



Banking, Insurance & Finance Union (K) v Consolidated Bank of Kenya Ltd (Employment and Labour Relations Cause 2330 of 2017) [2023] KEELRC 1543 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2330 OF 2017**

**AN MWAURE, J
JUNE 16, 2023**

**BETWEEN
BANKING, INSURANCE & FINANCE UNION (K) CLAIMANT
AND
CONSOLIDATED BANK OF KENYA LTD RESPONDENT**

JUDGMENT

1. The claimants filed an amended memorandum of claim dated 20th December 2018.

Claimant's case

2. The claimant states there is a recognition agreement between the respondent and the claimant signed in October 2000. As result they claim they have a valid recognition agreement and they entered negotiations on terms and conditions of service of all unionisable employees.
3. The claimant's members all signed individual contracts of employment in the form of individual terms of contract.
4. The claimants state that on 2nd August 2015 the directors or company known as Lavington Security Services Ltd opened an account at respondent's Koinange branch. The directors were introduced by one Eugene Busolo the branch Manager.
5. The branch manager stated he knew the directors for two years. After opening the account the said directors started depositing money in the accounts.
6. The claimant states the directors while depositing money sought validation to deposit cheques payable to Lavington Security Ltd. The varidation was allowed by branch manager and one Yusuf Mohammed.



7. The junior officers who are the claimants were instructed and/or authorised to receive and post cheques into account of Lavington Security Services Ltd although cheques were payable to Lavington security ltd.
8. The name of account was later changed to Lavington Guards Services Ltd and there were documents in that name of Lavington Guards Services Ltd.
9. The proceeds of cheques were withdrawn continually by the directors of the company as cash withdrawal and later it was discovered the respondent lost kshs 180,129, 913.25. It was also discovered the same directors opened accounts in the names of Lavington Guards Services at Respondent's Harambee Avenue Branch on 11th September 2009 and the fraudulent activities was unnoticed and same account was introduced by Daniel Leperes.
10. When Daniel Leperes was transferred to River Road branch the account migrated to the said branch and the fraudulent deposit and withdrawals continued.
11. The claimant's members in this suit were cashiers and customer's personnel and they simply accepted cheques in the Koinange branch account.
12. As a result of the alleged fraud the nine claimants were issued with show cause letters on 19th October 2017 as it was found cheques payable to Lavington Security Ltd were posted into account of Lavington Guards Services Ltd.
13. The nine members all responded to the show cause letters and were all later suspended from employment for reasons that their explanation were not satisfactory.
14. On 3rd November the members were invited for disciplinary hearing which took place on 8th November 2017. They were told of their rights to be accompanied by a colleague of their choice.
15. The union however filed a case on 22nd November 2017 by cause no 2330 of 207 and disciplinary process was stopped by court.
16. A second disciplinary hearing was called on 4/5/2018 and claimants attended without a union representative as the respondent did not allow them to invite a union representative or a colleague of their choice. Instead they were represented by a person chosen by the respondent one madam Rose Mwashimba.
17. The claimants says that no minutes were captured during the hearing.
18. After the disciplinary hearing all 9 members received termination letters dated 7th May 2018 for reasons captured as flouting bank's operations, procedure on bank deposits by receiving and depositing cheques payable to Lavington Security Ltd to the account of Lavington Services Guards Ltd yet the payee details did not match with the account in the bank's system.
19. After termination the claimants reported the matter to the cabinet secretary and a conciliation meeting was conducted on 26th June 2018. Recommendations were given but the respondent failed to adhere to the same.
20. The claimants therefore prays the court to declare their members termination of employment as unfair, unlawful and invalid and to grant their prayers as per the amended statement of claim including costs of the suit.



