



**Ndumia v Barclays Bank of Kenya Ltd (Cause 1321 of 2018)
[2023] KEELRC 1489 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1489 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1321 OF 2018
AN MWAURE, J
JUNE 16, 2023**

BETWEEN

AGNES NYAKINYUA NDUMIA CLAIMANT

AND

BARCLAYS BANK OF KENYA LTD RESPONDENT

JUDGMENT

1. The claimant in the memorandum of claim dated the August 16, 2018 and filed on the August 22, 2018 claims unlawful and unfair termination of employment.

Claimant's Case

2. She says she was employed by the respondent bank on the March 3, 2008 as a compliance co-ordinator and was posted to work at the bank's Kiriani Branch. The claimant's monthly emoluments were paid through the bank's payroll. The claimant was later transferred to Nyeri and thereafter to Thika branch.
3. The claimant says that she was suspended from duty on the August 9, 2017 and the suspension was later extended for a further 30 days. She was issued with a show cause letter on the September 12, 2017 and later invited for a disciplinary hearing on September 20, 2017 and was issued a termination letter on the September 26, 2017. The claimant says she was not involved in any case of gross misconduct or serious neglect which would lead to termination of employment.
4. The claimant states that she had no valid warning letter in her file. The punishment of termination from employment was quite harsh, far-fetched and uncalled for. If the respondent had found the claimant with misconduct at all, then she should have been served with the 1st and 2nd warning before a termination as required by clause A5 (b) of the collective bargaining agreement.
5. She avers the termination letter she is accused of failing to disclose full information as required to a customer who had applied for a personal loan is not accurate. The claimant says she was not dealing



with the customer directly but was working from the back office and getting the loan application from the sales representative Mr Eric Maina.

6. The claimant further says she was also accused of failing to treat the customer fairly and maintains that she never breached any of the respondent's loan policy and says that she suffered unfair/unlawful loss of job.

Respondent's Case

7. The claimant prays for the following remedies;
 - a. The honourable court do find and declare that she suffered unlawful and unfair termination of employment
 - b. An order of reinstatement back to the former position without loss of employment benefits and seniority in service
 - c. Compensation of 12 months gross salary of Kshs 2,777, 490.20 for having suffered unlawful and unfair loss of employment.
 - d. An order for payment of all the salaries and allowances of Kshs 2,777,490.20 which she has so far lost (actual pecuniary loss and back pay) as a result of the unfair /unlawful termination of employment from the date of termination to the date of judgment.
 - e. Notice pay of Kshs 231,490.85, leave pay, leave allowance prorated etc.
 - f. Any other relief which the honourable court may find justifiable to grant.
 - g. Interests on prayers above
 - h. Costs of the suit.
8. The respondent filed the memorandum of defence on the June 4, 2019 and says that it received a complaint from one of its customers Morris David Kashero that in the month of July, 2017, he applied for a top up loan of Kshs 2,000,000/= at the respondent's Thika Branch where the claimant was stationed.
9. He says that the customer complained that he felt short changed by the respondent bank as he had applied for a loan of Kshs 2,000,000 but his account was credited with a lesser amount of Kshs 1,818,927/= and after a debit of Kshs 35,769/= the take home amount was negligible ie Kshs 9,301/=. He claimed that he was made to sign blank loan application forms but no one at the respondent bank disclosed to him that the loan amount would change.
10. The respondent then engaged its Forensic Investigations Department to carry out investigations on the said complaint and prepare a report on its findings. The Investigations revealed that the checklist used as part of the loan documentation had been falsified by photocopying information from another document and the loan amount applied for had been changed thrice from Kshs 2,000,000/= to Kshs 1,957,962/= to Kshs 1,881, 000/= with no disclosure to the customer. The signatures appended on the application form were inconsistent with the customers signatures held in the system.
11. The respondent avers that following interview with the investigators the claimant was duly issued with a notice to show cause on the September 11, 2017 and being dissatisfied with the response thereto it invited the claimant to attend a disciplinary hearing scheduled on the September 20, 2017 and was advised of her entitlements to have a colleague or union representative at the said hearing.



