



**Mwangi v Family Bank Ltd (Cause 331 of 2014)  
[2023] KEELRC 2156 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2156 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 331 OF 2014  
DN NDERITU, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**FLORA NJOKI MWANGI ..... CLAIMANT**

**AND**

**FAMILY BANK LTD ..... RESPONDENT**

**JUDGMENT**

1. In an amended memorandum of Claim dated 5<sup>th</sup> December, 2016 and filed in court on 13<sup>th</sup> October, 2014 through Mwangi Mwaura & Partners the claimant prays for: -
  - a. A declaration that the claimant's termination illegal or unfair and the claimant be paid her full terminal dues and damages.
    - aa) The Respondent be restrained from advertising, selling transferring, realizing or in any other term so referred, from disposing off the plaintiff's properties Number L.R. No. Bahati/Kabatini/Block 1/6018 and L.R. No. Naivasha/Mwiciringiri 4/4909 And charged as security in respect to the claimant's loan and mortgage facilities respectively pending the hearing and determination of this application.
    - ab) The respondent be restrained form forwarding the claimant's name to Credit reference Bureau or circulating any information relating to the claimant's credit or employment status with the respondent.
  - b. An order for the Respondent to pay the Claimant Kshs.7,388,499.99
  - c. The Court to be pleased to compute the compensation for lost earnings.
  - d. Certificate of service.
  - e. Cost of this claim



- f. Interest on (b) & (f) above at 14%
2. Together with the amended memorandum of claim, as expected, was filed a verifying affidavit. The Claimant's witness statement and a list of documents dated 25<sup>th</sup> July, 2014 and a bundle of the listed documents had been filed earlier on alongside the original memorandum of claim.
  3. Vide a notice of change of advocates dated 22<sup>nd</sup> March, 2016 the Claimant changed her lawyers and appointed Manasses Mwangi & Associates to act for her. The Claimant filed a supplementary list of documents on 23<sup>rd</sup> March, 2016 and copies of the two listed documents.
  4. On 22<sup>nd</sup> October, 2014 the Respondent, through Murimi, Ndumia, Mbago & Muchela Advocates, filed a response to the claim and on 26<sup>th</sup> November, 2014 filed an amended response to the amended memorandum of claim in which it denied each and every allegation by the Claimant and sought the dismissal of the entire cause for lack of merits. The Respondent filed a list of documents on 2<sup>nd</sup> March, 2015 and a supplementary list on 11<sup>th</sup> October, 2019 and copies of the listed documents. However, with the leave of the court, the Respondent filed a consolidated list of documents and copies of the listed documents on 4<sup>th</sup> November, 2021.
  5. In the totality of its response to the claim the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
  6. As it can be observed from the header this cause has been in court for sometime now. The Claimant's case was heard and concluded by Mbaru J. on 21<sup>st</sup> February, 2019 when the Claimant testified. On 21<sup>st</sup> September, 2021 counsel for the parties consented and agreed that the matter proceeds for defence hearing before this court. The defence was heard on 3<sup>rd</sup> November, 2021 when STEPHEN KIMANI NG'ARU (RW1) testified partly and he was then stood down to 17<sup>th</sup> November, 2021 when he concluded his testimony and the Respondent's case was closed.
  7. Counsel for both parties addressed the court by way of written submissions. Mr. Mwangi for the Claimant filed his submissions on 14<sup>th</sup> November, 2022 while Mr. Murimi for the Respondent filed on 21<sup>st</sup> October, 2022.

## **II. The Claimant's Case**

8. The Claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by her Counsel and the same is summed up as hereunder.
9. In her amended memorandum of claim, the Claimant pleaded that she was engaged by the Respondent, a bank, in April, 2005 as an accountant and she was later confirmed on permanent and pensionable terms in November, 2005. By 2014 the Claimant had risen through the ranks to the position of branch operations manager based at Naivasha.
10. On 24<sup>th</sup> May, 2014 the Claimant was suspended from duty for two weeks pending investigations on allegations of fictitious deposits that had been made in some specific customers' accounts totaling to Kshs.6,000,000/=. For ease of reference the letter of suspension stated as follows –

24<sup>th</sup> May, 2014

Private and Confidential

Flora Njoki Mwangi

Thru' Manager



Family bank Ltd

Naivasha Branch

Dear Flora,

RE: Suspension

We refer to the ongoing investigations on the fictitious cash deposits on 23<sup>rd</sup> May, 2014 to account xxxx, xxxx and xxxx totaling to Kes..6,000,000.

