



**Khamasi v Paramount Bank Limited (Appeal E033 of 2021)  
[2023] KEELRC 910 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 910 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E033 OF 2021  
CN BAARI, J  
APRIL 20, 2023**

**BETWEEN**

**PAMELA KHAMASI ..... APPELLANT**

**AND**

**PARAMOUNT BANK LIMITED ..... RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. R. K.  
Ondieki (SPM) delivered in Kisumu CMELRC NO. 61 OF 2019)*

**JUDGMENT**

1. This appeal arises from a Judgment rendered on August 24, 2021, where the Trial Court found in favour of the Respondent and dismissed the Appellant's claim.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on September 16, 2021.
3. The appeal is premised on the grounds That:
  - i. The Learned Trial Magistrate erred in law and fact in holding that the Appellant's dismissal was fair and in accordance with the law.
  - ii. The Learned Trial Magistrate erred in law and fact in failing to find that the Respondent did not follow its own internal dispute procedure expressly stated in the Human Resource Department Manual Ref. No. 005-08-01 at Clause 6.
  - iii. The Learned Trial Magistrate erred in law and fact in disregarding evidence on record which showed that the Respondent's decision to terminate the Appellant was pre-empted.



- iv. The Learned Trial Magistrate erred in law and fact in ruling in favour of the Respondent when the Respondent had failed to give the Appellant warnings before terminating her services on the grounds set out in the termination letter.
  - v. The Learned Trial Magistrate erred in law and fact in holding that the Appellant was given an opportunity to present her case when the Notice to Show Cause dated December 16, 2017, letter dated January 8, 2018, and the subsequent disciplinary meeting fell short of the rules of natural justice, concept and principles of article 50(1) of the *Constitution* of Kenya and section 41 of the *Employment Act*.
  - vi. The Learned Trial Magistrate erred in law and fact by failing to consider and analyse the entire evidence on record and thereby arriving at wrong findings on the issues before court.
  - vii. The Learned Trial Magistrate erred in law and fact in exercising its discretion wrongly in the circumstances.
  - viii. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and judicial authorities thus leading to resultant miscarriage of justice to the Appellant.
4. Submissions on the appeal were filed for both parties.

#### **The Appellant's Submissions\*\***

5. It is the Appellant's submission that the Learned Trial Magistrate grossly erred in both law and fact in holding that the Appellant's dismissal was fair and in accordance with the law. The Appellant sought to rely in *Muthaiga Country Club v Kudheiba Workers* [2017] eKLR to buttress this position.
6. The Appellant submits that the Respondent issued her with a show cause letter inviting her to a disciplinary hearing on account of gross misconduct, but which letter did not disclose the particulars of the charges levelled against her.
7. The Appellant submits that she attended the disciplinary hearing where the Respondent neither disclosed particulars of the offence nor availed an opportunity for her to face her accusers or cross-examine her on her evidence.
8. The Appellant further submits that she complained to the Respondent's CEO over the conduct of the disciplinary hearing, who in response, explained what the particulars of charges against her ought to have been, and invited her to a repeat disciplinary hearing but which was not different from the first session. The Appellant submits that although she attended the meeting with an advocate of her choice, he was not allowed to enter the board room where the meeting was held.
9. It is the Appellant's submission that on January 16, 2018, the Respondent terminated her services on completely different grounds from the ones explained by the Respondent's CEO in a letter dated January 8, 2018
10. The Appellant's further submission is that the Respondent issued her with a notice to show cause letter which did not state the accusations against her, and which led to the commencement of disciplinary proceedings. It is the Appellant's further submission that failure by the Respondent to investigate the allegation raised before drawing the conclusion that the Appellant was disrespectful and had declined to go on transfer, shows pure malice by the Respondent to get rid of the Appellant.



11. The Appellant submits that the Respondent did not verbally explained to her its contemplation to terminate her services in the presence of a witness of her choice on the grounds raised contrary to the express requirement of section 41 of the Employment Act.
12. It is the Appellant's final submission that the Court comes to the conclusion that she proved her case on a balance of probabilities, and that the appeal herein be allowed and the Judgment and Decree of the Trial Court dated August 24, 2021, set aside and/or vacated in its entirety and substituted with a judgment allowing the Appellant's suit.

### **The Respondent's Submissions**

13. The Respondent submits that the court ought to infer from the Appellant's admissions and apology letters that indeed, there were several instances of insubordination as alleged, and whose effect is that the Appellant conceded to wrongdoing. It had reliance in the decision in Augustine Opondo Oyenga v Salama Fikira Group Ltd [2020] eKLR to support this position.
14. The Respondent submits that by the Appellant declining to be transferred, amounts to an act of refusal to obey lawful command by an employer and warrants summary dismissal under section 44(4e) of the Employment Act. The Respondent placed reliance in Justus Mukulu Muasya v Wells Fargo Limited [2018] eKLR for the holding that in declining the transfer, the Claimant was breaching a fundamental obligation arising under the contract of service.
15. It is the Respondent's submission that the Appellant was informed of the reasons for which the Respondent was contemplating her dismissal vide the letter dated January 8, 2018, and that she could attend the meeting with a colleague of her choice.
16. The Respondent further submits that the Appellant did not plead or demonstrate what was wrong with the disciplinary hearing of January 15, 2018, save to state that her lawyer was not allowed into the meeting. The Respondent sought to rely in Samwel Wambisah v Eastern Produce Kenya Ltd [2021] eKLR, where the Court stated thus on representation by Counsel:

