



REPUBLIC OF KENYA



KENYA LAW
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**Mutinda v Bank of Baroda [K] Limited (Cause 1583 of 2018)
[2023] KEELRC 1570 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1570 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1583 OF 2018**

**J RIKA, J
JUNE 30, 2023**

BETWEEN

SHARON NDUNGE MUTINDA CLAIMANT

AND

BANK OF BARODA [K] LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 5th December 2018.
2. She states that she was employed by the Respondent Bank, as a Clerical Officer, on a fixed-term contract of 1 year, on 10th January 2010. She worked at Industrial Area, Nairobi.
3. The contract was extended for another 1 year, in January 2011, and for another 1 year in January 2012. It was further renewed for another year, in April 2013. It was to expire on 31st March 2014.
4. In April 2013, she was transferred to Mombasa, to work at Digo Road Branch. She states that she was entitled to be paid 2 months' salary as disturbance allowance, on transfer, which was not paid, in accordance with the applicable CBA.
5. Before the lapse of the last fixed-term contract, the Claimant was converted to permanent and pensionable terms on 17th March 2014, and placed on 6 months' probation. She was assigned the role of a Teller in the Cash Department.
6. She states that since 2010, she was paid far below the applicable CBA scales for Clerical Staff. She was paid monthly basic salary of Kshs. 31,320; and house allowance of Kshs. 3,700 – total Kshs. 35,020.
7. The CBA provided for monthly basic salary of Kshs. 46,169 and house allowance of Kshs. 4,775 – total Kshs. 50,944. That was in the year 2010.
8. She claims underpayment of salary from 2010 to 2018, amounting to Kshs. 1,795,252.



9. She applied for a position as a Management Trainee, and was assigned the position, on 1st August 2017. Her monthly basic salary was Kshs. 100,000, with a house allowance of Kshs. 8,000 on appointment as a Management Trainee.
10. On 7th August 2017, she was transferred from Mombasa Nyali Branch, to Nairobi main office.
11. On 11th December 2017, a customer of the Respondent Ramji Vekaria, was alleged to have visited the Bank, and reactivated his dormant account. On 5th January 2018, another customer Luhar Bhanji was similarly alleged to have visited the Bank, and reactivated his dormant account. On 5th February 2018, a third customer named Lodha Harjiwan, was said to have visited the Bank and reactivated his dormant account.
12. It turned out that reactivation was fraudulent on all the 3 accounts, and substantial amounts of money, approximately Kshs. 9 million, was withdrawn from all the accounts.
13. The Respondent alleged the Claimant was involved, and transferred her to its Diamond Plaza Branch, on 5th March 2018. She was not assigned any duties on transfer.
14. She was arrested by Banking Fraud Investigations Unit on 13th March 2018, and later charged with the offences of conspiracy to commit a felony and stealing by servant.
15. The Respondent suspended her on 14th March 2018. She was invited to a disciplinary hearing, on 25th May 2018. She was heard in the company of Joshua Mbindyo, her colleague and shopfloor Trade Union Representative.
16. She was dismissed on 29th May 2018, for fraudulent reactivation of the 3 accounts, and negligence.
17. She prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Reinstatement.
 - c. Back salaries and allowances.
 - d. Kshs. 1,392,000 equivalent of 12 months' salary in compensation for unfair termination.
 - e. Underpayment of salary from 2010 to 2018 at Kshs. 1,795,252.
 - f. Disturbance and transfer allowances totalling Kshs. 294,000 on transfer from Nairobi to Mombasa, on 2nd April 2013.
 - g. 6% CBA salary increment effective 1st March 2018.
 - h. Leave pay, pro-rated leave allowance and damages of Kshs. 1,500,000.
 - i. Interest from the date of filing the Claim.
 - j. Costs.
18. The Respondent filed its Statement of Response on 1st February 2019. Its position is that the Claimant was first engaged on a temporary contract, as a temporary Clerk, not a Clerical Officer. The roles are materially different. She was engaged on 6th January 2010, not 10th January 2010.
19. She was not unionisable, while she worked under a temporary contract. The CBA did not apply to her. Her first contract was not extended after expiry. She was offered fresh temporary contracts, each independent of the previous contracts. None of the contracts mentioned previous contracts.



