



**Keter v Family Bank Limited (Cause E009 of 2022)  
[2023] KEELRC 1970 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1970 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E009 OF 2022**

**JW KELI, J  
JULY 27, 2023**

**BETWEEN**

**MONICAH JEPKEMBOI KETER ..... CLAIMANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant upon termination of her employment by the Respondent filed a Statement of Claim dated 8<sup>th</sup> April 2022 and received in this court on 12<sup>th</sup> April 2022 seeking the following reliefs against the respondent:-
  - a. A declaration be and is hereby issued that the termination of the Claimant unfair as it was not based on valid reasons.
  - b. An order be and is hereby issued unconditionally reinstating the Claimant to the position of Operations Manager family Bank Busia branch.
  - c. In the alternative the Respondent be and is hereby ordered to pay the claimant the sum of Kes 2,713,000.00 broken down as follows:-
    - i. One Month's gross pay in lieu of notice – Kshs. 135,650.00
    - ii. 12 months gross pay for unfair termination- Kes 1,627,800.00
    - iii. Service pay for 14 years.
  - d. Interest on (C) above from the date of termination.
  - e. Costs of the suit
2. In addition, on even date she filed her verifying affidavit to the claim sworn on the 8<sup>th</sup> April 2022.



3. The Claimant relied on her list of witnesses, her witness statement, list of documents and bundle of documents filed on 12<sup>th</sup> April 2022, with all pleadings being dated 8<sup>th</sup> April 2022.
4. The claim was opposed by the Respondent who entered appearance through the law firm of Wamae & Allen Advocates on the 22<sup>nd</sup> April 2022.
5. The Respondent filed a memorandum in response to the statement of claim dated 25<sup>th</sup> November 2022 and filed in this court on 21<sup>st</sup> December 2022. On even date, The respondent filed the Respondent's list of witnesses, Respondent's witness statement by Samuel Muchuku Matheri and the Respondents' list of documents, all pleadings being dated 25<sup>th</sup> November 2022. The Respondent also filed the bundle of documents on even date.
6. The claimant filed a Reply to the Memorandum of Response dated 21<sup>st</sup> February 2023 and filed in this court on 22<sup>nd</sup> February 2023. The Claimant filed a Further list of Documents on even date together with the bundle of documents.
7. The Claimant further filed a Supplementary List of Documents dated and filed on 1<sup>st</sup> March 2023 and contemporaneously filed the document on even date.

### **Hearing**

8. The Claimant's case

The Claimant's case was heard on the 26<sup>th</sup> April 2023 where Monicah Jepkemboi Keter testified on oath(PW), adopted her written witness statement dated 8<sup>th</sup> April 2022 as her evidence in chief, and produced her documents as exhibits C-1 to 16, as per her list of documents, Further List of Documents and the Supplementary List of Documents. The Claimant was cross-examined by counsel for the respondent, Mr. Kithinji

9. The Respondent's case

The Respondent's case was heard on the same day, 26<sup>th</sup> April 2023 where its witness Samuel Muchuku Matheri (DW) testified on oath as the Respondent's witness of fact and adopted his written witness statement dated 25<sup>th</sup> November 2022 as defence evidence in chief, and produced defence documents as exhibits R-1-13 as per list of documents. DW was cross-examined by counsel for the Claimant, Achieng.

10. Claimant's case in summary

The Claimant was a former employee of the Respondent(a bank) designated as a Branch Operations Manager - Busia. The Claimant alleged that she was retained by the Respondent as a Sales and Marketing Officer on 27<sup>th</sup> October 2008 and rose through the corporate ranks to be appointed as a Branch Operations Manager -Busia vide the appointment letter dated 22<sup>nd</sup> January 2016 until her contract termination.

11. The Claimant's employment was terminated through the letter dated 25<sup>th</sup> February 2022 and received on 28<sup>th</sup> February 2022 for professional misconduct for allegedly having failed to stop fraudulent transactions at the Busia Branch where she was in charge, which in turn allegedly exposed the bank to operational risks, as the Claimant had failed to comply with the Respondents' AML-CFT & KYC policy, resulting in the loss of Kshs. 2,548,927.43.



