



**Cheruiyot v KCB Bank Kenya Limited (Cause 1149 of 2018)  
[2023] KEELRC 238 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 238 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1149 OF 2018  
JK GAKERI, J  
FEBRUARY 1, 2023**

**BETWEEN**

**EDDAH CHEBET CHERUIYOT ..... CLAIMANT**

**AND**

**KCB BANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a Memorandum of Claim filed on 6<sup>th</sup> July, 2018 alleging that she was employed by the Respondent in August 2013 as a teller at the Prestige Branch, Ngong Road and later at the Tom Mboya Branch at Kshs.38,000/= per month. That she joined the union after confirmation in 2014.
2. It is the Claimant's case on 22<sup>nd</sup> December, 2016, a customer by the name Spencer Magira Onsongo came to her counter to withdraw Kshs.450,000/= and presented a completed Custom Transaction Voucher (CTV) duly signed, that she conducted the Know Your Customer (KYC) as required and checked the photograph, signature, ID card number and telephone and paid the amount of Kshs.450,000/=. That at around 2.30pm, the same customer came back with a dirty duly filled CTV to withdraw Kshs.450,000/=. It is the Claimant's case that because the CTV was dirty, she completed another one for the customer who had sought no assistance and paid.
3. That she later discovered that there was a discrepancy between the balances in the cash till and the system and attempts to resolve the same with the assistance of the Assistant Operations and Cash Managers failed and she discovered that the account had a restriction.
4. That on the following day, she was requested to respond to a memo on the Kshs.450,000/= and was afterwards sent on compulsory leave for 5 days which was extended by 15 days and subsequently suspended on 12<sup>th</sup> January, 2017 and her employment was terminated on 13<sup>th</sup> June, 2017.
5. That the termination of employment was based on falsehoods hearsay and vendetta.



6. That she had no warning letter or disciplinary issues and the termination of employment was unfair and unlawful.
7. The Claimant prays for;
  1. Order that termination of employment was unfair and unlawful within the meaning of Section 45 of the Employment Act.
  2. Order of reinstatement to the same position held before termination without loss of benefits or seniority.
  3. Twelve (12) month's salary as compensation, Kshs.926,976/=.
  4. Salaries and allowances of Kshs.926,976/= for unfair and unlawful loss of employment.
  5. Underpayment of Kshs.282,000/= when she was on contract.
  6. Leave pay, notice pay, leave allowance etc as if there was no termination of employment.
  7. Interest on 3, 4, 5 and 6 above.
  8. Costs of the suit.

#### **Respondent's case**

8. The Respondent filed a response to the Memorandum and Counter-claim on 4<sup>th</sup> June, 2019 denying that the Claimant joined the union after confirmation.
9. The Respondent avers that on 22<sup>nd</sup> December, 2016, the Claimant posted four fraudulent withdrawals of Kshs.1,297,000/=, all in three restricted accounts irregularly transferred from Eldoret Branch to Njoro Branch to facilitate the fraud in that;
  - i. The Claimant personally completed the CTV for Kshs.450,000/= and processed the withdrawal without a customer at the counter.
  - ii. The Claimant made two payments on the same account allegedly to the same customer yet the signatures and handwriting of the customer differed.
  - iii. The Claimant irregularly paid a man while the account was in the name of a lady.
  - iv. The two payments of Kshs.450,000/= were intended to avoid the KYC by line management to hide the fraud.
  - v. The Claimant made out payment on an account whose signature mandate was restricted to Njoro only.
10. The Respondent admitted to sending the Claimant on leave and suspension on 11<sup>th</sup> January, 2017 for investigation.
11. That the Claimant attended a hearing on 6<sup>th</sup> June, 2017 and her employment was terminated on 13<sup>th</sup> June, 2017.
12. The Respondent denied having underpaid the Claimant from 7<sup>th</sup> August, 2013.



13. It is the Respondent's case that the Claimant colluded with one, Harun Kipngetich Bett and other unknown persons to make illegal amendments to restricted accounts to facilitate fraudulent withdrawals and a forensic investigation implicated her and was dismissed for misconduct.
14. That the Claimant had no pending leave days as at the date of termination of employment.

