job description. This included all official travel arrangements and others. She said that the claimant's bundle of documents shows that the claimant made the application over one month after she was instructed. There is no evidence the claimant applied for any document for the CEO as the evidence brought in Court were in her possession. The CEO wrote to the Head of Human Capital where he complained that the claimant failed to manage his diary. She testified that the claimant was then issued with notice to show cause on the 2/1/2018 but responded on the 12/1/2018. Claimant was then invited to a disciplinary hearing but her response was found to be unsatisfactory and so was terminated.
12. Disciplinary hearing was held on the 6/4/2018 and Committee recommended that she be summarily dismissed. It was found the claimant did not act from the time she received instructions until December 11, 2017. She says that the claimant was paid for 26 days for annual leave in 2017 and leave days for 2018. The witness further said that the claimant is already employed elsewhere and general damages is not applicable.
13. On cross examination she said that she is not aware the CEO presented his travel documents on the December 11, 2017 but was aware the claimant made the application the same day. She was also not aware if the claimant requested documents to process visa. She said the claimant was given an opportunity to defend herself. On re-examination she said that there was no email on record from the claimant requesting for additional documents for visa processing.

### **Claimant's Submissions**

14. The claimant submits that she did not wilfully neglect to perform her duties, which in this case was to arrange her boss' travel which includes visa processing. She says that upon being given instructions by her boss she proceeded to give him a list of the travel documentation which were required in order to process his Visa to the Czech Republic. She also submitted that the claimant asked her boss to avail these documents and he did not do so until December 11, 2017. It is also said that the dates given at the Czech Republic embassy were beyond control of the claimant.
15. The claimant relied on the case of *Evans Kamadi Misango versus Barclays Bank of Kenya Ltd* 2015 e KLR where court held that 'To my mind, the burden placed on the employer by Section 43 is to demonstrate a valid reason which would cause a reasonable employer to terminate the employment of an employee. The *Halsbury's Laws of England* (4th Edition Vol 16) at page 482 expounds this principle as follows: "In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which



a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

16. The claimant also contends that during the disciplinary hearing, the committee did not consider her view point concerning the fact that, due to her late receipt of travel documentation needed to process Mr Brackenridge’s Visa, she was unable to get nearer appointment date that would have made it possible for Mr Brackenridge to travel as was planned.
17. The claimant also relied on the case of *National Bank of Kenya versus Anthony Njue John* 2019 e KLR where the court stated that(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.
18. The claimant submits that her testimony or view point was not heard nor put into consideration before summarily dismissing her from employment and the committee had already made their mind to dismiss the claimant without any basis.

### **Respondent’s Written Submissions**

19. The Respondent submits that it had justifiable reasons to terminate the claimant’s employment for wilful neglect of her duties as the assignment in question fell within the Claimant’s Job description and as confirmed by the Claimant, she negligently and wilfully failed to deliver the assignment to facilitate the CEO’s travel which was scheduled for December 23, 2017. The Respondent submits that to the extent that the claimant was well aware of the CEO’s intended travel since November 2017 as well as necessary documentation required to get the visa which she told the committee would be approximately 10 working days, the claimant ought to have been more prudent by ensuring that the application was timely made.
20. The respondent further submits that even assuming the claimant did not have all the documents she required for the purposes of the Visa application such as the copy of the passport, it would have been reasonably expected that she should have written to the CEO indicating the challenges she was experiencing and the implication it would have had on the timelines. The claimant did not exhibit any level of pro activeness in discharging her obligations since November 2017 when she received CEO’s instructions.
21. The Respondent relied on the case of *Leyland UK Ltd versus Swift* 1981 IRLR 91 where it was held that ‘the correct test is; Was it reasonable for the employer to dismiss him? If no, the reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases, there is a band of reasonableness, within which an employer might reasonably take one view; and another quite reasonably dismiss the man. The other might reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.
22. The Respondent argues that applying the reasonableness test, the courts have held that it will not substitute its decision with that of an employer unless it can be shown that the reason was so arbitrary and could not justify a termination.
23. The Respondent relied, *inter alia*, on the decision of the court in *Samuel Kalomit Murkomen versus Telkom Kenya Limited* 2017 e KLR. Where the court said that ‘In determining whether termination of



an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer.

### Issues for Determination

Having looked at the pleadings, the evidence and submissions in the case, the court frames the following issues for determination.