12. The genesis of the termination is that a complaint was made by a client on 20<sup>th</sup> October 2021 at the Respondent's Branch in Bomet- Eldoret, that money from her account amounting to Kshs. 370,120.80 had been illegally transferred.
13. The Claimant was in charge of respondent's Busia Branch, where the alleged illegal transfers had originated and she being in charge of the operations received the copy of the complaint from the Eldoret branch. She on the same day sought for clarification on the nature of the transfers from one Harrison Kisaka who was the action person on the alleged transfers on the complainant's accounts, to wit, Mr. Harrison Kisaka confirmed that he was the action person and the transactions might have been done by mistake and he was working to sought the discrepancies.
14. The Claimant noted other transactions actioned by Harrison Kisaka, which raised an eyebrow and she reported the issue to the Head of operations and Security for investigations. It is her case that she was issued with a Show Cause letter on 20<sup>th</sup> January 2022 for negligence and for flouting the Bank's Policies (AML-CFT & KYC policy).
15. The Claimant alleges that she responded to the show cause letter on 21<sup>st</sup> January 2022 setting out that the transactions in question occurred when she had been on her maternity leave; and the person involved in the transactions was one Harrison Kisaka.
16. She was invited through a letter dated 2<sup>nd</sup> February 2022 to a disciplinary hearing scheduled for 8<sup>th</sup> February 2022. She attended the hearing and stated her position and no witness from the Respondent was called nor was an adverse report from the Investigations department produced implicating her.
17. She received the Letter of termination on 28<sup>th</sup> February 2022 informing her of her termination from employment for failing to stop fraudulent transactions which she ought to have detected.
18. She appealed the said decision on 28<sup>th</sup> February 2022 pointing out that her duties during the period of the fraudulent activities were undertaken by the Branch manager as she was on maternity leave ,and the action person for the said flagged transactions had been Harrison Kisaka and on her part, she had promptly reported the suspicious transactions.
19. She alleges that the Disciplinary committee failed to consider that Harrison Kisaka had previously worked at Bomet where the illegal transactions had been undertaken and he solely was aware of the transactions having been the Maker and the checker of the said transactions.
20. The Respondent upheld the Claimant's Termination and the Respondent aggrieved filed this claim citing discrimination in the termination of her employment, as those involved in the flagged transaction were only served with a Notice to show cause but continued to work for the respondent.
21. The Claimant states that her dismissal was unfair as no valid reasons were availed to warrant her termination and the disciplinary and Appeal committees failed to consider her valid presentations that exonerated her from the alleged professional misconduct.
22. The Claimant avers that the bank produced no evidence as to show that Kshs. 2,548,927.43 had been lost when she was only aware of Kshs. 370,120.80. She prayed for the orders in 1 above.

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

23. The Respondent's case was that the Claimant was employed as a Branch Operations Manager on 22<sup>nd</sup> January 2016, which position was effective from 1<sup>st</sup> February 2016, at a consolidated monthly salary of Kshs. 110,000 under the Management Grade. The Claimant was bound by the Bank's HR Manual and Operations Procedures Manual in undertaking her duties. Subsequently, she was on 14<sup>th</sup> January 2020



- appointed as the Respondent's Branch Manager at Busia effective 15<sup>th</sup> January 2020 and was entitled to a Kshs. 10,000 acting monthly allowance over and above her monthly salary.
24. The Respondent states that the Claimant had a Fiduciary duty pursuant to the bank's HR Manual to ensure that the bank's policies were adhered to by her junior staff and she exercised the diligence required of her position to ensure the bank's trust with its customers was maintained and ensured that the bank's client's money was protected from loss or theft at her branch.
  25. The Respondent states that the Claimant was obliged to be diligent in her duties, by ensuring that she was not negligent, properly account for the Respondent's client's funds ; not cause a misappropriation of funds or warrant unauthorised dealings with customers, that would compromise the bank's reputation.
  26. Following a complaint from the Bank's customer, one Jane Wariara Ndung'u on 22<sup>nd</sup> October 2021 that Kshs. 370,120.80 had been illegally transferred from her account, the complaint was forwarded from the Eldoret branch to Busia branch and the Claimant was asked to investigate from her respective staff.
  27. That from the investigations, a sum of Kshs, 2,548,947.43 was discovered to have been lost from the Bomet and Busia Branches.
  28. The Claimant was issued with a show cause letter on 20<sup>th</sup> January 2022 and informed of the loss of Kshs. 2,548,927.43 to which in her response of 21<sup>st</sup> January, 2022 she intimated that she was the one who had detected the fraudulent transactions done by her staff and that the fraud had emanated from a different branch and she after questioning the responsible staff had reported the issue for investigations. The Respondent alleges that the Claimant only responded to the loss of Kshs. 370,120.80 and not the figure of Kshs. 2,548,927.43 highlighted in the show cause letter. She was through the letter dated 25<sup>th</sup> February 2022 terminated from employment effective 28<sup>th</sup> February 2022.
  29. The claimant appealed the decision to terminate her on 28<sup>th</sup> February 2022 and the bank affirmed its decision to terminate her employment.
  30. The claimant was required to undertake an internal clearance at the bank, which she failed to undertake and instead issued a demand letter dated 15<sup>th</sup> March 2022 seeking for reinstatement.
  31. The Respondent states that the position of a Branch Operations Manager is a crucial office for the running of a bank and the bank on 22<sup>nd</sup> March 2022 filled the position with one of its staff , one Grace Nyambura Njenga and the claimant's claim for reinstatement cannot stand as the same would amount to duplication of functions.
  32. The Respondent asserts that the dismissal of the Claimant was lawful under section 44 of the [employment Act](#) on the grounds of gross misconduct pursuant to Sections 45 and 46 of the [employment Act](#) and the Respondent's HR Policy and therefore, the Claimant's claim has no legal basis.