In the circumstances, you are now issued with a two (02) weeks suspension from employment with effect from today 24<sup>th</sup> May, 2014 to allow for further investigations. You should report to this office on Monday, 8<sup>th</sup> June 2014 at 9.00a.m. for further instructions.

You are required to read, sign and return to us a copy of this letter as an indication that you have read and understood the contents.

Yours faithfully

For: Family Bank Ltd

John Wamwati

Director of Human Resources

I Flora Njoki Mwangi I have read and understood the contents of this letter

Signature..... Date 7<sup>th</sup> June 2014

C.C.

Manager – Naivasha Branch Personal file

11. Vide a letter dated 9<sup>th</sup> June, 2014 the suspension was extended for a further three days and the Claimant was invited for a disciplinary hearing on 11<sup>th</sup> June, 2014 to defend herself on why she should not be held liable for the fictitious deposits. For ease of reference the letter said letter stated as follows –

9<sup>th</sup> June, 2014

Private and Confidential

Flora Njoki Mwangi

Thru' Manager

Family bank Ltd

Naivasha Branch

Dear Flora,

RE: Extension Of Suspension

We refer to our letter dated 24<sup>th</sup> May, 2014.

We would like to advice that your suspension has been extended for a further three days. You are required to present yourself to the Disciplinary Committee on Wednesday, 11<sup>th</sup> June 2014 at 1200a.m. at the Family Bank Towers 10<sup>th</sup> Floor to defend yourself on why you should not be held liable for the fictitious cash deposits on 23<sup>rd</sup> May, 2014 to account xxxx, xxxx and xxxx totaling to Kes.6,000,000.

You are required to read, sign and return to us a copy of this letter as an indication that you have read and understood the contents.



Yours faithfully

For: Family Bank Ltd

John Wamwati

Director of Human Resources

I Flora Njoki Mwangi I have read and understood the contents of this letter

Signature.....Signed..... Date 9/06/2014

c.c.

Manager – Naivasha Branch Personal file

12. Vide a letter dated 26<sup>th</sup> June, 2014 the Claimant was summarily dismissed in the following terms –

26<sup>th</sup> June 2014

Florah Njoki

Box 519

Nakuru

Dear Florah,

Summary Dismissal

Following the completion of investigations involving you and whose details you are aware of, you have summarily been dismissed from the services of the Bank effective 26<sup>th</sup> June, 2014.

Reasons for your dismissal are related to the incident where you authorised credits to customers account xxxx with Kshs.1,200,000.00, Account xxxx with Kshs.3,600,000.00 and account xxxx with Kshs.1,200,000.00 This was done against the policies and procedures of the Bank.

Your explanation during the disciplinary hearing held on 19<sup>th</sup> June 2014, was unsatisfactory and questions your credibility and integrity and the Bank has therefore lost confidence in you.

You are therefore required to clear from the bank as per the exit procedures. Payment of final dues will be processed and credited to your account on completion of the clearance with all the departments and had over the duly completed clearance form to Human Resource Department. Successful completion of this process will be critical to your formal departure from the Company.

Pension dues will be paid as per the rules of the Scheme. In this regard, you are required to fill in the Pension withdrawal form (available to Human Resources Office) to facilitate payment.

Yours faithfully

For: Family Bank Ltd

John Wamwati

Director Of Human Resources

Payroll Personal File

I Flora Njoki Mwangi I have read and understood the contents of this letter.

Signature.....Signed..... Date 01/76/2014

c.c.



13. Prior to the dismissal on 28<sup>th</sup> May, 2014 the Claimant was arraigned in court with another person charged with the offence of conspiracy to defraud the Respondent a sum of Kshs.6,000,000/=. For ease of reference the charge sheet, as far as it affected the Claimant, reads as follows –

Charge Count 1	Conspiracy To Defraud Contrary To Section 317 Of The Penal Code
Particulars Of Offence (See Second Schedule of C.P.C.	1. Flora Njoki Mwangi 2. Laban Musili Musyoka ===== On or before the 23 <sup>rd</sup> day of May 2014, at Family Bank Limited Naivasha Branch in Naivasha within Nakuru County, being employees of the said Bank as an Operations manager and a teller respectively, jointly with others not before court, conspired to defraud Kshs.6,000,000/= (Six Million Kenya Shillings) the property of the said Family Bank.  (Other counts see overleaf).