### **Counter-Claim**

15. The Respondent avers that on 7<sup>th</sup> October, 2015, it was instructed by the Ministry of Devolution & Planning to open accounts to facilitate payment to IDPs/Forest Evictees but on 19<sup>th</sup> October, 2015, it received a directive from the Directorate of Criminal Investigations (D.C.I) to withhold payment pending investigation on none-genuine IDPs and a further request from the Ethics and Anti-Corruption Commission (EACC) for information on payments was received on 5<sup>th</sup> November, 2015.
16. That as a consequence, all the accounts were restricted but the Claimant made suspicious payments on 22<sup>nd</sup> December, 2016 and her explanation was unsatisfactory and the Respondent suffered a loss of Kshs.1,297,000/=.
17. That the disciplinary committee recommended her dismissal from employment but the Claimant declined to answer to the charges citing a Criminal Court Case thus squandering her opportunity to be heard.
18. The Respondent prays for;
  - i. Dismissal of the Claimant's suit with costs.
  - ii. Sum of Kshs.1,297,000/=
  - iii. Interest on (ii) above
  - iv. Costs of the claim and counter-claim.

### **Claimant's evidence**

19. The Claimant adopted the written statement.
20. On cross-examination, the Claimant admitted the contents of her initial contract effective 7<sup>th</sup> August, 2013 to 6<sup>th</sup> August, 2014 and the second letter dated 30<sup>th</sup> July, 2014 which incorporated the CBA in force and salary rise to Kshs.55,860/= and a housing allowance of Kshs.6,700/= and had no objection.
21. The witness admitted having been involved in the three transactions and that she had written a statement over the issue.
22. Similarly, she admitted that she was the person referred to as Eddah Chebet Cheruiyot in the statement by one Mr. Lumumba Mutunga of Forensics Department.
23. Regarding the CTVs on record, the Claimant admitted that the handwritings were different as she filled in one of them because the customer's copy was dirty and he was the same person, something tellers do. That Code 4145 meant a restriction.
24. With regard to the CTV for Richard Ariwonyang, the Claimant confirmed that she did not assist him but conducted the KYC.
25. It was her testimony that if the Account had a restriction, it could not go through at the Tom Mboya Branch and she had called Njoro earlier.



26. Regarding the CTV of one Ann Njeri, the Display was “CUSTOMER TO UPDATE PHOTO” but paid out Kshs.207,000/=. The witness testified that the bank had challenges with the system on that day and there was a photo and her withdrawal limit was Kshs.500,000/=.
27. The witness confirmed having recorded the statement on pages 56 – 59 of the Respondent’s bundle of documents. That the 3 accounts were domiciled at the Njoro Branch and she was unaware of the restriction.
28. She admitted having known one Gideon Kipsoi Rop and the notice from the EACC dated 5<sup>th</sup> November, 2015
29. The Claimant admitted that she received an invitation to the disciplinary hearing and attended with a representative, one William Ololchike.
30. That the charges were not read to her but were the same as she had been given earlier and she indicated that she was not ready to proceed until a criminal matter in court was concluded and had not been concluded during the hearing of the disciplinary.
31. The Claimant admitted that the termination letter had the reasons for termination and all her dues were paid.
32. As regards underpayment, the witness confirmed that under the 1<sup>st</sup> contract of employment, she was not unionisable. On salary, leave and notice pay, she testified that the prayer was based on the assumption she was still at work awaiting conclusion of the Criminal Case.
33. On re-examination, the witness testified that if an account had a restriction, no deposit or withdrawal would have been possible.
34. That the documents she had requested for on the withdrawals were not provided and the restrictions were lifted at the Njoro Branch by Winnie and Ann.
35. That in relation to Ann Njeri’s account, she served a slender lady.

### **Respondent’s evidence**

36. RWI, Mr. Robley Ngonje testified that the Claimant was employed as a Clerk. He confirmed that the three accounts were transferred from Eldoret to Njoro by one, Harun Bett (a Sales Person) through surfing ie stealing and harvesting passwords in the course of employment.
37. That the restrictions at the Njoro Branch had been lifted when the Claimant performed the transactions but had other ways of knowing the position, such as the different signatures and a red flag (attention to detail) such as name at the top was different from the one at the bottom.
38. That Onsongo’s signature in the bank’s system was different from the one on the CTV and the Claimant had a line Manager or Supervisor to assist her.
39. The witness testified that the accounts were fictitious, opened by the persons who withdrew the cash and there were no originating documents.
40. It was his testimony that only customers who cannot write are assisted in the bank.
41. On re-examination, the witness testified that the Claimant knew Harun Bett and Gideon who were her village mates.