20. The fresh contract of 27th March 2013, placed the Claimant at Mombasa, Digo Road Branch. It was not a transfer, but fresh employment and posting.
21. She was appointed on permanent and pensionable terms for the first time, on 13th March 2014. She now became an eligible member of the Union. The CBA applied to her on this appointment.
22. She is not entitled to underpayment of salary, as the CBA did not apply to her, and in any event, the prayer for underpayment of salary is time-barred, under the *Employment Act*.
23. On being employed in permanent and pensionable terms, she was paid salary commensurate with the entry level contained in the applicable CBA.
24. Subsequent CBA dated 16th August 2017 did not apply to the Claimant. She was already a Management Trainee, and not eligible for union membership.
25. She was placed directly into Management Category, and at the time of termination was neither unionisable nor unionized, and the Banking, Insurance and Finance Union [BIFU], did not have locus to present the Claim, on behalf the Claimant.
26. She personally requested for transfer from Mombasa Nyali Branch to Nairobi.
27. Due process was followed in her dismissal. She was presented with charges on fraudulent reactivation of 3 accounts, and negligence. She was advised on her procedural rights before the disciplinary hearing. She was availed necessary documents and advised on her right to have the company of a colleague or trade union representative. Hearing took place on 25th May 2018, and the Claimant was found culpable. She did not follow Dormant Account Policy, 2017. It was recommended that her contract is terminated.
28. Terminal benefits comprising 3 months' notice at Kshs. 318,000; 3 months' house allowance at Kshs. 31,500; 3 months' conveyance/ entertainment allowance at Kshs. 18,000; and annual leave of 24 days at Kshs. 116,258 was to be paid directly to her bank account.
29. She had a loan balance of Kshs. 271,369, which was deducted from her dues, leaving her with a credit balance of Kshs. 48,963 in terminal dues.
30. She authorized reactivation of the dormant accounts. Kshs. 2,564,004, Kshs. 3,672,250, and Kshs. 3,362,000 were respectively withdrawn fraudulently, from the 3 accounts, as a result of the Claimant's actions or omissions. CCTV footage on the dates the accounts were reactivated, did not capture the presence of the account-holders at the Bank. They were not shown to have been present when the amounts left their respective accounts.
31. The Respondent prays the Court to dismiss the Claim with costs.
32. The Claimant gave evidence on 12th October 2022 and 29th November 2022, when she closed her case. James Kimintah, Human Resource – In charge at the Respondent, similarly gave evidence on 29th November 2022, when the hearing closed.
33. The Claimant adopted as her evidence, her Witness Statement and Documents, contained in page 1 to 197 of her bundle.
34. She restated on cross-examination that she was employed in January 2010 as a Clerk. She was on fixed-term contract, before engagement on regular terms, in the year 2014. During the contract period, she was not a member of the Trade Union.



35. She was not underpaid, according to her contract. She claims underpayment under the CBA. She became a member of the Union in 2013. She did not have a document to show when she joined the Union.
36. She became a Management Trainee on 1st August 2017. She was being trained to become a Manager in the future. She started to earn entertainment allowance. Clerks were not paid entertainment allowance. The appointment letter states as a Management Trainee, the Claimant would not be entitled to overtime pay. She was in Management. She insisted that she was still eligible for unionisation, while in Management.
37. It was alleged that 3 customer accounts were fraudulently reactivated, and substantial amounts of money, withdrawn from these accounts. The Claimant was allegedly involved and was taken through a disciplinary hearing.
38. She was notified about the disciplinary hearing. She attended in the company of her colleague, and union representative. She was given an opportunity to state her case. She was advised on her right of appeal. She filed a labour dispute before the Ministry of Labour. The Conciliator recommended that the Claimant is reinstated. Other Officers who were involved in reactivation of the accounts are still working. This shows there was no valid reason, justifying termination.
39. She was paid 3 months' salary in lieu of notice and other benefits. She did not recall if annual leave was paid. There would be trust and confidence if she was reinstated. She would produce evidence of union membership, given time. She would prove her prayer for leave pay and damages at Kshs. 1,500,000, given time.
40. Redirected, she told the Court that Clerks are unionisable. The position of a Clerk was listed in the CBA. The Respondent stopped remitting her trade union dues, once she became a Management Trainee. She performed management role, under supervision. After training, she could move to substantive management level. She did not write a letter resigning from the Union, on ascending to Management Training.
41. James Kimintah, Head of Human Resources, confirmed that the Claimant was initially employed under a fixed-term contract, in 2010.
42. She was not eligible for union membership, before 2014, and after joining management category. She became unionisable, in 2014 when she became permanent, and was offered salary at entry level, in accordance with the CBA. There was annual increment, based on the CBA. She enjoyed annual increments from the year 2014. Her prayers for underpayment of salary, from 2010 to 2018 has no foundation
43. She was on a fresh contract when she moved from Industrial Area in Nairobi, to Digo Road Mombasa. There was a timeout of 3 months, before the fresh contract issued. She was therefore not entitled to any transfer allowance, because she was on fresh engagement.
44. 3 dormant accounts were reactivated, and approximately Kshs. 9 million fraudulently withdrawn. The Claimant was suspended. Investigations took place. A report was generated. The Claimant was taken through a disciplinary hearing. Her rights were respected. She was supplied with relevant documents. She informed the Respondent that she would be represented by a shopsteward Joshua Mbindyo, who was also her colleague. She was heard in his presence. The decision to terminate her contract was communicated.