- a. Whether the Respondent had valid reasons to terminate the claimant
  - b. The remedies, if any, the claimant is entitled to.
24. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.
25. In the Court of Appeal case in *Kenya Revenue Authority v Reuel Waitaha Gitahi & 2 others* [2019] eKLR the court said that:
- “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.”
26. The Court went further and observed that “...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
27. Lord Denning MR in *Leyland UK Ltd versus Swift* 1981 IRLR 91 referred to by the Respondent held that ‘the correct test is; Was it reasonable for the employer to dismiss him? If no, the reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases, there is a band of reasonableness, within which an employer might reasonably take one view; and another quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.
28. The court is of the view that the claimant has on previous occasions been applying for the Respondent’s CEO’s travel documents as was in this case. She had worked in the bank for over nine years though in various positions. The Respondent’s main complaint is the lack of communication from the claimant from which it can be concluded that she indeed took the requisite steps to have the visa applied for within the reasonable time. On November 10, 2017 Braekenridge asked the claimant to organise his travel and visa. The email does not indicate when he was to travel but the claimant has stated elsewhere that the travel date was December 23, 2017.
29. The application for visa was then made on December 11, 2017. There is no evidence as to the delay between November 10, 2017 to December 11, 2017. Hence the loss of time then meant there was delay



in processing the visa on time and therefore the executive director could not make it to his Christmas holidays with his family.

30. The claimant says she could not get the email communication with the Executive Director asking for the documents to enable her to apply for the visa. On further cross examination she said she did not write emails to the Executive Director to ask for the documents as she used to manage his emails anyway but that she would ask for the documents orally.
31. It was part of Claimant's job description to assist the Chief Executive East Africa promoting comprehensive administrative support and those would include planning organising, directing and controlling functions of CEO office in accordance with laid down policies, procedures and delegate authorities and guideline. Furthermore it was her duty to prepare, schedule and diarize meetings identify schedule appropriate venue, travel and conference accommodation both locally and internationally. These duties required proactivity on the part of the claimant to make sure there is no lacuna in the performance of the chief executives duties.
32. That in itself gives the impression that the claimant was negligent in this instance and that act cost the chief executive moneys for cancellation of the accommodation and inconvenience to him and his family over 2017 Christmas vacation.
33. As is a cardinal rule in employment disputes is that an employer must give a valid reason or reasons in terminating an employee from employment. Section 45(1) of employment act provides as follows:
  - "(1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove——
    - a. that the reason for the termination is valid;
    - b. that the reason for the termination is a fair reason——
      - i. related to the employees conduct, capacity or compatibility; or
      - ii. (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure."
34. In the case already cited of *Kenya Revenue Authority vs Reuwel waitthaka (supra)* eh court held that:

“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.
35. Again in the case of Leyland UK ltd vs Swift 19811 RLR 91 Lord Denning as already referred earlier explains the reasonable test applied by an employer. He said that a test is reasonable if a reasonable employer could have dismissed an employee but is unreasonable if a reasonable employer could not have dismissed the employee under those circumstances. He concluded that if it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.



36. Section 43(2) of *Employment Act* also provides:
- "(2) 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."
37. So in this case the respondent was able to give evidence on a balance of probability showing that the claimant neglected to perform her duties in getting a visa for the Chief Executive and hence caused him to lose money in the accommodation he had booked for his family as well as himself during their Christmas holiday.
38. In the claimant's letter of appointment dated July 13, 2009 it was specifically provided that claimant would be summarily terminated from employment if claimant wilfully neglects to perform any work which she is duty bound to perform or if she carelessly or improperly performs any work which she is duty bound to perform.
39. The claimant neglected to perform a duty she was bound to perform much to the inconvenience and financial loss of the Chief Executive. She did not offer any apologies but instead blamed the Chief Executive that he did not supply her with the relevant documents on time. Yet she has not demonstrated any time she asked the Chief Executive for those documents and he neglected or delayed to provide her with the same. The court is convinced the respondent had a valid reason to invite the claimant for a disciplinary hearing.
40. The respondent in terms of following due procedure he complied. He sent her a notice to show cause on December 28, 2017 and asked her to respond by January 2, 2018. She ended up writing a response on January 12, 2018. After the notice to show cause response she was invited for disciplinary hearing and was asked to invite a fellow colleague as her witness. The disciplinary hearing was to take place on February 26, 2018 but claimant said she was unwell.
41. The disciplinary hearing finally happened on April 6, 2018 and the minutes were produced and in all fairness the minutes seem to capture the proceedings very accurately. The claimant was asked to invite a fellow colleague as her witness and she said she would not call one.
42. She was then terminated after the committee deliberated on the hearing and this was on April 20, 2018. The court has considered the procedure mandated under section 41 of the *Employment Act* and it is evident the respondent complied with the procedure well provided in the said law. Actually section 41(1) of *Employment Act* provides:
41. "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."
43. Flowing from the pleadings and exhibit and submissions hereto the court finds the respondent has discharged their burden of proof and has given a valid reason for terminating the claimant and has also followed the required mandatory procedure. They have complied with the test of substantive justification and procedural fairness well-articulated in the case of *Walter Oguro Onuro Vs Teachers Service Commission* (2013) eKLR.



44. In view of the foregoing the claimant has failed to prove the claim that she was unfairly and unlawfully terminated. The same is therefore dismissed accordingly.

The court orders each party to bear their costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023.**

**ANNA N. MWAURE**

**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.

