



**Nganyi v National Bank of Kenya Limited (Cause 725 of 2019)  
[2023] KEELRC 234 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 234 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 725 OF 2019  
BOM MANANI, J  
FEBRUARY 2, 2023**

**BETWEEN**

**JERITAH NGANYI ..... CLAIMANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant, who was an employee of the Respondent until her termination from employment in July 2017, has sued the Respondent for compensation for alleged unlawful termination. It is the Claimant's case that the Respondent terminated her contract of service without valid reason and in contravention of the requirements of due process.
2. The Respondent denies liability for the claim. According to the Respondent, the Claimant engaged in a series of financial malpractices during the currency of her employment that were contrary to the terms of her engagement. This behavior necessitated the closure of the employment relation between the parties.
3. In the Respondent's view, there was a valid reason to terminate the Claimant's employment. Besides, it is contended that the Claimant was subjected to a fair disciplinary procedure before the decision to terminate her services was reached.

**Claimant's Case**

4. The Claimant avers that she was employed by the Respondent on 2<sup>nd</sup> September 1996 in the position of a clerical and or switch board operator. She asserts that she was later promoted to the position of Senior Clerical Officer, a position she allegedly held until termination of her contract on 27<sup>th</sup> July 2017. The Claimant asserts that her monthly salary on exit was Ksh. 149,000/.



5. The Claimant avers that during her term of service she received a couple of warnings from the Respondent relating to alleged chronic financial misconduct. That on 17<sup>th</sup> August 2016, she was issued with a final warning on the subject.
6. The Claimant asserts that on 27<sup>th</sup> July 2017 the Respondent unlawfully terminated her contract of employment after accusing her of failure to seek and obtain consent to sell property charged to the Respondent to secure a loan facility advanced to her. The Claimant further avers that the Respondent accused her of irregularly receiving proceeds of the sale and applying the money to her personal use instead of paying it into the loan account in contravention of the charge contract between the parties.
7. Although she does not deny offering the charged property for sale, the Claimant denies receiving Ksh. 2,500,000/- on account of the sale. She also accuses the Respondent of using a flawed disciplinary procedure to arrive at the decision to terminate her contract of service. The Claimant suggests that she was denied the opportunity to challenge the decision of the disciplinary committee on appeal.

### **Respondent's Case**

8. On the other hand, the Respondent states that the Claimant's contract of employment prohibited her from living beyond her means as this had the potential of pushing her into activities that could embarrass the Respondent. That despite the prohibitions in the rules of engagement between the parties as evidenced in the contract of employment as read with supplemental documents such as the Human Resource Policy, the applicable Collective Bargaining Agreement and Staff Code of Conduct, the Claimant engaged in a series of acts of financial misconduct that embarrassed and compromised the financial security of the Respondent.
9. The Respondent accuses the Claimant of: regularly overdrawing her account and issuing bouncing cheques to third parties; borrowing but failing to repay personal loans from third parties; and attempting to irregularly sell property that she had pledged as security for a mortgage facility from the Respondent.
10. As a result of the matters aforesaid, the Respondent asserts that it had to contend with receiving and processing complaints about the Claimant's financial misconduct from affected third parties. That these activities exposed the Respondent to public shame.
11. That besides, the attempts to sell the property charged to the bank exposed the Respondent to the risk of financial loss. It is the Respondent's case that the attempt to sell the security was made without first seeking the Respondent's consent contrary to the terms of the charge instrument executed between the parties.
12. The Respondent has produced seventy three (73) exhibits in support of its assertions. These documents show the following:-
  - a) That the Claimant consistently took personal loans from third parties with little regard for the restrictions on this matter in her contract of employment.
  - b) That most of the individuals from whom the Claimant took the personal loans ended up not being repaid as agreed between the parties forcing some of them to seek the intervention of the Respondent to recover their money.
  - c) That sometimes, the Claimant issued bouncing cheques to the individuals she had taken the personal loans from.