45. She was paid terminal dues, including 3 months' salary in lieu of notice; house allowance; conveyance and entertainment allowance; and leave days. She had a loan balance, which was offset from her terminal dues, leaving a net payment of terminal dues, in the sum of Kshs. 48,963.
46. The Respondent did not receive her alleged letter of appeal. The email of the addressee was incorrect. Other disciplinary appeals were processed and heard. Kimintah did not receive any appeal from the Claimant.
47. Termination was fair. The Respondent cannot reinstate her. She cannot be paid salary for no work done. She was not underpaid. She was in Management. She was paid all her 34 pending annual leave days.
48. Cross-examined, Kimintah stated that the Claimant was on temporary contract in 2010. She was not unionisable. There were no union dues remitted on the Claimant's account. Contract Employees are not unionisable. Clerks and Clerical Staff were included in the CBA. Their roles were detailed. The Claimant carried out these roles. There was 1 payroll, which included regular and contract Staff. Her contract did not state that she was not unionisable.
49. She was issued afresh contract in 2013. It was not for the Respondent to pay her cost of relocation. Continuing Employees were paid 2 months' salary as disturbance allowance. Upon being employed on permanent and pensionable terms, she became unionisable. The Respondent deducted and remitted union dues. It was not necessary for her to resign in writing from the Union, once she joined Management Category.
50. Kimintah did not know how dormant accounts were reactivated. He did not know that the Claimant's role was just to collect details of the Customer. There was a letter at Respondent's page 190, from one of the affected customers, asking for reactivation. The letter was subject of criminal investigations which lead to the charging of the Claimant and her colleagues in a pending criminal case.
51. Redirected, Kimintah emphasized that the Claimant was not a member of the Union, until she became a permanent Employee. The new contract indicated she was going to work in Mombasa, Digo Road Branch. She accepted the contract. It was not for the Respondent to organize her movement. The Respondent did not have an obligation to continue deducting and remitting trade union dues, once the Claimant was in Management Category.
52. The issues are whether: The Claimant's contract was terminated fairly on procedure and in substance; whether she was a beneficiary under the CBA concluded between the Respondent and BIFU; and whether she merits the prayers sought.

The Court Finds: -

53. The Claimant was employed by the Respondent on a temporary contract, commencing 6th January 2010. She was engaged as a member of the Contract Staff and designated as a temporary Clerk. Employment was for a period of 1 year. Her contract gave her a monthly salary at Kshs. 31,230 and house allowance at Kshs. 3,700.
54. She was engaged on a second contract for a similar period, beginning 10th January 2011. On 12th January 2012, she was offered and accepted what was now termed to be a fixed-term contract for a period of 1 year, ending 11th January 2013. This was succeeded by another fixed-term contract running from 2nd April 2013 to 1st April 2014.
55. All these contracts state that they were not part of the previous contracts, concluded between the Parties. Each was a standalone contract.