### **Written submissions**

33. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions were drawn by Omondi Abande & Company Advocates and dated 8<sup>th</sup> May 2023 and filed in this court on 9<sup>th</sup> May 2023. The Respondent's written submissions were drawn by Wamae & Allen Advocates and dated 19<sup>th</sup> May 2023 and received in this court on 30<sup>th</sup> May 2023.



## Determination

Issues for determination.

34. The Claimant in their written submissions identified the following issues for determination: -
- a. Whether the Claimant was a whistle-blower
  - b. Whether the Respondent has demonstrated that the Claimant was negligent
  - c. Whether the disciplinary hearing was procedural.
  - d. Whether the Claimant's termination was fair.
  - e. Whether the claimant is entitled to the orders sought.
35. The Respondent in its written submissions identified the following issues for determination:-
- a. Whether the termination of the Claimant's employment was unfair and unlawful.
  - b. Whether the Claimant was accorded a fair hearing.
  - c. Whether the Claimant is entitled to the prayers sought in the Memorandum of Claim.
36. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the question of whether the claimant was a former employee of the respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
- a. Whether the termination of employment of the claimant by the respondent was lawful and fair.
  - b. Whether the claimant was entitled to the reliefs sought.
  - c. Who bears the costs of this suit.
- Issue a. Whether the termination of employment of the claimant by the respondents was lawful and fair.
37. The court in determination of the issue was guided by the provisions of section 45 of the [Employment Act](#) which states:- 'Unfair termination 45(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— (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.'

## Substantive fairness- validity of the reason

Claimant's case

38. On the validity of the reasons for the termination of the employment, the claimant submits that the termination was unfair as the accusation levelled against her for the loss of Kshs. 2,548,927.43(C-7) and negligence was never substantiated as no investigation Report or record as required under 8.11.3 of the hr Manual(R-3), of when the sum had been lost was provided to her and DW1 confirmed that no report



- or record of monies allegedly lost was available in court nor during the disciplinary hearing. To buttress her assertion, she relied on the case of Standard chartered Bank<sup>9K</sup>) V Zachary Mogeni<sup>92012</sup>)eKLR.
39. The petitioner pointed out that DW during hearing argued that money was lost from Busia and Bomet branches yet she had never worked in Bomet and the loss of Kshs. 370, 120.80 which she intimated arose from a system lapse was investigated on 22<sup>nd</sup> October 2021, reported the same day and eventually was refunded to the customer (C.5 email from Harrison Kisaka on 22<sup>nd</sup> October 2022 at 4.32 pm), a position the respondent did not rebut.
  40. The Claimant states that the termination based on the charge of negligence was unfair as the Respondent's HR Manual(R-3) provided for a maximum of two warnings in the instance of a charge of negligence, which position was confirmed by DW1 during cross examination.
  41. The Claimant submitted that the termination letter alluded to the professional misconduct of the claimant for failure to stop several fraudulent transactions she ought to have stopped, yet she had never worked in Bomet where the said transactions occurred and the bank never informed her how she could have prevented the same.
  42. The Claimant submitted that she had no control over the Respondent's system to have been in a position to foresee an instance where the system allowed one Harrison Kisaka to be a maker and checker on the system; and the absence of Vouchers did not help the situation as she could not see the transactions with anomalies done by Harrison Kisaka and she reported the incidence.
  43. The claimant submits that she acted as a whistle-blower when she escalated the discrepancies on the account of the Bank's complainant and she was entitled to protection under the Respondent's whistle-blower policy(C-15) that the respondent's dismissed as a training manual.
  44. The Claimant submits that she personally received a call from the Complainant , one Jane Wariara Ndung'u(albeit no call log was availed) that her money had been illegally been transferred and she advised her to report at the Eldoret branch. The claimant argues that the customer in her complaint letter(C-3) indeed corroborated her argument that she was the first to receive the complaint with the Complainant having intimated that she had tried to seek for assistance before she reported at the Eldoret branch.
  45. The Claimant argued that she began to investigate the complaint as evidenced by her emails to Harrison Kisaka(C-5 Email of 22<sup>nd</sup> October 2022 at 4.27pm) before the email from Eldoret where the complaint was physically reported was sent to her(C-6).