42. That it was not possible to transact through Richard Ariwonyang account because of the different signatures and the Red Flag.

### **Claimant's submissions**

43. The Claimant's counsel raised for issues for determination, namely; underpayment, termination of employment and entitlement to reliefs by both parties.
44. On underpayment, it was submitted that the Claimant was engaged as a clerk as per her letter of appointment dated 7<sup>th</sup> August, 2014. Counsel relied on the CBA on record dated 16<sup>th</sup> August, 2017 and signed on 30<sup>th</sup> August, 2017 to urge that the Claimant was unionisable and thus privy to the CBA. Reliance was made on the salaries set out in the CBA isolating an underpayment of Kshs.23,500/= . Reliance was made on an unidentified Civil Appeal No. 14 of 2016.
45. That other employees working with the Claimant were paid in accordance with the CBA and was therefore discriminative. Section 5(2) of the Employment Act, 2007 was relied upon on discrimination.
46. As regards termination of the Claimant's employment, it was submitted that on 22<sup>nd</sup> December, 2016 the Claimant assisted the customer fill in the CTV, a normal thing in the bank where a customer was illiterate. That a junior officer could not remove the restrictions on the 3 accounts as per the Respondent's evidence on record and the amendments to the accounts were made at the Njoro Branch and thus the culprits were at the Njoro Branch and nothing linked the Claimant to the fraudsters at Njoro. That the changes were made at the Njoro Branch between 18<sup>th</sup> December, 2016 and 23<sup>rd</sup> December, 2016 and the withdrawals at the Tom Mboya Branch.
47. It was urged that some employees of the Bank were negligent with their user credentials as to allow another to use them. Reliance was made on the sentiments of Rika J. in an unnamed Cause No. 739 of 2011 to urge that the Claimant was not negligent in the performance of her duties.
48. On entitlement to reliefs to the Claimant, it was submitted that the culprits were based at the Njoro Branch and the changes were effected from there and the officers implicated were not disciplined.
49. It was submitted that no specific evidence connected the Claimant to the fraud and there was no reason for her to decline payment and all the prayers were justified as her employment was unlawfully terminated.
50. That the Claimant was doing her job when the fraudsters withdrew cash through her counter and there was no evidence that she was a fraudster and was terminated from employment alone.
51. Finally, the Claimant's counsel maintained that the Claimant was entitled to the reliefs claimed.

### **Respondent's submissions**

52. The Respondent's counsel restated the facts of the case and isolated three issues for determination as follows;
- i. Whether termination of the Claimant's employment was unfair and unprocedural.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Whether the Respondent is entitled to the reliefs sought.



53. As to whether termination of the Claimant's contract was unfair and unprocedural, it was urged that the Respondent followed the law and the decision in *Kenafric Industries Ltd V John Gitonga Njeru* (2016) eKLR was relied upon to buttress the submission to underscore the fact that the Respondent complied with the provisions of Section 45(2) of the *Employment Act*, 2007.
54. Counsel submitted that the forensic audit conducted by the Respondent implicated the Claimant who was invited for a hearing but declined to testify citing the criminal case in court. That the committee made a decision to terminate her services due to her uncooperativeness and the same was formalised on 13<sup>th</sup> June, 2017.
55. It was urged that the Claimant was granted an opportunity to defend herself and the letter of termination contained the reasons for termination of employment.
56. Reliance was made on the decision in *Banking, Insurance and Finance Union (Kenya) V Kenya Commercial Bank Ltd* (2020) eKLR to urge that the courts makes a similar finding in the instant case in that the Claimant executed the second CTV for Mr. Spenser Onsongo, the CTV by Richard Ariwonyang had discrepancies and the accounts in question were domiciled at the Njoro Branch and had restrictions.
57. That from the Claimant's statement on record, it was clear that the Claimant was complicit in the fraud perpetrated on 22<sup>nd</sup> December, 2016 and thus culpable.
58. It was submitted that the banking industry operated on trust and integrity and the Claimant should have acted in a transparent manner.
59. The decision in *Samson Thuku Mutiso V Diamond Trust Bank Kenya Ltd* (2015) eKLR was relied upon to urge that trust and integrity were core values in the financial services industry.
60. Reliance was also made on the decision in *Banking, Insurance Finance Union (K) V Co-operative Bank of Kenya Ltd* (2019) eKLR.
61. As regards the reliefs sought by the Claimant, it was submitted that the court should find that termination of the Claimant's employment was fairly terminated and her claims (prayers) had no basis having admitted that she was paid all her dues.
62. As regards reinstatement which the Claimant insisted upon, it was urged that it was more than 5 years since the separation and the remedy was not available.
63. The decision in *Mohamed Bayaan Adan V Kenya Meat Commission* (2021) eKLR was relied upon to urge that the court must consider the factors set out in Section 49(4) of the *Employment Act* and balance the interests of the employees and employer. It was submitted that the remedy was not available to the Claimant.
64. It was further submitted that the claim for Kshs.282,000/= for underpayment was unsubstantiated as the contract dated 7<sup>th</sup> August, 2013 which the Claimant accepted and signed for one year had a consolidated salary of Kshs.38,000/= and she adduced no evidence of union membership and confirmed as much. Moreover, the claim was filed on 4<sup>th</sup> July, 2018 more than 12 months prescribed by Section 90 of the *Employment Act*, 2007.
65. That the claim for Kshs.926,976/= for salaries and allowances lost as a result of the unfair loss of employment was not substantiated and had not demonstrated that termination of employment was unfair for compensation.