14. However, the Claimant was acquitted of the charges and set free without being called to defend herself as the prosecution failed to establish a prima facie case against her. A copy of the judgment in the criminal trial court delivered on 6<sup>th</sup> May, 2015 was produced as an exhibit by the Claimant.
15. It is the Claimant's case that the disciplinary process and the subsequent hearing and the ultimate dismissal were irregular, wrongful, unfair, and unlawful both in substance and procedure.
16. In her oral testimony in court the Claimant adopted her filed statement and testified alongside the foregoing position as espoused in her pleadings and she tendered her filed documents as exhibits in support of her case. She testified that at the time of her dismissal her monthly salary was Kshs.120,000/=.
17. She stated that as the operations manager she was in-charge of supervising cashiers/tellers, replenishing ATM machines, authorizing and confirming deposits of over half a million shillings, amongst other duties. She further stated that on 24<sup>th</sup> May, 2014 she received a system generated alert that one of the cashiers, Laban Musili Musyoka, had received deposits of about six million in cash and as was the norm she approved the transaction in the system awaiting to physically confirm the deposits with the cashier. She stated that the branch manager also routinely received the prompts through the automated system. She substantiated that the alerts were system generated and that at no point did she receive or handle deposits from customers as that was done by the cashiers.
18. The Claimant stated that when she approached the said cashier to collect the cash deposits for safe custody into the strong room she discovered that there was no cash received as purported and ordered the said cashier to reverse the affected transactions. The branch manager who had also been prompted through the system came to the front office and established that no such deposits had been received as alleged. It is after this incident that the Claimant was subsequently investigated by the Anti-Banking



Fraud Unit of the Directorate of Criminal Investigations (DCI) and charged with the afore-stated criminal charges alongside the above named cashier.

19. It is also in view of foregoing events that the Claimant was suspended from duty as afore-stated and subjected to disciplinary process and subsequently dismissed. It is the Claimant's case that she was not subjected to due process in that the Respondent had no lawful reason for taking the disciplinary action and that the hearing was un-procedural and unfair. She stated that she was not informed of her rights before, during, and after the disciplinary hearing, she was not informed of the charges and the evidence against her with certainty, she was not allowed to defend herself or to present her evidence, and that the panel that heard her case was composed of senior managers who purported to hear and determine her case in five minutes.
20. The Claimant stated that as at the time of her dismissal she was servicing facilities with the Respondent which had been extended to her at favourable and lower staff interest rates as opposed to commercial rates. She stated that upon dismissal the Respondent revised the interest rates to commercial levels which she could not afford as a result of which she defaulted and the Respondent forwarded her name for listing as a bad debtor with the Credit Reference Bureau (CRB). The Claimant further testified that she could not secure a job as the bad reference from the Respondent has rendered her unemployable. She accuses the Respondent of spreading wrong, false, and malicious information concerning and about her employability making it impossible for her to secure and hold a job.
21. It is on the basis of the foregoing that the Claimant is seeking for judgment against the Respondent in the terms of the amended memorandum of claim as reproduced in the introductory part of this judgment.
22. The submissions by counsel for the Claimant shall be considered in the succeeding parts of this judgment alongside those by counsel for the Respondent.

### **III. The Respondent's Case**

23. The Respondent's case is contained in the amended response to the claim and the oral and documentary evidence adduced through RW1 and the same is summarized as hereunder.
24. The Respondent's case is that the Claimant was fairly and lawfully dismissed for gross misconduct exhibited and evidenced by irregular and un-procedural authorization of fictitious deposits to the aforementioned customers' accounts with the intention of defrauding the Respondent. It is the Respondent's pleading and position that the Claimant lacked integrity and credibility as a result of which it lacked confidence in her.
25. It is the Respondent's position that it had good reason(s) for taking disciplinary action and that it afforded the Claimant a fair hearing by a properly constituted panel culminating in what it considers to be a fair and lawful dismissal. The Respondent denies that the Claimant worked overtime.
26. Further, the Respondent states that it advanced to the Claimant loans and or facilities totaling to about Kshs.5.62 million on specific conditions as per the documentation thereof. It is the Respondent's position that in the event that the Claimant left the employment of the Respondent, regardless of the circumstances, the interest rate reverted to commercial rates and the balance became due and payable within 30 days unless otherwise agreed by and between the parties.
27. It is alleged that the Respondent paid all dues to the Claimant, terminal or otherwise, and that it owes the Claimant nothing. Without prejudice to the foregoing, the Respondent pleads that if there is any money due and owing to the Claimant the first charge thereon should go towards payment and or



settlement of the balance on the loan which the Claimant has failed, refused, and or neglected to service since her dismissal.