### **Respondent's case**

46. DW confirmed that the reasons for the termination of the employment of the claimant was due to negligence and had she been more diligent the sum of Kshs. 2,548,927.43 could not have been lost from the bank.
47. The Respondent argued that the mention of thorough investigations did not mean it was mandatory for a Report to be prepared and the bank could take the appropriate disciplinary action upon the issuance of a maximum two warnings. The Respondent submitted that had the Claimant been more responsible she could have notified the bank of the fraud.
48. On the Claimant's insistence that she was a whistle blower could not stand as the bank had already received a complainant from their customer and the claimants actions were only reactive to the email. Further the Whistle Blower policy filed as supplementary document by the claimant was never



referenced to in her statement. The Respondent relied on the case of Housing Finance Company of Kenya v palm Homes limited & 2 others(2002) 2 KLR.

49. The respondents submit that the Claimant was lawfully terminated in line with Clause 8.11.8 of the HR Policy (R-3) for gross misconduct as due to the claimant's negligence the respondent lost money. The respondent relied on the decision of Justice Ndolo In John Otieno Mukabi Vs Kenya Builders & Concert Company Limited (2014)eKLR.
50. The respondent avers that the it adhered to the law under section 41,43 and 45 of the *Employment Act* for providing the sufficient grounds for the claimant's termination and the Claimant was afforded a chance to be heard and challenge all evidence against her. The respondent relied on the case of Danson Mwashako Mwakiwona Vs CFC Stanbic Bank Ltd(2013) eKLR

### **Decision on substantive fairness**

51. The burden of proof of the validity of reasons for termination lies with the employer under section 43 of the *Employment Act* which reads:- '43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.'
52. In the instant case the termination of the Claimant employment was pegged on the Termination letter dated 25<sup>th</sup> February 2022 (R exhibit 10) which disclosed the reason for the termination of the Claimant as follows:-'The reason for the termination is based on your professional misconduct whereby as the officer in charge of branch operational risk, you did not stop the several fraudulent transactions which you ought to have detected earlier to avoid further losses. This is clear breach of the banks policies and procedures and against the banks code of conduct.  
  
During the Disciplinary hearing you failed to explain the above action to satisfaction. Your actions exposed the bank to a possible financial and reputational risk therefore the bank has lost confidence in you.'
53. What the court needs to determine is whether the dismissal decision met the reasonable test where Lord Denning in British Leyland UK Limited v Swift(1981)I.R.L.R 91 held that:-  
  
'The correct test is: Was it reasonable for the employers 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, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...'
54. DW told the court during cross-examination that no investigation report was available that could show that money belonging to the Respondent's client had been lost. But the investigations carried out by the bank showed that money was lost in Bomet and in Busia and the money could not have been lost if the Claimant was not negligent.
55. DW stated that the sum of Kshs. 2,548,927.43 was stolen in batches and when asked how many batches and dates of theft, he responded he had no figures and when the losses had occurred.
56. DW had the following to say:-



(Pg 37)- Cross Examination Claimant's Counsel: See the Notice to show cause at page 32 of the Claimant's bundle;

DW : Seen

Claimant's Counsel: See page 99 of your bundle, is that your

Notice to show cause of 20<sup>th</sup> January 2022? Confirm at paragraph 2, you accused claimant of what?

DW : Negligence

Claimant's Counsel: How much was lost?

DW: Kshs. 2, 548,927.43

Claimant's Counsel: From the letter, how much was lost in Busia

DW: We indicated the total amount lost in two branches

Claimant's Counsel: Did you investigate the loss?

DW: The amount came after the investigation, there is investigation report

Claimant's Counsel: Is the investigation report in court

DW: No.

Claimant's Counsel: In the minutes attached is the investigation report attached?

DW : No.

Claimant's Counsel: See HR Policy and Manual confirm it applied to Monicah

DW: I confirm

Claimant's Counsel: See clause 8.11.3 what does it say

DW: read

Claimant's Counsel: Confirm under clause 8.11.3 (c ) the manual obliged investigations in disciplinary.