- d) That the Claimant at one point exceeded her credit card limit leaving her in financial distress that forced her to request the Respondent to convert the overdrawn account into a term loan as she could not repay the funds at once.
  - e) That the Claimant triggered the sale of a property registered as Nairobi/Block 140/05/026 whilst it was still charged to the Respondent to secure a mortgage facility in her favour. The attempted sales involved four individuals to wit the Claimant, one Susan Kaluki, one Titus Terta and one Lilian Nkirote Marete. That at the time of the attempted sales, there was no evidence of prior consent to sell the property granted by the Respondent.
  - f) That around 20<sup>th</sup> July 2016, the Claimant acknowledged that her financial adventures had left her in a financial hole with a debit balance of Ksh. 5,103,800 and that she was trying to dispose some of her properties in order to recover from the financial quagmire that she found herself in.
  - g) That the Claimant owned up her misconduct severally and pledged to reform only to fall back into her old habits days thereafter.
13. The Respondent states that in reaction to the Claimant's chronic financial misadventures, she was subjected to a series of disciplinary processes. That the Claimant was issued with several written warnings but never reformed.
14. That on 5<sup>th</sup> July 2017 the Claimant was issued with yet another letter requiring her to explain why she should not be disciplined for attempting to sell the bank's security without the bank's consent and diverting the proceeds to her personal ventures. That the Respondent thereafter invited the Claimant to a disciplinary meeting on 7<sup>th</sup> July 2017.
15. It is the Respondent's case that the Claimant was heard in her defense before the decision to terminate her services was rendered. The Respondent states that it communicated to the Claimant the decision to terminate her contract through its letter dated 24<sup>th</sup> July 2017.

### **Analysis**

16. The parties testified orally. In addition, they adopted their respective witness statements and produced a number of documents as exhibits.
17. The record shows that the parties filed agreed issues. These are as follows:-
- a) Whether the Claimant in discharging her duties as an employee of the Respondent observed and or complied with the terms and conditions of her contract of service, the Respondent's Code of Conduct and such other rules and regulations governing the banking business.
  - b) If number 1 is not in the affirmative, was the dismissal of the Claimant by the Respondent lawful?
  - c) Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.
  - d) Whether the Respondent is entitled to the reliefs sought in the Memorandum of Response.
18. Despite filing the joint statement of issues, the parties have subsequently attempted to individually reframe the issues for determination in their final submissions. Although the reframed sets of issues



do not radically depart from the joint set, I think that it is proper, for purposes of good order, to be guided by the agreed list.

19. The law on termination of contracts of service is set out in the *Employment Act* (EA). Section 41 of the Act requires that before the employer terminates an employee, he must first issue the employee with details of the charge against him in a language that the employee understands and in the presence of a fellow employee or trade union representative if the employee so desires. The employer must then hear any representations by the employee and his witnesses in reaction to the accusations against him. Thereafter, the employer must render his decision promptly and notify the employee. Where possible, it is appropriate that the employer allows the employee the opportunity to challenge the decision on appeal.
20. Under section 43 of the EA, it is the duty of the employer to justify the validity of the decision to terminate an employee from the employment. The process of justifying the decision requires the employer to prove the reason for the termination and to show that the employment was terminated in accordance with fair procedure. Before the employer is called upon to justify the termination, the employee must, in terms of section 47 of the EA, establish a prima facie case of the unlawfulness of the decision to terminate his contract of service.
21. The reasons for termination of employment contracts are varied. Under section 41 of the EA, they include: poor performance; physical incapacity; and misconduct.
22. At the end of the day, the employer must demonstrate that the decision to terminate the contract was just and equitable having regard to the totality of the prevailing circumstances. In determining this, consideration may be given to the previous conduct of the employee and the warnings previously served on him (see *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others* [2019] eKLR).
23. Black's Law Dictionary defines misconduct as "a dereliction of duty; unlawful, dishonest; or improper behavior." In its defense, the Respondent accuses the Claimant of misconduct when she: decided to borrow from third parties without authority; failed to repay third party loans taken in contravention of the terms of her letter of appointment; begun living beyond her means; and compromised the bank's security for facilities extended to her.
24. Misconduct is defined under section 44 of the EA. The matters that are raised by the Respondent as grounds for misconduct by the Claimant do not appear to be expressly included in the list of acts of misconduct under the said section of the EA. However, the section is clear that the list is not exhaustive.
25. What the court must then consider is whether what the Respondent complains about amounts to misconduct notwithstanding that it is not expressly set out under section 44 of the EA. I will consider this question in the context of the definition of misconduct as given in the Black's Law Dictionary.
26. The letter of appointment of the Claimant dated 2<sup>nd</sup> September 1996 contains a clause forbidding the Claimant from living beyond her means. The letter also prohibited the Claimant from borrowing funds without disclosure to the employer. The record shows that the Claimant signed the letter accepting that the prohibitions aforesaid would form part of her contract of employment.
27. These conditions appear oppressive. They appear intrusive. However, one must construe them in the context of the nature of business that the Respondent undertakes. The money market requires a high level of financial probity. And hence the need to ensure that those who serve in it do not engage in acts that could lure them into conduct that may compromise the need to uphold this probity.