28. The Respondent has pleaded that the loan contract between it and the Claimant was completely different and separate from the employment contract and that the only nexus was the change in interest rates from employee/staff rates to commercial rates once the Claimant left the employment of the Respondent in whatever manner or circumstances. It is the Respondent's position that it would be inequitable for this court to stop the Respondent from realizing the securities provided by the Claimant in enforcing recovery of the loan balance that is now overdue.
29. Further, the Respondent pleads that it afforded the Claimant due procedural fairness and that it had lawful reason for terminating her. It is pleaded that the Claimant acted in cohort with the aforementioned cashier in an attempt to defraud the Respondent of Kshs.6 million but she moved quickly to reverse the illegal transactions once she realized that the manager had been alerted of the fictitious entries.
30. In his testimony in court for the Respondent RW1 supported the Respondent's case as pleaded in the foregoing paragraphs and produced all the 35 documents listed by the Respondent as exhibits. He testified that the Claimant was deemed culpable of gross misconduct after she called the customers in whose accounts the fictitious deposits had been posted and instructed them on what to state if questioned by the police or the Respondent's investigators. He alleged that one of the customers was bribed by the Claimant in order to give a false account of the fictitious deposits.
31. RW1 insisted in his testimony that the Claimant was given and afforded a fair hearing before dismissal and that the Respondent had lawful grounds and reasons for the dismissal based on gross misconduct by the Claimant. While insisting that all the prayers by the Claimant are misconceived and bad in law, he added that the pension scheme was separately administered by Minet Kenya and that the Respondent remitted all dues that were deducted from the Claimant. He therefore stated that the Claimant should seek payment of her pension from that entity which has not been joined as a party in this cause. He stated that the Claimant is not entitled to service pay, overtime pay, and the other prayers sought. He insisted that the Claimant was given a fair hearing and that the dismissal was fair and lawful, both in substance and procedure.
32. It is on the basis of the foregoing that the Respondent is pleading and praying that the Claimant's cause be dismissed with costs. The submissions by counsel for the Respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimant.

#### **IV. Issues For Determination**

33. After a careful and thorough scrutiny of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for the both parties, this court identifies the following issues for determination –
  - a. Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
  - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the amended memorandum of claim?
  - c. Who meets the costs of this cause?



## V. The Termination

34. The terms and conditions of service of the Claimant are not in dispute. They are as alluded to in an earlier part of this judgment. As at the time of termination the Claimant was the Respondent's operations manager in its Naivasha Branch. Her last gross monthly salary was Kshs.120,000/=.
35. The chronology of events leading to dismissal of the Claimant is not in dispute as the evidence by both sides agree on the same as outlined elsewhere above. The letter of summary dismissal that has been reproduced above indicates in the material part that "Reasons for your dismissal are related to the incident where you authorized credits to customers account numbers; xxxx with Kshs.1,200,000.00, a/c xxxx with Kshs.3,600,000.00 and a/c xxxx with Kshs.1,200,000.00. This was done against the policies and procedures of the Bank."
36. The court has gone through the evidence availed and noted that the Respondent held the view that the Claimant was liable for the fictitious deposits mentioned above as per the letter of suspension and that of extension of suspension that have been cited and reproduced in an earlier part of this judgment. It was therefore incumbent upon the Respondent to avail evidence that prima facie it had reasonable and genuine grounds upon which to found the disciplinary action and the ultimate dismissal.
37. In the aforementioned criminal case, wherein the standard of proof is beyond reasonable doubts, the Claimant was acquitted before the hearing of her defence for lack of prima facie evidence that she was involved in the alleged conspiracy to defraud the Respondent. The charges against the Claimant during the disciplinary hearing, based on the minutes of the meeting produced as exhibit by the Respondent, was attempted theft. The court has gone through the said minutes and there is no evidence on how the Claimant was involved in the alleged attempted theft or fraud.
38. While the Respondent may have had some apprehension that the Claimant was involved in some conspiracy to steal or defraud it through the alleged fictitious deposits, the Respondent was duty and legally bound to gather evidence and then confront the Claimant with such evidence and then proceed to disciplinary hearing in case the Claimant failed to give reasonable or convincing evidence to exonerate herself from the alleged misconduct. Mere suspicion cannot form the basis for such serious action as dismissal from employment which came along with disastrous effects to the career, reputation, and financial life of the Claimant and her family.
39. While the Respondent may have had reasonable grounds for suspending the Claimant from duty in order to investigate the alleged theft or conspiracy to defraud, it ought to have evaluated the same in a genuine and reasonable approach and process in determining whether to proceed to disciplinary hearing and later in making the ultimate decision to dismiss her summarily.
40. The letter dated 9<sup>th</sup> June, 2014 extending the suspension and in essence inviting the Claimant for the disciplinary hearing did not inform the Claimant of her right to call witnesses or to be accompanied with a union official or a workmate, it did not specify the charges against her, and it did not state what evidence had been gathered against her. The charges and allegations against the Claimant were not specified in the original letter of suspension in the letter of 24<sup>th</sup> May, 2014 and her rights before, during, and after investigations and disciplinary hearing were neither spelt out nor disclosed. The investigation report was not availed to the Claimant and the same was not availed in court as evidence.
41. From the evidence adduced by the Respondent as contained in the two letters of suspension, the minutes of the disciplinary hearing, and the letter of dismissal, it appears to this court that the Respondent approached the disciplinary process with the misconceived view that it was for the Claimant to prove her innocence rather than that it was the duty on the Respondent to prove on a