DW: Yes

Claimant's Counsel: See page 54 of the Respondent's bundle

clause ( b) what is your understanding of full investigation and thorough investigation

DW: Investigations be carried to satisfaction of bank.

Claimant's Counsel: Was the 2.5 million in the Notice to show cause stolen at once

DW: In batches

Claimant's Counsel: In how many batches?

DW: I do not have the figures



Claimant's Counsel: Are you in a position to tell when the losses occurred in Bomet or Busia and dates

DW: I cannot tell.

Claimant's Counsel: Who were the complainants in the alleged

loss under the Notice to show cause?

DW: The investigation is the one that revealed the

loss. Some customers had not complained .

Some of the transactions were authorised by Kisaka

Claimant's Counsel: Who were the checkers and makers in the

loss?

DW: I do not have those facts

(On Re-exam )

DW: There was investigation by bank which

revealed money was lost. The Notice to show cause loss was accumulated for Busia and Bomet. The money could not have been lost if the claimant was not negligent. It was stated in the termination letter if the claimant had been diligent, she would have notified the bank of the fraudulent transaction .

Thorough investigation does not

mean there is investigation report but bank must conduct thorough investigation.

DW: The loss was in respect to customer accounts

by complaint or bank's own discovery.

57. The court of appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR stated that: "With regard to issue number one (1), since it is not disputed that the employer/ employee relationship subject of this appeal was subject to the prerequisites of the Act, the procedure the Bank ought to have followed when terminating the respondent's employment is what is set out in sections 41, 43 and 45 of the Act. In *Janet Nyandiko versus Kenya Commercial Bank Limited* [2017] eKLR, the Court summarized those procedures as follows:-

"Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the



date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.(emphasis mine)

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

58. The Respondent issued the Claimant was a show cause letter(R Exhibit 6) with the content that:-

"We refer to the irregular fraudulent transactions that happened at Busia & Bomet branches respectively details which you are aware of. As an Officer of the bank, you were negligent in performing your duties by breaching the AML-CFT& KYC policy whereby as the officer in charge of branch operational risk , you did not stop the several fraudulent transactions which ought to have detected earlier to avoid further losses. This led to a loss of Kes 2548, 927.43.

Your inactions exposed the bank to financial , reputational and legal risks.

In the circumstances you are required to Show cause why

disciplinary action should not be taken against you in the above misconduct.

Your response should reach HR Department by close of business on 24<sup>th</sup> January 2022.

59. The Letter to show cause, read with the termination letter and DW evidence, the Respondent required the claimant to respond to allegations of loss of money that had happened in a branch that the Claimant was not responsible at Bomet. Needless to say, even with the transactions that had occurred at the claimant's branch, The Claimant provided an account of how the funds in the tune of Kshs. 370,120.80 had been dealt with in answer to the show cause letter in her response (C exhibit 8). The respondent did not avail to the Claimant a record of the "several fraudulent transactions" in "Bomet and Busia" that had been fraudulently been occasioned by the negligence of the Claimant, but required the claimant on her own accord to respond to claims unknown to her and provide a concrete answer. The test of reasonableness in British Leyland UK Limited(supra) would then be; would a reasonable employer having not given their employee the evidence they were relying on to dismiss the employee be said to be fair. The court finds that no fairness could be there when the employer withheld the very information they required an employee to revert.
60. Referring to National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR(supra), the court observed that "Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee."
61. This court was invited to consider the Respondent's HR Manual(R-Exhibit 3) , at the Appendices Section, 10.1.1.Schedule 1: summary of Infractions and Consequences;- Under infraction: the



consequence that was provided for negligence was that of : ‘Maximum of two warnings in writing and appropriate disciplinary action. A third offence termination of service shall be issued following the laid down disciplinary process’. The Respondent was the maker of the HR Manual and could not refute its contents. However DW argued that the respondent was entitled to take disciplinary hearing in case of negligence and the claimant’s negligence was noted in several transactions. No other documents in the form of warnings had been issued to the Claimant or presented before this court as alleged by DW. This court relies on the principle of Contra Proferentem that the interpretation of this clause binds the respondent who was the maker of the document. The Respondent was bound to follow its own laid out procedures in handling of cases of negligence and as the maker of the document the Respondent was bound by the same.