Respondent's cause

21. The respondent filed his response dated 7th February 2019. They deny each and every allegation contained in the amended memorandum of claim save as expressly otherwise admitted herein.
22. The respondent admitted that they had a collective bargaining agreement with the respondent and the claimant. The agreement provided that if an employee commits or is reasonably suspected of having committed a criminal offence that will constitute a case of gross misconduct.
23. The same manner in their human resource manual gross misconduct is as provided where inter alia an employee misappropriates or misuses bank's funds.
24. Respondent states that Simon Kipkorir and Emmanuel Chelimo opened an account by the name Lavington Guard Services and were introduced by Eugene Busolo the branch manager.
25. The respondent says the customers used to merely withdraw cash of less than one million and so was hard to track the fraud. The investigator found there were lapses of about two years as tellers received cheques with anomaly and never sought guidance from branch authority. The amounts were less than one million and so did not trigger account profiling or query by risk and compliance department. Lavington Security Services does not operate an account with the bank.
26. The respondent states that 294 cheques were fraudulently deposited and as a result Lavington security lost kshs 74,883,263.23. There was also investigations for the Harambee branch account and River Road branch. So directors of Lavington Guard Security Limited stole cheques of Lavington Security Limited and diverted them to their account.
27. The respondent says the cashiers accepted cheques not properly drawn. The respondent says that 9 employees were issued with show cause letters and thereafter suspended from employment.
28. The employee responded to the show cause letters and were then invited for disciplinary hearing between 13/11/2017 to 17/11/2017 but the same was stopped by court.
29. The respondent called another disciplinary hearing on 4th May 2018 and some claimants were accompanied by a shop floor union representatives but others waived their right to be represented. The respondent not being satisfied with the claimant's presentations issued them termination letters on 7th May 2018.
30. Thereafter the respondent says the parties were invited for a conciliation meeting but conciliator was already biased and returned findings in favour of the claimants. The respondent says the recommendation were made on 6/6/2018 and yet hearing was to take place on 26th June 2018. The respondent therefore submit the conciliator was prejudiced against the bank.
31. The respondent says the claimants were under a duty to comply with the bank procedures and policies of depositing cheques.
32. The respondent all in all testifies that the claimants were lawfully dismissed in accordance with section 44, 45 and 49 of *employment act* and respondent's human resource manual. Respondent prays the claimants memorandum of claim be dismissal with costs.
33. The court reviewed and considered the submissions by the claimants dated 28th November 2022 and the respondent's submissions as well dated 10th January 2023. The court also considered the evidence adduced by the claimants on 13th June 2022 and by the respondent on 5th October 2022 respectively.



Determination and analysis

34. The court finds the issues for determination are:
 1. Whether the respondent terminated the claimants lawfully.
 2. The other issue is whether the claimants are entitled to the prayers sought.
35. This is an interesting scenario presented in this case. It involves massive losses of funds from the bank. It is not even clear the amount lost in a period of two years or so through fraud.
36. The investigation report conducted by the bank fraud unit placed blame on negligence and at the same time a grand conspiracy by various personnel. The report puts the losses by the bank to KShs 295,000,500 of one customer by the name Lavington Security services Ltd. The riddle is that this company Lavington Security did not have an account with the respondent.
37. It is also amazing that the colossal amounts of money was lost by the Lavington Security services for a period of over two years and yet they never detected it. The court is not attempting to take the role of a sleuth but this seems to be a very interesting and almost unbelievable testament.
38. It is also noteworthy that the detectives did not get involved to investigate this case despite the fact that there was definitely something sinister in this whole transaction involving well-choreographed fraudulent activities spanning over a period of several years and involving at least three branches of the respondent's bank.
39. It is not clear why only cashiers and or tellers of Koinange branch were dismissed and yet the fraud spanned also over Harambee branch and also River Road branch.
40. The account where funds were diverted opened by Simon Kipkorif Taiget and Emmanuel Chelimo in Koinange street was approved by Eugene Busolo who was the branch manager and he confirmed he knew the directors of that company. The account ended being the conduit for illegal transactions and losses by the respondent.
41. The claimant members who were dismissed were the cashiers and tellers. The court indeed could agree the claimants were lax in their duties as they should have got written approval from their supervisors and manager to bank cheques that were in a different name from the name in the account. They also handled the case very casually and claimed they got verbal approval from their supervisors.
42. It may be of comfort to note that those managers including Fridah, Eugene Busolo, Mohammed and Kevin were all dismissed according to the evidence adduced by Rose Mukoba the respondent witness.
43. Flowing from the foregoing it is clear the activities that led to all these bank losses were acts of massive fraud and well planned conspiracy probably from all levels of the employees of the bank including the top cadre. The claimants were the scape goat being the recipients of the cheques in question.
44. Indeed it is very perplexing that the said Lavington Security services never noted the losses of their money and that their cheques were never banked in their rightful accounts. Did they never used to get bank statements or undertake audit of their books? We are not talking of small amounts of moneys but huge amounts that were misappropriated over a span of years.
45. It is also equally surprising that the respondent did not pick these lapses through their audit over the years.
46. The disciplinary process of the claimants was a trumped up process to cover massive fraud and indeed to cover the "big fish" who must have been a party to this conspiracy.