balance of probability that the Claimant was guilty of gross misconduct as alleged. This court is of the view and holds that the Respondent has failed to demonstrate that it had genuine and honest grounds or reasons upon which it took the disciplinary action against the Claimant culminating in her summary dismissal. In other words, there is no prima facie evidence presented by the Respondent that the Claimant had committed acts of gross misconduct as alleged.

42. None of the customers whose accounts were affected by the fictitious deposits were called as witnesses either in the disciplinary hearing, in the criminal court, or in this cause. There is no evidence on how the Claimant was involved in making or processing of the fictitious deposits or how she was to ultimately benefit from the alleged deposits so as to found attempted theft or fraud which was the basis for the disciplinary action and the ultimate dismissal.
43. The jurisprudence on substantive and procedural fairness is now settled in a multitude of decisions from this court (ELRC) – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
44. Substantive fairness is about an employer having and establishing lawful reason(s) or ground(s) for termination – see Sections 40, 43, 44, 45, 46, and 47 of the [Employment Act](#) (the Act).
45. Procedural fairness is about the reasonableness, fairness, and lawfulness of and in the procedure adopted and the steps taken by the employer in taking the disciplinary action against the employee up to and including the termination in whatever form or manner – See Article 47 of [the Constitution](#), the [Fair Administrative Action Act](#), and Sections 35, 41, and 45 of the Act.
46. It is on the basis of the foregoing provisions of the law that the termination of the Claimant by the Respondent has to be viewed, weighed, and scaled in determining whether the same was substantially and procedurally unfair and unlawful as urged by and for the Claimant.
47. It is not the duty of this court to substitute its own opinion for that of the employer as regards the reason for termination. Section 43(2) of the Act requires the employer to have a genuine belief that matters existing and subsisting as at the time of disciplinary action are good reasons for lawful termination. This is a fairly subjective test that can only be viewed from the lenses of a reasonable man or bystander – See *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR.
48. Section 47(5) of the Act places a burden upon an employee to prove that the dismissal or termination is wrongful and unlawful. The employer has a burden to justify the dismissal or termination – See *Janet Nyadiko V Kenya Commercial Bank* (2017) eKLR and *National Bank of Kenya V Anthony Njue John* (2019) eKLR.
49. Did the Respondent have any reason(s) for dismissing the Claimant as envisaged in law, and more particularly Sections 43 and 45 of the Act? Section 43(2) of the Act urges that the reason for termination or dismissal “are the matters that the employer at the time of termination of the contract genuinely believed to exist”. The belief must be genuine as opposed to whimsical or capricious. As noted elsewhere in this judgment the court has not established any genuine, reasonable, or even probable ground upon which the Respondent was to found the disciplinary process and the ultimate dismissal. After the suspension, the Respondent ought to have carried out proper investigation to establish good basis for the disciplinary hearing and the ultimate dismissal. It is not every disciplinary process that must conclude in dismissal. As noted elsewhere in this judgment there is no evidence availed on what investigations were carried out by the Respondent. The investigation report has not been availed. Further, the Claimant was acquitted of the criminal charges that she faced emanating from the alleged deposits in the particular accounts mentioned above.