28. To ensure observance of this goal, the Respondent's contract with the Claimant prohibited her from taking personal loans without full disclosure to the Respondent. The contract also required that the Claimant lives within her financial means.
29. However, the evidence on record portrays a picture of an employee who disregarded these contractual boundaries at every opportunity. She continuously borrowed from private individuals without full disclosure to the Respondent. She did not repay these private loans except when prodded by the Respondent after the third parties had raised the matter directly with the Respondent. In effect, the Claimant's failure to honour her financial obligations forced those who had loaned her money to convert the Respondent into a debt collector for them.
30. There is also evidence that the Claimant took a loan from the Respondent in order to purchase the property registered as Nairobi/Block 140/5/26. Although the charge document was not produced in evidence, the Sale Agreement dated 2<sup>nd</sup> June 2017 and the affidavit by the Claimant dated 8<sup>th</sup> June 2015 and produced as exhibits by the Claimant confirm that the property was charged to the bank. This confirmation is also discernible from a letter from M/S Kabathi and Co Advocates dated 31<sup>st</sup> May 2017 and produced in evidence by the Respondent.
31. It appears that after purchasing the aforesaid property through a loan advanced by the Respondent and secured by the same property, the Claimant entered into an informal arrangement with the vendor, one Susan Kaluki through which she borrowed Ksh. 700,000/ from Kaluki. This informal loan arrangement was concluded through a loan agreement dated 18<sup>th</sup> August 2010 and signed by the parties to be bound by it. It was produced in evidence by the Respondent and appears at page 57 of the Respondent's bundle of documents.
32. This informal loan from Susan Kaluki appears to have accentuated the Claimant's financial tribulations. According to the loan agreement, the Claimant was supposed to have repaid the money by 10<sup>th</sup> October 2010. However, she appears to have defaulted.
33. According to the Claimant's statement in the minutes of the disciplinary session of 26<sup>th</sup> May 2016, she allowed Susan Kaluki to collect rental income from the charged property in order to offset the informal loan of Ksh. 700,000/-. However, Susan was unwilling to accept this arrangement. Meanwhile the loan monies from Susan had grown to Ksh. 2,000,000/- on account of interest.
34. It would appear, as the Claimant suggests in the aforesaid minutes, that Susan then demanded to re-purchase the charged property from the Claimant at its original value. Pursuant to this demand, the Claimant told the disciplinary committee on 26<sup>th</sup> May 2016 that Susan paid her Ksh. 2,500,000/. Although she was to deposit the cash into her loan account in order to release the security, the Claimant stated that she used the money to purchase another property in Mumias.
35. Matters did not end there. The situation, as a result, became more complicated. The bank did not discharge the security. The title to the charged property could not therefore vest in Susan as yet. The implication of the foregoing is that whilst the Claimant had now received Ksh. 2,500,000/= from Susan on account of the second sale, the bank still held the charged property on account of the legal charge in its favour.
36. After some while and perhaps owing to the aforesaid challenges, both the Claimant and Susan appear to have resolved to sell the security to a third party. That the two attempted to jointly re-sell the property is demonstrated through a demand letter issued to the Claimant by Kabathi and Co Advocates dated 31<sup>st</sup> May 2017.



37. In the demand letter, it is indicated that the Claimant together with the said Susan Kaloki entered into a Sale Agreement with one Titus Terta dated 3<sup>rd</sup> August 2016 for the sale of LR Nairobi/Block 140/05/026. According to the demand, the Claimant allegedly gave a warranty that she will secure the discharge of the charge on the property from the Respondent where after the property would be conveyed to Titus Terta. However, this was never to be.
38. There is no evidence that the Respondent's consent to these transactions was sought and granted. Indeed, the Claimant does not suggest that she procured such consent or even made the Respondent aware of her efforts to sell the security privately.
39. Although the Claimant denies that she received Ksh. 2,500,000/- from the re-sale of the property to Susan Kaluki, it appears from the minutes of the disciplinary meetings of 26<sup>th</sup> May 2016 and 7<sup>th</sup> July 2017 that she confirmed having received this money. The Claimant signed the minutes as a sign of her concurrence with their contents. I do not think that it is open to her to renege on this fact. I believe the Respondent's evidence that the Claimant confirmed having been paid Ksh. 2,500,000/on account of the impugned sale.
40. The behavior of the Claimant was a clear depiction of her dishonesty to the Respondent. She was not supposed to sell the bank's security without first clearing the loan for which the security had been pledged and without the bank's concurrence. Indeed, nowhere does the Claimant deny that this is what was required of her. Yet, she proceeded with the sale.
41. The totality of the evidence aforesaid portrays the Claimant as not just having acted contrary to the terms of her contract of employment by soliciting for a private and unauthorized loan from Susan Kaluki but also as having acted in a manner that was inconsistent with the interest of her employer by selling the mortgage security without the Respondent's permission. The evidence points to acts of dishonesty on the Claimant's part. This conduct fits in the definition of the term 'misconduct' as captured in the Black's Law Dictionary. The Claimant's behavior was a proper candidate for misconduct within the expanded parameters contemplated under section 44 of the EA.
42. Flowing from the above finding, it is apparent that the Claimant's conduct, particularly with regard to her dealings in the charged property, was inconsistent with the financial interest of her employer. The Claimant's actions exposed her employer to the risk of loss. Her actions were not in line with the terms of her contract of service and the Respondent's code of conduct.
43. The second issue for determination is whether the dismissal of the Claimant by the Respondent was lawful. As pointed out in the preceding sections of this judgment, the lawfulness of termination of a contract of employment is measured against compliance with the statutory parameters set out under section 43 as read with section 45 of the EA. The employer must demonstrate that: he had a valid reason to terminate the contract; and that the employment was terminated in accordance with fair procedure.
44. From the record, the Respondent has been able to demonstrate that the Claimant's conduct breached the agreed terms of engagement between the parties. The Respondent has also been able to provide evidence pointing to dishonest behavior by the Claimant when she attempted to sell property that she had pledged as security for a loan that she had taken from the Respondent without involving the Respondent. As indicated in the preceding sections of this decision such conduct by the Claimant constituted misconduct in terms of section 44 of the EA. Consequently, the court finds that the Respondent has proved that it had a valid reason to terminate the Claimant as required under sections 43 and 45 of the EA.