47. The court finds that in view of the foregoing the respondents had no valid reasons to dismiss the claimants as the claimant's were just naively performing their duties as lower cadre staff under instructions of their bosses.
48. In that regard the court finds the reasons given by the respondents to terminate the claimants are not valid as provided in section 45(1) of the *Employment Act*. Section 45(1) of the *employment act* provide:
- (1) No employer shall terminate the employment of an employee unfairly.
49. Section 44(1) and (2) of the *Employment Act* also provide
- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
50. The case of Pius Machafu Isinu vs Lavington security Guards Limited
- “there can be no doubt that the act places heavy legal obligation on the employers in the matters of summary dismissal for breach of employment contract and fair termination involving breach of statutory law. The employer must prove the reason for termination or dismissal prove the reasons are valid and fair and prove the grounds are justified”.
51. The case also No 864 of 2014 Banking Insurance Finance Union (Kenya) vs Cooperative Bank of Kenya. The court held that it was not convinced that there existed a valid reason for termination of the grievant for the termination of grievant's services. The court further stated “the grievant in her testimony went further to state comprehensively the circumstances of the transactions which had not been denied by the respondent.”
52. The grievants were represented in their evidence by two of their representatives Helidy Waturi and Victor Njini who testified on their behalf and on behalf of the other seven grievants who were all junior employees in the bank. The witnesses testified that even during the disciplinary hearing on 4th May 2018 they were not represented by a fellow worker or a shop union representative of their choice.
53. Witness Helidy says she was given a chance to be accompanied by shop floor union representative but the person she invited was not accepted by the respondent. The claimants say they were represented by a union member one Rose Machaba but she was not their representative and she did not present their case at all at during the hearing.
54. This was a very sensitive case and the claimants who were junior staff of the employee needed all the support at the disciplinary hearing. Indeed they say they did not see the minutes of the meeting and they were thereafter issued with a termination notice.
55. The termination of an employee must be both substantially justified and proceduraly fair. If any one of those ingredients is lacking the termination is not compliant and the termination must be found to be flawed.
56. In Loice Otieno vs Kenye commercial bank Limited cause 1050 of 2011 the court held that in order for the employer to demonstrate that requirements of section 41 are complied with he must show that



1. He explained to the employee in a language the employee understood the reasons why he was considering termination
 2. Allowed representative of employee being either a fellow employee or a shop floor union representative to be present at the hearing.
 3. Heard and considered explanations by employee or his representative
 4. Where the employer had more than 50 employee as required by section 12 of the [employment act](#) that it had and complied with its own internal disciplinary rules.
57. After considering the evidence adduced by the parties and the pleadings and submissions the court has reached to the conclusion that the claimants were not fairly, lawfully and procedurally terminated and so judgment is rendered in their favour.
58. The respondent under the circumstances will have to compensate them.
59. The remedies awarded to the claimants are as hereunder
1. Jane Ikapesi
 - a. Pay in lieu Kshs 127,242/-
 - b. leave pay is not proved and is declined
 - c. notice pay will be 6 months considering she served the bank for about 6 years Kshs 763,452/-
 - d. prayers for damages and pecuniary loss are all in abstract and not proved so both are declined.
 - e. Total award to the claimant is kshs 890,694/- awarded costs and interest at court rates from date of judgment till full payment.
 2. Yolán K. Limo
 - a. Pay in lieu Kshs 121,595/-
 - b. Leave pay is not proved and is declined. Compensation for 6 months considering provisions of sections 49(1) c of [employment act](#) and having worked for the respondent for about 6 years awarded 6 months equivalent. Kshs 730,170/-
 - c. The pecuniary damages and the prayers or damages are not proved and they are not granted.
 - d. Total award is kshs 851,165/- Interest awarded at court rates from date of judgment till full payment and costs are awarded.
 3. Victor Mbiri
 - a. Notice pay in lieu is awarded Kshs 92,899/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months considering provisions of sections 49(1) c of [employment act](#) as awarded for four(4) months considering the period he served the bank kshs 371,596/-



- d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 464,495/- plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.
4. Judy Mueni
- a. Pay in lieu of notice is awarded Kshs 92,899/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months considering provisions of sections 49(1) c of [employment act](#) as awarded for four (4) months 92,899 considering the period he served the bank kshs 371,596/-
 - d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 464,495/- plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.
5. Truphosa Apondi
- a. Pay in lieu of notice is awarded Kshs 92,899/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months considering provisions of sections 49(1) c of [employment act](#) as awarded for four(4) months considering the period he served the bank kshs 464,495/-
 - d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 557,394 plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.
6. Helidy Waturi
- a. Pay in lieu of notice is awarded Kshs 83,373/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months considering provisions of sections 49(1) c of [employment act](#) as awarded for four(4) months considering the period he served the bank kshs 333,492/-
 - d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 416,865/- plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.
7. Lorraine Ochawade
- a. Notice is awarded Kshs 82,873/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months considering provisions of sections 49(1) c of [employment act](#) as awarded for four(4) months considering the period he served the bank kshs 331,492/-



- d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 414,365/- plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.
8. Pharis Ayah
- a. Pay in lieu of notice is awarded Kshs 77,974/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months considering provisions of sections 49(1) c of *employment act* as awarded for four(4) months considering the period he served the bank kshs 311,896/-
 - d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 389,870/- plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.
9. Angeline Apolo
- a. Pay in lieu of notice is awarded Kshs 75,446/-
 - b. Leave pay is not proved and is not awarded.
 - c. Compensation for 4 months @ Kshs 75,446 considering provisions of sections 49(1) c of *employment act* as awarded for four(4) months considering the period he served the bank kshs 301,784/-
 - d. The pecuniary damages and other actual damages not being proved are declined.
 - e. Total award is kshs 377,230/- plus Interest awarded at court rates from date of judgment till full payment and costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF JUNE, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.



ANNA NGIBUINI MWAURE
JUDGE