50. In the entire circumstances of this cause, the evidence adduced, and the submissions by counsel for the parties, this court takes the considered view that the Respondent had no genuine and or reasonable grounds in law to dismiss the Claimant. The court agrees with counsel for the Claimant that she was neither negligent, careless, and nor reckless in performance of her duties or fraudulent in her conduct as envisaged under Section 44(4)(c)(g) of the Act or any other provisions of the law.
51. In terms of procedure, an employee is entitled to a fair hearing based on the rules of natural justice and the laws cited above. For the reasons that are clear in the foregoing paragraphs of this judgment, this court is of the considered view that the Claimant was not afforded a fair hearing in the procedure adopted by the Respondent.
52. Disciplinary process is an administrative action. While the law does not envisage that an employer shall conduct the disciplinary process as if it were a court trial, it is the view of this court that so long as the process is in line with the general rules of natural justice a court of law should not interfere with the same. In this matter the Claimant was suspended, which suspension was extended in a letter that also invited her for the disciplinary hearing. The letter did not inform the Claimant of her right to bring along with her a union official or a coworker or even a witness to the hearing. The charges against her were not specified and the evidence against her was not supplied to her before or during the trial. The investigation report was not availed to her and in fact the same has not been availed to court. The verbatim minutes of the disciplinary hearing have not been availed to court and there is hence no evidence that the Claimant was afforded a fair hearing. There is no evidence that the holders of the accounts wherein the alleged fictitious deposits were made were called as witnesses in the disciplinary hearing and or the investigating officer or officers were called as witnesses to be questioned by the Claimant. The witnesses statements filed in court from the intended witnesses amount to nothing without those witnesses appearing in court to testify on the same and being subjected to cross-examination. Such statements added no value to the Respondent's case.
53. The letter of dismissal states that the Respondent had lost confidence in the Claimant as the explanation that the Claimant had given during the disciplinary hearing was unsatisfactory bringing her credibility and integrity into question. While the Respondent's business as a bank is based on confidence and fiduciary trust, it appears to this court that the Respondent lacked tangible evidence against the Claimant for the alleged misconduct yet it expected the Claimant to prove her innocence. That is not a procedural and lawful approach in disciplinary hearing. Further, the letter of dismissal did not inform the Claimant of her right of appeal or review and what the Claimant was to do in case she opted to challenge the dismissal.
54. The Claimant's counsel has submitted that the procedure was not fair and has cited *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR and *Geoffrey Gikonyo Mathu V Intex Construction Company Limited* (2017) eKLR among others.
55. On the other hand, counsel for the Respondent has cited *Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd* (2013) eKLR wherein the court so well laid down the ingredients of fair hearing. This court does not agree with counsel for the Respondent that it adopted and complied with the requirements of fair hearing culminating in the summary dismissal of the Claimant. In fact, and in law, the Respondent failed to comply with the fairness in substance and procedure which should be as per the decisions cited by counsel for both parties.
56. For all the foregoing reasons, the summary dismissal of the Claimant by the Respondent is declared wrongful, unfair, and unlawful both in substance and procedure.



## VI. Reliefs

57. Having held that the Claimant was unfairly and unlawfully dismissed, this court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
58. Prayer (a) is for a declaration that the termination of the Claimant was unfair and unlawful. The court has found and held in the foregoing paragraphs that the summary dismissal was wrongful, unfair, and unlawful for lacking both in substance and procedure. It is so declared.
59. Prayer (aa) is for an order restraining the Respondent from advertising, selling, transferring, realizing, or in any other way disposing of the Claimant's properties that had been mortgaged and or charged for loan and other advances made to the Claimant at her request. Other than that the Claimant stopped servicing the said facilities upon termination, no evidence was offered by either party on the current status of the said facilities and the properties. Interim orders that had been issued by the court (Ongaya J.) on 28<sup>th</sup> July, 2014 restraining the Respondent from realizing the said securities were vacated (Radido J.) on 17<sup>th</sup> October, 2014. There is no evidence on record as to the current status of the matter in this regard.
60. However, the court has gone through the documents availed in regard to the said facilities and established, and this is not disputed by either party, that the Claimant was to enjoy discounted staff interest rates on the facilities as long as she was an employee of the Respondent. It has been found and concluded in the foregoing paragraphs that the summary dismissal of the Claimant was wrongful, unfair, and unlawful. The question then becomes, in those circumstances what is the fit of the mortgage/loan facility advanced?
61. There is clearly a nexus between the employment of the Claimant with the Respondent and the servicing and payment of the loan. It cannot be, and this court disagrees with counsel for the Respondent on this issue, that regardless of the circumstances under which the Claimant left the employment of the Respondent, including wrongful, unfair, and unlawful dismissal, that the interest rates automatically became commercial and the balance became due and payable within 30 days, unless otherwise agreed between the Claimant and the Respondent. If this court were to agree with the Respondent's counsel on this issue, it would then mean that even a malicious, whimsical, and capricious dismissal of the Claimant would have entitled the Respondent to revise the interest to commercial rates and recall the facilities within 30 days. That would be absurd, inequitable, unfair, and unjust.
62. As concluded in the foregoing paragraphs, the dismissal was wrongful, unfair, and unlawful. The payment of the financial facilities was related and tied to the employment in as far as the interest rate was concerned. If the dismissal was unlawful, and the court has found and held so, any interest rate charged beyond the agreed staff rate is unfair, unjust, and unlawful. Had the Claimant remained in employment of the Respondent she should have continued paying for the facilities till completion. There must have been a schedule of payments that was agreed by and between the parties and that is what was and still is applicable in view of the wrongful, unfair, and unlawful dismissal.
63. In the circumstances, and this court is working on the assumption that the securities have not been realized, the court orders that the Claimant was and still is liable to pay for the facilities as per the payment schedule that was agreed and applicable as at the time of the wrongful, unfair, and unlawful dismissal. The Claimant is neither liable nor obliged and shall not be compelled to pay more than what was due and payable as per the payment schedule and no interest is payable beyond that period when the monthly payments were to come to an end. The interest rate payable and applicable is that of a member of staff as at the time of the unlawful dismissal.