56. On 13th March 2014, the Claimant was offered employment on regular terms, and directed that she would serve the Respondent, at Digo Road Branch Mombasa. She had been working at Nairobi under contract, from the year 2010. She served a probationary period of 6 months, and was confirmed in the clerical cadre, with effect from 17th September 2014.
57. She applied successfully to be promoted to the position of Management Trainee. She was appointed as such, effective from 1st August 2017.
58. On 11th August 2017, she applied for transfer from Nyali Branch in Mombasa to Nairobi, saying she wished to be nearer to her home, to provide care for her ageing parents. She was transferred to Nairobi, with effect from 12th August 2017.
59. It is while at Nairobi, that on 14th March 2018, she was suspended by the Respondent for suspected fraud. She was arrested alongside her 2 colleagues, Vincent Shiangala and Sheila Idenya and charged in Court with the offences of conspiracy to commit a felony, and stealing by servant.
60. The Claimant was invited for a disciplinary hearing through a letter dated 3rd May 2018. Hearing was scheduled for 9th May 2018. It was rescheduled on account of the Claimant's request, to 25th May 2018. She was heard on 25th May 2018, in the company of Joshua Mbindyo, Section Head, Nairobi Main Office. A decision was made and communicated to the Claimant, to terminate her contract, effective 29th May 2018.
61. Procedure and validity of reason[s], Sections 41, 43, 44 [4], 45, and 47[5] of the *Employment Act*. The procedure summarized above does not appear to the Court, to have infirmities, as would lead the Court to declare that termination was unfair.
62. The allegations against the Claimant were investigated. A report was generated. She was suspended. She was invited to disciplinary hearing, and given an adjournment upon her request, to enable her prepare. She was accompanied to the hearing by Joshua Mbindyo, who was a Shopsteward and Section Head at Nairobi. The minutes of the meeting, which were signed by all the Participants, including the Claimant and Joshua Mbindyo, capture the specific charges against the Claimant. They record what the Claimant stated, with regard to each charge.
63. The Claimant and Joshua Mbindyo asked the Disciplinary Committee at the tail end, to be lenient with the Claimant. They regretted that the Respondent lost money, on account of the fraudulent transactions.
64. There was no evidence placed before the Court to show that the letter of appeal, reached the desk of Kimintah, an incorrect e-mail address having been used by the Claimant. The Court agrees with the evidence of the Respondent, that where appeals were received, they were duly dealt with and the Claimant's appeal, if properly lodged with the Managing Director, would have been properly dealt with by the Respondent. Failure to be heard on appeal, cannot in the view of the Court, amount to a procedural infirmity, the Claimant having failed to show that her letter of appeal, reached the Respondent.
65. Procedure was in conformity with the minimum standards of fairness, under the *Employment Act*.
66. The Claimant and Joshua Mbindyo, adopted an apologetic attitude, asking for leniency at the disciplinary hearing, which in the view of the Court, would be an indication of the Claimant's responsibility for her acts or omissions, in the fraudulent transactions, involving the reactivation of the 3 dormant accounts.



67. The Report dated 13th March 2018, generated by the Respondent's Head of Internal Audit, Winston Shitsukane Sore, assigned clear responsibility to the Claimant, in the fraudulent reactivation of the 3 accounts.
68. Vekaria's account was reactivated in the system on 11th December 2017 by Sheila, and authorized by the Claimant. The Claimant acted on the documents presented by Sheila, and never interacted with the account-holder. Bhanji's account was reactivated on 5th January 2018 by Patrick Nguni Kirigwi, and was authorized again by the Claimant. The Claimant explained during interrogation that she received the reactivation documents from an old Asian man, on a date she could not remember. The last account, held by Harjiwan, was reactivated by Sheila and authorized by the Claimant on 5th February 2018. Again, the Claimant did not interact physically with the customer before reactivation.
69. It is not disputed that a total of approximately Kshs. 9 million was withdrawn from the accounts fraudulently. The Claimant authorized reactivation in all the accounts.
70. There was more than sufficient reason for the Respondent to find that the Claimant acted negligently at the very least, an act of gross misconduct under Section 44[4] of the *Employment Act*. The Respondent demonstrated valid reason, under Section 43 and Section 47 [5], to justify termination. The Claimant did not fault the audit trail. 3 dormant accounts were reactivated, and almost emptied in a couple of months. All reactivation processes were authorized by the Claimant in quick succession, based on fake documentation, and without the physical presence of the account holders. In Bhanji's case, the fraud was uncovered only after Bhanji's widow, complained about unauthorized withdrawals, her husband who was the account-holder, having been dead about 3 years from the date of reactivation. Why did the Claimant authorize reactivation of an account held by a man who was 3 years dead? Why would she reactivate an account on the ground that she had seen an old Asian Man at the Bank?
71. Termination was fair on all fours. Prayer [a] of the Claim seeking declaration that termination was unfair and unlawful is declined. Prayer [b] seeking an order of reinstatement is declined. Prayer [c] pursuing lost salaries and allowances, quoted at Kshs. 1,396,000 is declined. The prayer for compensation [d], is declined.
72. Membership to BIFU, applicability of the CBA, and underpayments. The contract commencing 6th January 2010 indicates employment was temporary, over a period of 1 year. Subsequent contracts commencing on 10th January 2011 and 12th January 2012, were similar to the initial contract.
73. None of them mentions that the CBA in place at the workplace, was part of the terms and conditions of service applicable to the Parties. The Claimant was not shown to have been paying trade union dues, or agency fees, while serving under these contracts. There was no evidence of her subscription to BIFU membership. The terms and conditions contained in the relevant CBAs were expansive, containing employment benefits outside the contracts concluded between the Parties. The Claimant has not shown that the CBA applied to her. The salary scales contained in her appendix 6, page 81 to 118 are bare scales, without the complete CBA document, relating to the scales. The bare scales show salaries payable on promotion and after specified number of years, ranging from 1 year. The graduated scales suggest the CBA applied to continuing, rather than temporary staff.
74. There are CBAs exhibited by the Parties, which for instance, show that be employed as Clerical Staff, an Employee was required to undergo probation of 6 months. The contracts issued to the Claimant at the outset, did not require her to undergo probation. They had a commencement date, and an expiry date, without any requirement for probation.