12. The respondent states that following the disciplinary hearing it made a decision to terminate the claimant's employment on grounds of gross misconduct for breaching the bank's policies and procedures by conspiring with another colleague to forge a customer's checklist, and for failing to disclose information to the customer as required in regard to actual loan amount and acting against the Bank's TCF principles by not seeking the customer's consent. The claimant was also informed of her right to appeal against the decision but reported a dispute through the Banking Insurance and Finance Union to the Ministry of Labour. The conciliator's finding was that there was gross negligence of duties by the claimant.
13. The respondent further avers that it is not true that the claimant had served the respondent for 10 years with a clean record as she had previously received a warning letter dated April 10, 2015 on her performance rating and refusing to sign performance improvement plan.
14. The respondent prays that the court finds its decision to terminate the claimant lawful and fair and upholds its decision to terminate the claimant's employment contract and dismiss the suit with costs awarded to the respondent.

Claimant's Evidence

15. The claimant, Agnes Nyakinyua Ndumia gave sworn testimony and said that she was upto the year 2017 working with the respondent. She adopted her witness statement dated August 15, 2018 as her evidence in the case. She also adopted as exhibits in the case documents numbered 1-81 in the list.
16. She testified that she worked with the bank from March 3, 2008 to September 26, 2017, that is for 9 years and 7 months and the bank recognised her severally. She says that during her period of service there were no cases of gross misconduct raised against her.
17. In cross examination she said that she was employed as a compliance coordinator and one of the areas of compliance was loan application to confirm all the documents were in order. Her service was to save the bank from losses of loans that were unpaid and she worked as a compliance coordinator for 8 years.
18. She said that it was said that she had submitted a checklist that was not proper but that was not correct. The checklist was a photocopy document and she was not told that it was forged. She said she was invited before a disciplinary hearing and was told that she could be accompanied by a colleague of her choice. In the disciplinary hearing she testified that one Eric did the checklist but in this case there was no original checklist and the signatures had slight differences because of the pen used to do the signing.
19. The claimant further said the customer applied for loan of Kshs 2 million but was eligible to get only 58,000 ksh because he had a credit card which exposed his debt exposure. The customer did not get the Kshs2 million as this was a top up. She further said that the customer was to pay the loan in 6 months' time before retirement. She claimed she is not the final authority as there is centre of excellence that approves the loan.

Respondents' Evidence

20. Respondent witness Vasalis Odhiambo said that he is the head of ABSA bank employment relations formerly Barclays bank and he further that he joined the bank on the November 16, 2016. He testified that he worked with the claimant. He adopted the witness statement dated the June 4, 2019 as his evidence in chief.



21. He said that the claimant was terminated because the loan application form she handled was changed without the customer's instructions and customer did not get what he had applied for as his loan. He confirmed that there is no room to change customer's instructions without written approval.
22. On cross examination the witness said that the customer had existing loan and was supposed to take home 54,000 Kshs but got Kshs 9,000/= The bank was meant to deduct instalments but client was not told. The changes in the form 28 is not client's signature. Client confirmed changes were made without his authority. The claimant was compliance officer and there was reputational loss to the bank.

Claimant's Written Submissions

23. The claimant relied on the case of *Pius Machafu Isindu v Lavington Security Guards Limited* 2007 e KLR where it was held that 'there can be no doubt that the act places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination are valid and fair and prove that the grounds are justified. A mandatory and elaborate process under section 41 of the *Employment Act* requiring notification and hearing before termination is then set up. The appellant employee in this case had the burden to prove not only were his services terminated but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon to prove the reasons for termination. And where the employer fails to do so the termination will be deemed to have been unfair. *Halsbury Laws of England* 4th Edition, Vol 16 (1b para 642 in adjudicating the reasonableness of the employee's conduct, a wider inquiry must be made to determine whether a reasonable employer could have decided to dismiss on those facts. The function of tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses to which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band, it is unfair.
24. The claimant submitted that flowing from the decision of the apex court, the employer and in this case the respondent is under strict statutory obligation to prove that the allegation of forgery and falsification of the customer's signature and colluding with Mr Muchiri are valid. He further submits that in the absence of such proof, the decision to terminate the claimant with reasons that are not proven is therefore invalid and must be refused by this court.
25. Further the claimant states the respondent has failed the test of proof of valid reasons before termination as required by section 43, 45 and 47 of the *Employment Act* 2007. He says that in the bank's policies and procedures every employee has his/her job description and the two employees were not the same. It is therefore unfair for the respondent to allege that the claimant instructed a fellow employee to falsify documents without producing evidence of such instructions. In any case, the claimant was working from the back office and was not in direct contact with the client. It was Mr Muchiri who was in direct contact with the customer and it is only fair that if Mr Muchiri falsified the loan application checklist, then, the respondent cannot copy and paste that offence on the claimant.
26. There is no submission in the file for the respondent.