66. As regards the counter-claim, it was urged that the bank lost Kshs.1,297,000/= as set out in the forensic investigation report dated 11<sup>th</sup> January, 2017.
67. It was submitted that the Claimant was culpable.
68. Reliance was made on the decision in *Liech V Sameer Agricultural & Livestock (K) Ltd (now) Devyan Industries (K) Ltd (2022) eKLR* where money lost through the negligence of the employee was recovered from his salary as the insurer refused to pay.
69. The decision in *Margaret Auma Ingwe V Kenya Power and Lighting Co. Ltd (2015) eKLR*, was also cited to urge the court to dismiss the Claimant's suit with costs and allow the counter-claim.

## Determination

70. The issues for determination are;
  - i. Whether termination of the Claimant's employment was unfair and unlawful.
  - ii. Whether the Claimant is entitled to the reliefs sought.
71. As to whether termination of the Claimant's employment was unfair and unlawful, the home port are the relevant provisions of the *Employment Act, 2007* and judicial decisions on the issue.
72. The *Employment Act, 2007* contains detailed provisions on termination of employment from the requisite notice, reason and reasons for termination, burden of proof, procedural tenets and justification among other requirements.
73. Some of these requirements were captured by the Court of Appeal in its decision in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR* where the court stated as follows;

“There can be no doubt that the Act which was enacted in 2007 places heavy legal obligations on employers in matters of summary dismissal for breach of contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (Section 43); prove the reasons are valid and fair (Section 45); prove that the grounds are justified (Section 47(5) amongst other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination . . .”
74. The court expressed similar sentiments in *Kenafic Industries Ltd V John Gitonga Njeru (Supra)*;

“. . . Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the termination of employment . . .

It is trite law that where termination of employment is contested and alleged to be unfair, the burden of proving the unfairness rests on the employee while the burden of justifying the grounds of termination or dismissal rests on the employer.”
75. The foregoing provisions of the *Employment Act, 2007* and case law are clear that for a dismissal or termination of employment to pass muster, it must be substantively justified and procedurally fair, as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and elaborated by the Court of Appeal in *Naima Khamis V Oxford University Press EA Ltd (2017) eKLR*.



76. I will now proceed to apply the foregoing principles and provisions of law to the facts of the instant case.

### **Reason(s) for termination**

77. A copy of the termination letter on record outlined the allegations made against the Claimant and the findings of the investigations that the Claimant;

1. Processed two withdrawal vouchers each amounting to Kshs.450,000/= on A/C No. 1125897880 in the name of Spencer Magira Onsongo with two different signatures contrary to the Cashiers Guide and Standing Operating Procedures.
2. Completed a withdrawal voucher for Kshs.450,000/= when not the account holder.
3. Served a male customer for the withdrawal voucher of Kshs.207,000/= on A/C No. 1175473405 in the name of Ann Njeri while the account belonged to a female customer.
4. Irregularly processed fraudulent withdrawal vouchers of Kshs.450,000/=twice (totalling to Kshs.900,000/=), 207,000/= and Kshs.190,000/= all amounting to Kshs.1,297,000/=.
5. Knowingly engaged and dealt with a fraudster named Gideon whom she confessed came from her rural village on various accounts and received funds.
6. Displayed active dishonesty by denying knowledge of the fraudulent transactions until confronted with CCTV footage.