“...Since the Claimant was informed of the allegations to confront and was afforded an opportunity to be heard and because there is no express legal requirement for the presence of an advocate during internal disciplinary hearings, the Court finds that the Respondent was in substantial compliance with the requirements of sections 35(1) and 41 of the Employment Act, 2007...”
17. The Respondent submits that it was incumbent upon the Appellant to demonstrate to this court, which material evidence and submissions were ignored as her submissions do not indicate which evidence was ignored, and neither does it refer to any submissions or authorities before the Trial Court which were ignored and which renders her appeal baseless.
18. It is the Respondent's further submission that the Appellant was unable to prove unfair termination as required under section 47 (5) of the Employment Act, and hence damages for unlawful termination could not be awarded. The Respondent submits that payment in lieu of notice could not be awarded as the same was paid as can be noted from the final dues slip submitted in evidence before the trial court.
19. The Respondent prays that the Appellant's appeal be dismissed.



## Analysis and Determination

20. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into the following two grounds: -
  - i. The Learned Trial Magistrate erred in law and fact in holding that the Appellant's dismissal was fair and in accordance with the law.
  - ii. The Learned Trial Magistrate erred in law and fact by failing to consider and analyse the entire evidence on record and thereby arriving at wrong findings on the issues before court.
21. It is generally settled that an appellate court will not interfere with a discretionary decision of the Judge appealed from, on the simple ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case
22. The primary role of an appeals court was set out in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held that:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”
23. The Appellant's position is that the Learned Trial Magistrate erred in law and fact in holding that her dismissal was fair and in accordance with the law.
24. To uphold or set aside this finding of the Trial court, this Court has to re-evaluate and analyze the record of appeal and decide whether or not the Appellant's termination was unfair.
25. A decision on whether or not a termination is fair, is depended on the twin requirement of procedural fairness and the substantive justification for the termination. The Appellant was issued with a letter dated December 8, 2017, informing her that the Respondent could no longer accommodate her for declining a transfer to their Westlands branch, and further requiring that she either resigns or she would be terminated.
26. A further letter to show cause was issued on December 16, 2017, inviting the Appellant to a disciplinary committee hearing scheduled for December 20, 2017. The letter spelt out the grounds of the show cause to be the Appellant's letter to the Respondent's Chief Executive Officer (CEO), warning letters issued by her supervisor and allegations of gross misconduct. The letter further informed the Appellant to appear for the hearing with a colleague of her choice.
27. Upon the Appellant's written complaint against the disciplinary action taken against her, the Respondent's CEO wrote to her informing her of a reconvening of the disciplinary committee and spelling out the grounds of the intended disciplinary action.
28. Although the Appellant attended the two disciplinary meetings, she faults the Respondent for not allowing her Advocate to represent her at the hearing. The Respondent in its submission contends that there is no express legal requirement for the presence of an advocate during internal disciplinary hearings,



29. Section 41 of the *Employment Act* states thus on representation during administrative disciplinary hearing: -

“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.”

30. Indeed, the foregoing provision does not envisage representation by Counsel during disciplinary hearing. Further, the notice to show cause clearly indicated that the Appellant appears for the hearing with a colleague from the Respondent’s bank.

31. It is my considered view that absence of the Appellant’s counsel did not render the hearing unprocedural. (See *Samwel Wambisah v Eastern Produce Kenya Ltd* [2021] eKLR)

32. On the question of substantive justification, section 45 of the *Employment Act* states thus: -

“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.....”

33. The reasons for the Appellant’s termination include declining a transfer, disrespect to her supervisor, rude behavior amongst others. These reasons were listed both in the show cause letter and in the letter terminating the Appellant.

34. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR, the Court held that: -

“It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”

35. Further, the Court of Appeal in *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR while citing with approval the following excerpt from the Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol.16(1B) para 642 stated:

“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.....”

36. In determining whether the reasons for the Respondent terminating the Appellant were valid and fair, this court has to answer the question of whether a reasonable employer would have terminated the Appellant in the circumstances of her case.



37. It is evident from the court record that the Appellant had a long-standing push and pull with her supervisor which resulted in her transfer. The Appellant was issued a final warning letter dated February 16, 2017, on disrespectful behavior and insubordination, and which she responded to with her letter of apology dated February 17, 2017.
38. On November 21, 2017, the Appellant was issued a transfer letter which informed her the reason for transfer to be her inability to comply with instructions given by her branch manager, the same one she was earlier accused of insubordinating. The Appellant declined the transfer leading to the disciplinary action against her, and her subsequent termination.
39. The foregoing chronology of events is in my view, prove that the Respondent/employer acted responsibly and reasonably leaving this Court with no reason to interfere with its decision to terminate the Appellant. In other words, this Court finds the Appellant's termination fair, and upholds the finding of the Trial Court.
40. In conclusion, the Appellant's appeal is dismissed with costs.
41. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

N/A for the Appellant

Mr. Kioko h/b for Mbabu for the Respondent

MS. Christine Omolo - Court Assistant.