64. Prayer (ab) is for an order restraining the Respondent from forwarding the name of the Claimant to the Credit Reference Bureau (CRB) for listing her as a bad debtor or circulating information on her alleged bad credit record or employment status. The evidence on record is that since her termination the Claimant has not been able to secure employment as the Respondent has always sent out negative information which denies her employment opportunities. The evidence on record is that the Claimant has had to resign on two occasions after the Respondent interfered with her employment with other companies.
65. Since the court has already found that the dismissal was wrongful, unfair, and unlawful, and it is on the basis of the dismissal that the facilities could not be serviced, this court is equally convinced that the listing of the Claimant with the CRB on the instigation of the Respondent was and remains unfair, unjust, and unlawful. It is equally unfair, unjust, and unlawful for the Respondent to circulate and or give negative information on the employability of the Claimant based on the wrongful, unfair, and unlawful dismissal. For the above reasons the court shall issue orders against the Respondent as contained in the final orders below.
66. Prayer (b) is for payment of Kshs.7,388,499.99 made of various item heads as pleaded and tabulated in paragraph 20 of the amended memorandum of claim. Item (a) is for loss of earnings at Kshs.120,000/= per month until conclusion of the case. This prayer cannot be granted as it would be grossly unfair to order the Respondent to pay monthly salary to the Claimant who has not been offering any services since her dismissal. In any event, the Claimant has pleaded compensation and that is what should take care of the loss incurred for her unlawful dismissal under Section 49 of the Act. For the foregoing reasons this prayer is hereby denied.
67. Item (b) is for payment of pension scheme contributions totaling Kshs.802,000/=. The Claimant has not availed any evidence to confirm that she was a contributor to such scheme and that the Respondent failed and or neglected to submit and remit her contributions to the said scheme. The administrator of the said scheme has not been joined as a party to this cause. However, the Respondent through RW1 stated that the said pension scheme was administered by Minet Kenya and that while the Claimant was a contributor it remitted and submitted all deductions made from her to the scheme. Further, it was stated that the Claimant ought to have approached the said administrator for release of her pension contribution but she has failed to do so. In the circumstances, this court is of the opinion that it would be unfair and unjust to order the Respondent to pay for what it claims to have submitted to the administrator of the pension scheme yet the Claimant has opted to leave the administrator out of this cause. This item is thus denied.
68. Item (c) is for one month's salary in lieu of notice. This item is granted as no notice was issued or paid for in the sum of Kshs.120,000/=.
69. Item (d) is for medical, house, and transport allowance at Kshs.25,000/= totaling Kshs.1,200,000/=. This court has stated on numerous occasions and I repeat it here that unless the law places the burden of proving a specific issue on the adverse party the general rule on burden of proof is that he who alleges must prove. The Claimant has not only failed to properly plead on how the foregoing amount is arrived at but also failed to adduce evidence in support of the same. She did not avail a pay-slip to confirm that she was indeed entitled to but denied the said allowances in the claimed amounts. It is not even explained in evidence how the said amount is arrived at and for what period of time. In the circumstances this prayer is denied for lack of proper pleading, certainty, and lack of evidence in support of the same. In any event a letter dated 28<sup>th</sup> June, 2013 that raised the Claimant's gross monthly pay at Kshs.120,000/= indicates that the same was consolidated or global meaning that it included all allowances and other monetary benefits without exception.