78. The letter identifies the grounds of termination as lack of honesty and integrity for continued employment by the bank. That the bank had lost confidence in the Claimant.

79. It is not in dispute that the Claimant paid out the sum of Kshs.450,000/= to one, Spencer Magira Onsongo Kshs.207,000/= to a gentleman from the account under the name Ann Njeri and Kshs.190,000/= to one Richard Ariwonyang all on 22<sup>nd</sup> December, 2016.

80. It is also not in contest that the Claimant filled in the CTV on behalf of Spenser Magira Onsongo when the individual visited the bank that afternoon.

81. Instructively, the signatures in the two CTVs in respect of Spenser Magira Onsongo were different from the naked eye, a fact the Claimant admitted.

82. Similarly, the copy completed by the Claimant did not state the customer's branch while the first one had. Puzzlingly, the branch was indicated Garden Plaza yet the Account was domiciled at the Njoro Branch. This was a red flag which the Claimant did not notice when conducting KYC. The forensic telephone number was another red flag. The Claimant adduced no evidence that she attempted to call the number.

83. Strangely, although the Claimant testified that it was normal for bank tellers to fill in CTV for customers, RWI testified that that was only applicable where a customer was illiterate. The Claimant adduced no evidence that Mr. Spenser Onsongo who allegedly had just jetted into the country was illiterate or needed assistance.



84. With regard to the CTV filled by Mr. Richard Ariwonyang, the signature on the document and the one in the system were different and as RWI testified there was a red flag.
85. Similarly, the names on the CTV do not appear to have been written by one person and are different too.
86. The Claimant testified that she conducted the KYC checks and nothing aroused suspicion.
87. In the court's view, the most bizarre payment relates to the Account of Ann Njeri No. 1175473405. The CTV had no Branch and the telephone number was unclear and strangely the amount was collected by a person other than the account holder.
88. Although the Claimant testified that she dealt with a slender woman, she had already disclosed that she dealt with a man following instructions by another man.
89. In her undated hand written statement to the Forensic Department, whose authenticity the Claimant confirmed, the Claimant stated as follows:

“On 22<sup>nd</sup> December, 2016, I paid 3 accounts that later was told they were fraudulent. Before that, a customer approached me and asked me if I could help him with his accounts that were opened with Imaginary names at Njoro Branch. His name is Gideon Kipsoi Rop and he happens to be coming from my rural home and I know him since childhood. He gave me 2 accounts to check for him but I found out that they were restricted. I called Njoro Branch and inquired more about the accounts. The Branch Manager Njoro- Mr. Saina confirmed to me that all IDPs accounts were restricted and that there were no IDP Accounts that were NOT restricted. I didn't honour his proposal since my job was at risk here. I confirmed the same with customer consultant at Njoro Branch (Cynthia) . . .

That same customer called me after sometime and proposed the same. He sent me the account No. to check. On checking it, I found that it had no restriction on it and he asked me to post it to confirm if the accounts he had opened had restrictions. I did that and it went through. (HE CLAIM THAT THIS ACCOUNTS WERE ALL HIS AND HE OPENED WITH THE HELP OF A KCB STAFF AT NJORO). He called me telling me that he will send someone to pick the cash since he was engaged with other issues. A tall guy came to me directly and said that he had been sent by Gideon to pick the money. I knew nothing about the person . . .

He collected the money and left. After a while, he came back with a voucher filled well the said that its part of the accounts. I paid him without checking on much details. Later on, a customer came by the name of Spenser and the account details was ok but the signature was slightly different. We talked for few minutes and since I was comfortable paying him, I paid. He came again at around 4 pm and he didn't pick a ticket because . . . he expected me to give him the same services. I proceeded with the transaction . . .”

90. In her own words, the Claimant admitted paying monies to a person who was not the account holder at the instigation of her village mate, one Gideon Kipsoi Rop. This would appear explain the CTV under the name Richard Ariwonyang and Ann Njeri. The same person presented both CTVs and the Claimant paid. In relation to Ann Njeri's Account, the Claimant paid without checking the details. No wonder the Bank System had no photo of the alleged Ann Njeri and there was no slender lady on that day.