62. The claimant was entitled to a first warning in the event of the negligence on her account and the respondent’s failure to produce an account of monies lost on account of the claimant’s alleged negligence was hearsay, to say the least, with the bank having at its disposal the records of the losses that may have occurred, the failure in availing the same works in favour of the Claimant.
63. Of interest is that in the Show cause letter the bank stated : “This led to a loss of Kes 2, 548, 927.43.” However, in the termination letter the bank conversely stated that : “Your actions exposed the bank to a possible financial and reputational risk”. This statement refuted the Respondent’s evidence by DW that the sum of Kshs. 2, 548,927.43 was lost and indicated that the sum could have been possibly lost. The bank did not provide any evidence that the bank had lost any money and there was no investigation report. The Respondent in relied on the HR Manual to state that the Claimant was bound by the Bank policies. The court holds that it was also required to follow its own laid out procedures in punishing the Claimant. For that, I am of the convinced that the reason for the termination of the claimant was not valid and justified.

### **Procedural fairness**

64. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness for gross misconduct is as defined under section 41(2) of the *Employment Act* to wit:- ‘41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.’
65. It was not disputed there were disciplinary proceedings before the termination of employment of the claimant on 8<sup>th</sup> February 2022. The respondent produced the Invitation to attend the disciplinary hearing (R-Exhibit8) during which the Claimant attended and answered her position.
66. The claimant faults the termination process for reasons:- That the she was not given the right to be accompanied by a colleague when she requested; the respondent did not provide her with particulars of the loss of Kes 2, 548, 927.43 to have been able to defend herself on each particular loss levelled against her. She argued that she was not invited to an appeal hearing as her appeal was dismissed without a hearing against the Respondent HR Manual Clause 8.11.13(iv)(R-Exhibit 3). The Claimant argued that she was entitled to a hearing of her appeal but the bank only made a decision without calling her for hearing. DW argued that since no evidence was produced, there was no need for a new hearing. The Claimant relied on the case of *Oyombe V Eco Bank Limited (Civil Appeal 185 of 2017) 2022 KECA 540 (KLR)(13 May 2022)*.



## Response

67. The Respondent submit that they complied with the legal process under section 41 of the Employment Act as the Claimant went for disciplinary proceedings. The respondent submits that the Claimant was told the reason for her termination being the loss of Kshs. Kes 2, 548, 927.43, but the claimant responded to the loss of Kshs. 370, 120.80 and after the hearing the claimant was found that the Claimant had not been diligent in her duties and her employment was terminated lawfully(R-Exhibit-9).

Decision on procedural fairness

68. The court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR observed on procedural fairness :-‘13. 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 employment 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. The Act also provides for most of the procedures to be followed ...”(emphasis mine)

69. Section 41 of the employment Act provides for the procedure for fair termination as follows:- ‘41. (1) 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.”

70. The Claimant alleges that she was denied a chance to be accompanied by a colleague during the disciplinary hearing. The Invitation letter to the Disciplinary hearing (R-Exhibit -8) indicated that: ‘During the hearing , you are entitled to come with a witness who should be a fellow staff of Family bank ltd”.

She argued that she did not waive her right to have a witness and she was never asked about the presence of her colleague.

71. Section 41 of the Employment Act provides that: “(1) 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.

72. The Claimant did not raise the issue of being accompanied during her hearing as evidenced by the minutes of the disciplinary hearing of 8<sup>th</sup> February 2022(R-exhibit-9), and neither did she raise that issue in her Appeal letter to the Respondent. (C-Exhibit -11). The Claimant, I agree with the Respondent was informed prior to meeting to be accompanied by an employee colleague but she choose not to be accompanied. She had sufficient notice to be accompanied by a colleague and let the respondent refuse the presence of the employee but she did do that. The claim that the respondent denied the claimant the right to be accompanied is without basis.

73. On the claim of unsubstantiated loss of Kes 2, 548, 927.43, the court agrees that while the respondent did issue the Claimant with a show cause letter reading: “We refer to the irregular fraudulent transactions that happened at Busia & Bomet branches respectively details which you are aware of. As



an Officer of the bank, you were negligent in performing your duties by breaching the AML-CFT& KYC policy whereby as the officer in charge of branch operational risk , you did not stop the several fraudulent transactions which ought to have detected earlier to avoid further losses. This led to a loss of Kes 2, 548, 927.43.” The bank which is the custodian of its records, was better placed to provide the claimant with an elaborate statement of the alleged transactions that would lead to the termination of the Claimant’s employment. The respondent required the Claimant to respond to allegations within her knowledge and this is what the Claimant responded to; the sum of Kshs. 370, 120.80, which transaction she was aware of having received the complaint on the same.