45. With respect to the procedure followed in terminating the Claimant's employment, there is evidence that the Respondent issued her with a notice to show cause dated 5<sup>th</sup> July 2017. The notice required the Claimant to give a written explanation why action should not be taken against her for acting in a way that was detrimental to the interest of her employer, the Respondent, by irregularly attempting to dispose of property which the bank held as security for a facility advanced to her. The notice was received on the same day that it was prepared.
46. The Claimant responded to the letter on the same day she received it. In her response, the Claimant denied receiving the money allegedly paid to her pursuant to the irregular sale of the bank's security. However, she did not deny offering the property for sell without the consent of the Respondent.
47. The Respondent says it was not satisfied with the Claimant's response. Accordingly, it convened a disciplinary session for 7<sup>th</sup> July 2017. Incidentally, the decision to invite the Claimant for the disciplinary session was communicated on 5<sup>th</sup> July 2017, I suppose after she had delivered her response to the show cause letter.
48. The letter inviting the Claimant for the disciplinary session informed her of her right to attend the session in the company of a co-employee of her choice or her trade union representative. Again, the invite was delivered to the Claimant who signed to acknowledge receipt.
49. There is evidence that on 7<sup>th</sup> July 2017, the disciplinary committee convened at 9.00 am. The Claimant was in attendance. According to the minutes of the meeting, the particulars of the charge against the Claimant were once again explained to her.
50. The minutes show that the Claimant was given a chance to ventilate her case. She signed the minutes to confirm her concurrence with their content.
51. On 24<sup>th</sup> July 2017, the Respondent communicated its decision to terminate the Claimant's employment. The letter confirmed that the Claimant will be paid salary for one month in lieu of notice since the termination was to take effect immediately. Finally, the letter restated the Claimant's right of appeal within seven days of the decision.
52. In her pleadings and evidence, the Claimant attacks the disciplinary proceedings for allegedly denying her the right of appeal. Yet, the letter of termination bears contrary evidence. It is noteworthy that the copy of the termination letter produced in evidence by the Claimant actually speaks to the fact of her right to appeal. In the circumstances, it is incomprehensible that she would suggest that her right of appeal was withheld.
53. Finally, the employment record of the Claimant as produced by the Respondent paints a picture of an employee who was unwilling to depart from her wayward habits even after she was issued with several warnings. Before her termination, the Claimant had been subjected to a series of separate disciplinary interventions on account of transgressions that bear the same generic: financial misconduct. She admitted her shortfalls but kept repeating the same mistake. I think that in the circumstances of the case, the Respondent acted in accordance with justice and equity in terminating the employment of the Claimant. The Respondent was entitled to bear in mind the Claimant's past poor record on the subject in terms of section 45 of the EA.
54. Having considered the evidence on record, I am satisfied that the Respondent terminated the contract of service between the disputants in strict compliance with the law. I am satisfied that the Respondent met the requirements of sections 43, 45 and 47 of the EA.



**Determination**

- 55. In view of the findings above, the court holds that the Claimant’s contract of service was lawfully terminated. Consequently, the Claimant is not entitled to the reliefs that she seeks in the Memorandum of Claim.
- 56. Conversely the Respondent has proved that it acted within the law in terminating the Claimant’s contract of service. I will therefore grant the prayers sought by the Respondent by dismissing the Claimant’s case with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 2<sup>ND</sup> DAY OF FEBRUARY, 2023**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

.....for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**