91. Regrettably, the Claimant adduced no evidence that he sought the assistance of her line manager or supervisor in dealing with the payments.
92. Although the Claimant Counsel's submission that employees at the Njoro Branch were negligent in the use of their credentials has merit, the acts and omissions of the Claimant on 22<sup>nd</sup> December, 2016 could not pass muster too. She singly facilitated up to four questionable withdrawals in a single day.
93. In addition, contrary to the Claimant counsel's submission that the Respondent's forensic investigation found her not culpable, the evidence on record revealed that the Claimant was the conduit through which monies was withdrawn from fictitious accounts, the red flags notwithstanding.
94. In the court's view, the evidence on record reveals that on 22<sup>nd</sup> December, 2016, Claimant as a bank teller exhibited negligence and carelessness in the discharge of her responsibilities by inter alia taking instructions from an outsider without alerting her superiors and making payments on the basis of questionable documentation presented by persons other than the account holder.
95. Although there is no direct evidence showing that the Claimant was part of the fraudsters, the manner in which she conducted herself on 22<sup>nd</sup> December, 2016 would appear to suggest that she knew more than she disclosed during the investigation and in court. From her statement to the investigators, it is discernible that Gideon Kipsoi Rop had a contact at the Njoro Branch. The fact that she did not consult her supervisor is also puzzling.
96. In the court's view, the Respondent was justified in questioning the Claimant's honesty and integrity and had justifiably lost confidence in her remaining an employee of the bank.
97. It cannot be gainsaid that the Claimant was a bank employee, a relationship grounded on trust and good faith, where honesty and integrity were indispensable as elaborated in *Samson Thuku Mutiso V Diamond Trust Bank Kenya Ltd (Supra)* where the court stated that;
 

“As observed earlier, the Respondent is in financial services industry where trust, integrity and due care are some of the industry's core values . . .
98. Similarly, in *Banking, Insurance Finance Union (K) V Co-operative Bank of Kenya Ltd (2019) eKLR*, the court was emphatic that;
 

“. . . The position of the grievant was a fiduciary one based on trust and good faith. The grievant was required to act in the interest of the bank at all times . . .”
99. The same may be said of the Claimant who was handling cash and dealing with customers of the bank.
100. For the above-mentioned reasons, it is the finding of the court that the Respondent has on a balance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant's employment on 13<sup>th</sup> June, 2017.

### **Procedure**

101. As explained by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*, Section 41 of the *Employment Act* provides a mandatory and elaborate procedure to be complied with before termination of employment.



102. The specific principles to be complied with have been elaborated in countless decisions including *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR where the Court of Appeal stated as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

103. While the Claimant’s counsel did not specifically submit on the procedure employed by the Respondent, counsel for the Respondent submitted that the Respondent satisfied the ingredients of Section 45(2) of the *Employment Act*, including fair hearing.

104. The Claimant confirmed on cross-examination that she was invited for a disciplinary hearing by letter dated 30<sup>th</sup> July, 2017, acknowledged receipt and attended the hearing as evidenced by the minutes on record.

105. It was her testimony that the letter informed her the right to attend with a representative and she attended with a Mr. William Olochike and the union was also represented.

106. The Claimant further admitted that she told the committee that she was not ready to proceed until the criminal case against her was concluded and declined to proceed with the hearing as the matter was still pending in court.

107. Although the representative and the union representative shared the sentiments of the Claimant, the committee was of the view that the criminal case had no effect on the Respondent’s internal disciplinary hearing and had done it before.

108. Needless to underline, the position taken by the Claimant as well as her representative and the union representative that proceeding with the hearing would amount to contempt of court or illegality was incorrect. The two are parallel processes and none was dependent on the other.

109. The committee was persuaded since the Claimant had been invited for the hearing and had confirmed attendance but declined to proceed on account of a pending criminal case against her and had admitted being involved in serious irregularities, the committee was satisfied that she had squandered her opportunity to be heard and recommended termination of employment.

110. The Claimant faulted the proceedings on the ground that the charges were not read out to her a fact not reflected in the minutes yet she had a representative and the union was represented too and none of them raised the issue as she did not.

111. Strangely, according to the Claimant, she was still awaiting her disciplinary hearing once the criminal suit was concluded. The court is of the view that adopting such a reasoning would subject internal disciplinary process to unimaginable uncertainty which would have adverse effects on both parties.

112. Although the Respondent should have advised her to reconsider her position, which had no legal backing, it cannot be faulted for the decision the committee made.