74. The Claimant could not have been required to respond to loss of Kshs. 2,178, 806.63, when she was not aware of where the said amount had been lost and when.
75. Justice Nzioka in *Freddy Kipkorir Lang’at v Co-operative University of Kenya* [2021] eKLR stated that:-

“9. The decision of *Walter Ogal Anuro v Teachers Service Commission* (supra) held in paragraph 23 thereof as follows:-“23. It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant’s employment by way of summary dismissal unfair for want of due procedure. In this case, the Respondent similarly did not go the whole way by disallowing the Claimant an opportunity to defend himself. The tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken in the disciplinary process but also documentation to prepare a defence where such documentation is in the custody of the Respondent as in this case. Put another way, if one is accused of misleading the employer and the evidence for such is the correspondence with a third party, it is incumbent upon the employer to lay the whole case against the employee by availing the full accusation and await the response or defence of the employee. In the final analysis the termination herein is found to have been ipso facto unfair for want of procedure.....”

76. The Court upholds the foregoing decision in holding that the respondent failed to provide the Claimant with concrete Information to defend herself, there was no investigation report and her response to the Respondent was limited to what was within her knowledge and no more was required of her.
77. Relating to the Appeal process, the Claimant argued that the bank vide its letter of 3<sup>rd</sup> March 2022(R-Exhibit-12) dismissed her appeal stating there were no new facts to support the appeal. DW during hearing confirmed that no record of whom had sat on the appeal committee was available and no minutes of the same were available.
78. The Respondent’s HR Manual(R-exhibit-3) at clause 8.11.13(iv) laid out the procedure for appeal that:- “An appeal against dismissal will involve a further hearing to be attended by employee and persons who made the decision to dismiss should not attend the appeal , however , the CHRO or HR Representative may attend but should not be involved in the decision on appeal. An appeal will be heard on grounds that:-The dismissal hearing was materially flawed on procedural grounds;The decision to dismiss was not reasonable in the circumstances.’(R-Exhibit8-pg 59”).



79. The Respondent argued that the appeal committee would affirm a decision where no new evidence was provided without need of calling the claimant as a witness and that further under clause 8.11.13(v) if there was new evidence then a hearing could have been conducted, which was not case for the claimant.
80. The Court disagrees with the Respondent on the issue of new evidence being availed for the requirement of a hearing at appeal. The HR Manual Clause 8.11.13(v) stated as follows:- “Where there is new evidence , the committee may re-hear the matter to consider such evidence but appeal should not consider new evidence.” This clause meant that during the Appeal hearing if new evidence had been availed, then the committee would hear it, otherwise the appeal hearing was to consider whether the decision to dismiss was reasonable in the circumstances, which was what the claimant had sought from the appeal; the consideration of the evidence she had adduced at the first hearing.
81. The Appeal committee is comprised of new persons who are mandated to hear the Claimant at first hand as she was dissatisfied with the decision of the first committee, for the Appeal Committee to have stated that the Claimant’s evidence was not new without having heard her as is required by the respondent’s policy was unprocedural.
82. The Respondent failed to follow its own laid out procedure in undertaking the disciplinary process against the claimant. There was no investigation report. The procedure in the disciplinary process is held to have been unfair.

**Issue b-Whether the claimant is entitled to reliefs sought.**

83. The Claimant seeks :-
  - a. A declaration be and is hereby issued that the termination of the Claimant unfair as it was not based on valid reasons.
  - b. An order be and is hereby issued unconditionally reinstating the Claimant to the position of Operations Manager family Bank Busia branch.
  - c. In the alternative the Respondent be and is hereby ordered to pay the claimant the sum of Kes 2,713,000.00 broken down as follows:-
    - i. One Month’s gross pay in lieu of notice – Kshs. 135,650.00
    - ii. 12 months gross pay for unfair termination- Kes 1,627,800.00
    - iii. Service pay for 14 years.
  - d. Interest on (C) above from the date of termination.
  - e. Costs of the suit
84. The jurisdiction to order reinstatement of an employee is donated by Section 49 (3) (a) of the *Employment Act* and section 12 (3) (vii) of the *Employment and Labour Relations Court Act*. The emerging jurisprudence from the Court of Appeal is that, before the court can order reinstatement, it is must be guided by the provisions of section 49(4) of the *Employment Act*. In Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014] eKLR the Court of Appeal held that the relevant factors to be taken into account when considering reinstatement are provided under section49(4) of the *Employment Act* and they include: -

“...the wishes and expectation of the employee; common law principle that there should be no order of specific performance in a contract of service except in very exceptional



circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment.”