Determination

27. The court has considered the pleadings and the submissions filed and the evidence in this case. The issues which are to be determined are the following;
 - a. Whether the respondent had valid reasons to terminate the claimant's employment contract.
 - b. Whether the respondent followed the laid down procedures in terminating the claimant.



- c. The remedies, if any, the claimant is entitled to.
28. Section 45 of the Act provides in part as follows: -
- (1) 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: - related to the employees conduct, capacity or compatibility; or -based on the operational requirements of the employer; and -that the employment was terminated in accordance with fair procedure.’
29. Section 47(5) of the Act provides as follows: -
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
30. In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.
31. In the Court of Appeal case in *Kenya Revenue Authority v Reuel Waitbaka Gitabi & 2 others* [2019] eKLR the court said that:
- “The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.”
32. The court went further and observed that “...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. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
33. Lord Denning MR in *Leyland UK Ltd v Swift* 1981 IRLR; said that the test is ‘Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases, there is a band of reasonableness, within which an employer might reasonably take one view; and another take a different view. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.



34. The respondent as evident in the witness statement of respondent witness 1 Vaslas Odhiambo says that one of its customers had applied for Kshs 2,000,000 loan but his account was credited with a lesser amount of Kshs 1,818,927/= and after a debit the take home was negligible that was Kshs 9,301/.
35. The respondent then did investigations which revealed that the checklist used as part of the loan documentation had been falsified by photocopying information from another document and the loan amount applied for had changed from Kshs 1,957,962 to Kshs 1,881,000/ and there was no disclosure to the customer. The signatures appended on the application form were inconsistent with the customer's signature held in the system.
36. The respondent says that the claimant did not realize that as a compliance officer she is the gatekeeper for the respondent bank and has the primary responsibility to check, monitor and ensure compliance on customer instructions and guard against any malpractices and dishonest behaviour.
37. The claimant did admit in cross examination that one of the areas of compliance expected of her on loan application was to confirm all the documents were in order. What the court therefore expected to hear from the claimant in advancement of the claim against the respondent is why, despite her work involving ensuring the forms are duly filled, she should have been excused on allegations that a particular loan form/document which was improperly filled went through her for processing of the loan without compliance. The claimant unfortunately has not provided any valid reason that would inform a finding that she was not negligent. The court finds that the claimant was negligent in performing her duties. In that regard the respondent complied with section 45(1) of the Employment Act in that he established he had a valid reason to terminate the claimant. The respondent confirmed that the checklist document used to process the loan of that particular customer were falsified. The claimant said she got the checklist from one Eric and forgot to attach the original checklist and that was a mistake. This is an employee who had worked for the respondent from 2008 to 2017. Those are the reasons that convinced the court that the respondent had valid reason to terminate the claimant from employment.
38. It is also of interest that the claimant kept changing the customer's loan and would not inform him and that was a serious breach in dealing with a customer.
39. In considering terminating an employee from employment the employer is obligated in mandatory terms to pass the fairness test which includes both substantive justification as well as procedural fairness. These two allude to the reason for termination and the procedure conducted in terminating the employee. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* (supra) the court held that:
- “There is no doubt the act places heavy legal obligation on employers in matters of summarily dismissal of employment contract and unfair termination. A mandatory and elaborate process under section 41 of the Employment Act requiring notification and hearing before termination is then set up.
40. The respondent no doubt complied with the procedural requirements under section 41 of the Employment Act 2007 as he issued her with notice and held a disciplinary hearing. She was given a chance to appeal. The court is convinced the claimant's termination was substantially and procedurally fair.
41. The conclusion therefore is that the claim by the claimant is found to be without merit and is dismissed. Each party will meet their costs.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT 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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