113. In sum, the Claimant was afforded the opportunity to rebut the allegations made against her but refused to participate on the premise that there was a pending Criminal Case against her which neither she nor the Respondent had control over and could not subsequently allege that termination of her services was procedurally unfair having opted out voluntarily.
114. The court is satisfied and finds that the Respondent has discharged the burden of proof to demonstrate that termination of the Claimant's employment was procedurally fair.
115. In a nutshell, it is the finding of the court that termination of the Claimant's employment was lawful and fair. Having so found, I now proceed as follows as regards the reliefs sought.

### **Underpayment**

116. Neither the Claimant's written statement nor the oral evidence adduced in court made reference to the alleged underpayment of Kshs.282,000/=.
117. On cross-examination, the Claimant confirmed that the letter of appointment dated 7<sup>th</sup> August, 2013 was her initial contract of employment from 7<sup>th</sup> August, 2013 to 6<sup>th</sup> August, 2014 and accepted the terms therein and was on 7<sup>th</sup> August, 2014 appointed as a Clerk on permanent and pensionable terms with 6 months probationary period and the contract incorporated the terms and conditions in the CBA. Under the one (1) year contract, effective 7<sup>th</sup> August, 2014, the CBA, if any, was not applicable and the Claimant led no evidence that she was a member of the union.
118. The Claimant's prayer for underpayment is premised on the CBA between the Kenya Bankers Association and the Banking Insurance and Finance Union (Kenya) dated 16<sup>th</sup> August, 2017 effective 1<sup>st</sup> March, 2017 and executed on 30<sup>th</sup> August, 2017. The amount claimed is for the period 7<sup>th</sup> August, 2013 to 6<sup>th</sup> August, 2014.
119. The CBA on record has no provisions for salaries or other benefits applicable to employees in 2013/2014 and is thus not reliable. It is unclear where the salary of Kshs.55,860/= and house allowance of Kshs.5,640/= was extracted from.
120. The Claimant counsel's submission that employees working alongside the Claimant were being paid in accordance with the CBA and the Claimant was being discriminated was not supported by evidence. The Claimant led no evidence of how much her colleagues were earning when she joined in August 2013.
121. In the absence of evidence to establish that the Claimant was entitled to the alleged salary and housing allowance, it is the finding of the court that the prayer is not sustainable and is disallowed.

### **Reinstatement**

122. The remedy of reinstatement is provided for under Section 49(3)(a) as read together with Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011.
123. Under Section 12(3)(vii) above, the remedy is only available within 3 years of termination of employment or dismissal.
124. Relatedly, and as emphasized in *Kenya Airways Ltd V Aviation and Allied Workers Union (2014) eKLR*, the remedy is discretionary.

In the circumstances, the prayer for reinstatement is unavailable.



### **Twelve (12) months compensation**

125. Having found that termination of the Claimant's employment was conducted in accordance with the law, the Claimant is not eligible for the relief provided by Section 49(1)(c) of the *Employment Act*.

The prayer is disallowed.

### **Salary and allowances Kshs.926,976/=**

126. The Claimant adduced no evidence of his entitlement to the sum claimed. Relatedly, the Claim lacks the necessary particulars.

The prayer is disallowed.

### **Leave pay, notice pay, leave allowances etc Kshs.77,248/=**

127. This is an amorphous claim lacking in specificity.

128. More significantly, the Claimant adduced no evidence of pending leave days, leave allowance or notice pay.

129. Finally, the Claimant confirmed on cross-examination that all dues were paid after the letter of termination was served. The prayer is disallowed.

### **Counter-Claim**

130. The Respondent claimed the sum of Kshs.1,297,000/=, interest and costs. According to the Respondent, the actions of the Claimant led to the loss of Kshs.1,297,000/= on account of the payment she made from three accounts as the accounts from which payment was made were fictitious.

131. Intriguingly, the Respondent's witness adduced no evidence on how the amount claimed became a loss to the bank and how it was reflected in its books of accounts. This is because banks typically take out insurance cover for such loss and the Respondent led no evidence that its insurer declined to pay the alleged loss.

132. The decision in *Liech V Sameer Agricultural & Livestock Ltd (Supra)* relied upon by the Respondent is inapplicable as in that case, it was demonstrated that the insurer refused to compensate the insured for the loss. No such evidence was adduced in this court.

133. In the circumstances, the counter-claim is unproven and is dismissed.

134. In the end, the Claim and Counter-Claim before the court are unmerited and accordingly dismissed.

135. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have



waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