75. In contrast, the letter which appointed the Claimant as a Clerk, dated 13th March 2014, had consistent to the CBAs, a requirement for 6 months of probationary service.
76. In the respectful view of the Court, the Claimant was not covered under the relevant CBAs for the period 2010 to March 2014.
77. She became a beneficiary under the CBAs, from 13th March 2014. The letter of appointment dated 13th March 2014, clause 5, specifically mentions that the Claimant would be bound by provisions of the CBA. This is unlike the earlier limited-term contracts. The Respondent deducted and remitted her trade union dues, upon her appointment on permanent and pensionable terms.
78. The Court does not think that the prayer for underpayment, over the period she was in temporary employment, is meritorious. The Claimant was in standalone contracts, whose terms and conditions of service, were confined to the four corners of the contract documents. The CBAs could not be read into these contracts.
79. She was paid an entry level salary of Kshs 55,860 and house allowance of Kshs. 6,700 on appointment, effective 17th March 2014. Subsequently, she was paid an annual increment, in accordance with the CBA. The Court is not persuaded that there was underpayment of salary, from 17th March 2014, until the next significant date submitted by the Parties.
80. Management Role. If the Claimant became unionisable, and eligible to access collective benefits contained in the CBA, from March 2014, she most certainly ceased any relationship with BIFU, on 1st August 2017, when she became a Management Trainee. There is no CBA exhibited by the Parties, which indicates that Management Trainees were unionisable.
81. She entered Management Category with fresh terms and conditions of service, including entertainment allowance, a benefit reserved for Management Category. She ceased to be eligible for benefits reserved to unionisable Employees, such as overtime pay. The Claimant was advised upon her appointment as a Management Trainee, that, “you will be admitted in the Officer’s cadre of the Bank, on the starting salary under Junior Officers of the Bank, and you will be entitled to the relevant benefits attached to the Grade.” This did not have any link, with the terms and conditions of service negotiated between the Respondent and BIFU
82. She was not unionisable after 1st August 2017. Her prayer for underpayment of salary from 1st August 2017 the date of termination, has no foundation and is declined.
83. Prayer [f] touching on underpayment of salaries post - 1st August 2017 is declined. The same applies to prayer [h] on 6% CBA salary increment, to all unionisable staff. The Claimant was not unionisable on 1st March 2018.
84. Prayer [g] on disturbance and transport allowances relates to Claimant’s transfer, from Nairobi to Digo Road Branch, Mombasa, on 2nd April 2013. The Claimant was not transferred to Mombasa through the letter dated 27th March 2013; she was freshly appointed, and advised she would be stationed at Digo Road Branch, Mombasa. There was no contract concluded on 27th March 2013 or 2nd April 2013, which bound the Respondent to cater for the Claimant’s movement to Mombasa. She was not a continuing Employee of the Respondent; she was in a fresh appointment. Previous contracts, as well as the letter of appointment of 27th March 2013, stated that “this contract does not in any way, form part of any previous employment contract with the Bank, and hence does not serve as a continuation of any previous contract.” The Claimant did not establish that the Respondent was in any way, bound to offer her any allowances to enable her report to the place she was assigned duty, in her new appointment.



85. Annual leave of 34 days was paid out to the Claimant. Damages of Kshs. 1,500,000, based on what calculus, and for what? The Claimant did not attempt to justify this prayer, and the same is rejected.
86. The Conciliator appears to have recommended reinstatement of the Claimant, without examining the documents such as the Auditor's Report, which placed the Claimant at the heart of the fraudulent transactions. He states in his report, that other Officers who were involved, were not dismissed, and therefore, the Claimant must be reinstated. This was a flawed premise. The Conciliator ought to have looked into the trail of papers, and not look what action was taken or not taken, against Officers who in his estimation were involved in the transactions.
87. Lastly, BIFU or the Claimant, did not establish BIFU's capacity to present the Claim before the Court, or to prosecute the Claim on behalf of the Claimant. It is clear the Claimant was not unionisable, or a member of BIFU at the time she left employment. She was in Management, and not eligible for membership of, or representation before the Court by, BIFU.

It is ordered: -

- a. The Claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF JUNE, 2023.

James Rika

Judge