- f. The Claimant during hearing confirmed that she is employed by a pharmaceutical firm. Further the respondent has already engaged a different person in the same position. The court finds that it would not be practicable for that person since employed to be pushed aside for the Claimant to occupy the position as a Branch operations manager at Busia. Further an order for reinstatement would not be tenable or appropriate in the circumstances of broken down trust of employer employee considering the banking sector operational requirements. The court holds that the compensation under section 49 of the *employment Act* were sufficient remedies in the instant case as considered below.

### **One Months' Salary in Lieu of Notice**

85. The Claimant claims for one months' salary in lieu of notice of Kshs. Kshs. 135,650.00/-. During hearing the claimant stated produced a pay slip (C-Exhibit-16) showing that she received Kshs. 135,650.00.” I award to the Claimant one month's salary in lieu of notice at Kshs. Kshs. 135,650.00.  
Claim for 12 months' gross pay for unfair termination- Kes 1,627,800.00
86. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR) cites that “...23. The measure of compensation should have been guided by the statutory capping- the statutory standards in place- at the time of termination. The Respondent benefited from the principles regulating unfair termination, and should not have been granted anything outside the contemplation of the existing law of unfair termination...”.
87. The Claimant in her testimony, told this court that she has since secured alternative employment. Considering that no other complaints had been provided as to the work of the Claimant in her capacity during her tenure, the lack of valid reasons for termination and lack of procedural fairness, coupled with the fact that she has since secured comparable employment, I award the Claimant the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 135,650.00x6 total award of Kshs. 813,900/.

### **Service pay.**

88. The claimant did not plead the basis for the claim for service pay. Her letter of employment provided for pension. The service pay being not provided for in the letter of employment or justified in any other way, section 35(5) of the *Employment Act* was not applicable. Section 35(6) of the Act excludes service pay where the employee enjoys pension. The claim for service pay is disallowed.

### **Issue c.) Interest**

89. The claimant prayed for interest since termination. The respondent submits that award of interest is discretionary and further it would unjustly enrich the claimant and the claimant had not indicated the applicable interest. The court holds that the default interest rate applicable under section 26 of the *Civil Procedure Act* is the prevailing court rate. The same is awarded at discretion of the court. I exercise my discretion and award interest rate on entire award and cost at the prevailing court rate from date of judgment.



## Certificate of service

90. The respondent submits that the claimant had failed to clear and would have received the certificate had she subjected herself to the clearance process.

The certificate of service is a statutory right of the employee upon termination of employment by the employer under section 51 of the [Employment Act](#) which states:- ‘

- (1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.
- (2) A certificate of service issued under subsection (1) shall contain—
  - (a) the name of the employer and his postal address;
  - (b) the name of the employee;
  - (c) the date when employment of the employee commenced;
  - (d) the nature and usual place of employment of the employee;
  - (e) the date when the employment of the employee ceased; and (f) such other particulars as may be prescribed.
- (2) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.
- (3) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.” The court finds no fetter on the issuance of certificate to an employee whose services have been terminated by the employer thus the condition of clearance is not applicable to such an employee for issuance of the certificate.

## Who bears the costs of this suit.

91. Cost follow the event. In this case the claim succeeded. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgement.

## Conclusion and Disposition

92. In conclusion the court enters judgment for the claimant against the respondents for unlawful and unfair termination as follows:-

- a. Notice pay in lieu of Kshs. Kshs. 135,650.00/-
- b. Compensation for unfair termination granted at the rate equivalent to the Claimant’s salary for 6 months, that is to say Kshs. 813,900/-  
Total award Kshs. 949,550/-
- c. Interest awarded at court rate from date of judgment until payment in full.
- d. Costs of the case are awarded to the Claimant with interest at court rate from date of judgment.



- e. Certificate of service to issue to the claimant through the advocates in compliance with section 51 of the [Employment Act](#) within 30 days.

93. It is so ordered

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF JULY 2023**

**JEMIMAH KELI**

**JUDGE**

**In The Presence Of:-**

Court Assistant : Brenda

For Claimant : Ms. Achieng

For Respondent: Mr. Kithinji

**Mr.Kithinji**

I seek for stay of 30 days and for typed and certified proceedings, judgment and decree of court.

**Further Court Order**

Stay of 30 days granted.

The resident be availed typed and certified proceedings, judgment and decree in the case in the usual process.’

It is so ordered.

**Jemimah Keli**

**JUDGE.**

**27/07/2023**