70. Item (e) is for damages for wrongful termination equivalent to 12 months gross salary. The damage or loss that an employee incurs or suffers as a result of unfair and unlawful dismissal or termination is the wages, salaries, and allowances that such an employee should have earned bar the dismissal or termination. However, the law caps such loss or damage, to loosely use those words, at a maximum of 12 months gross salary. This is what is provided for in Section 49(1)(c) of the Act. The court has considered the factors that are provided for under the foregoing section of the law. The parties have not expressed willingness to re-engage and the period within which the court may order reinstatement is long gone. The Claimant has testified that she has not been able to secure another job in the banking industry wherein she had served for close to 10 years because the Respondent has deliberately given negative information to prospective employers which has denied and locked the Claimant out of employment making it hard and or impossible for her to secure a job. The Claimant had served the Respondent for over nine years which is a considerably lengthy period of time. She was ready and willing to continue working until retirement or for as long as she was capable. Although the Respondent claimed to have settled all terminal dues no evidence of payment of terminal dues was availed.
71. For all the foregoing reasons, it is the opinion of this court that this is an appropriate case for a maximum award equivalent to 12 months gross salary. There is no evidence that the Claimant contributed to her dismissal. No loss was occasioned to the Respondent in the alleged fictitious transactions and it is the Claimant who detected and reversed the said transactions through the digital system that was available for the Respondent to interrogate. The Respondent denied the Claimant both substantive and procedural fairness culminating in wrongful, unfair, and unlawful dismissal. The compensation is computed as follows – Kshs.120,000/= \* 12= Kshs.1,440,000/=. This amount is subject to statutory deductions.
72. Item (f) is for overtime in the sum of Kshs.3,226,500/=. The Claimant pleads to have worked for three extra hours each day of the nine years that she worked for the Respondent. The Respondent admitted that there was a digital/computed/automated clock-in system that each employee used to indicate the time of reporting and leaving the place of work. It was upon the Respondent to provide the records to disprove the allegation by the Claimant – see Sections 10 and 74 of the Act. Nothing would have been easier than for the Respondent to avail the said records for the court to establish with certainty as to how much overtime the Claimant worked if at all.
73. However, this court cannot make an award for dues that were more than three years old at the date of filing the cause. This cause was filed in July, 2014 and counting backwards the awardable overtime goes back to June, 2011 which equals to a third of the entire sum prayed for. The awardable amount under this item is salary per hour times three hours times five days a week for three years which equals a third of the amount prayed for – Kshs.3,226,500/= divided by three which equals Kshs.1,075,500/=.
74. Item (g) is for two months salary for May and June, 2014. There is no doubt that the Claimant was dismissed on 26<sup>th</sup> June, 2014 and as such there is no argument that she was an employee of the Respondent in May and June, 2014 and the court has no difficulties in granting this item in the sum of Kshs.240,000/=.
75. Item (h) is for service pay in the sum of Kshs.359,999.99. Service pay is usually paid where the employer has not made provision for a pension scheme for its employees or in addition to the pension if there is such provision in the contract of employment. The Respondent remitted deductions from the Claimant to a pension scheme to which the Claimant is entitled. There is no evidence in support of service pay and counsel for the Claimant has not established the basis for payment of the same in his written submissions. For the foregoing reasons this item is denied.



76. Going back to the main prayers, prayer (c) is for lost earnings. This prayer has already been taken care of in the award of the compensation above. Any award under this prayer now shall amount to double compensation and or unjust enrichment to the Claimant. This prayer is thus denied in toto.
77. Prayer (d) is for issuance of certificate of service. This is a legal right to an employee under Section 51 of the Act and the Respondent is ordered to issue and deliver the same within 30 days of this judgment.

## VII. Costs

78. Costs follow event and the Claimant has to a large extent succeeded in her cause and hence she is awarded costs of the cause.

## VIII. Disposal

79. In final disposal of this cause, this court issues the following orders: -
- a. A declaration be and is hereby issued that the dismissal of Claimant by the Respondent was wrongful, unfair, and unlawful.
  - b. If the Respondent has not done so as at the time of delivery of this judgment, the Respondent be and is hereby restrained from advertising, selling, transferring, realizing, or in any other term or manner referred, from disposing of plaintiffs properties being LR Bahati/Kabatini Block 1/6018 and LR Naivasha/Mwicingiri 4/4909 charged as security in respect of Claimant's loan and mortgage facilities respectively pending the computation and tabulation of the amount actually due and payable in regard to the said facilities based on order (c) below.
  - c. The Respondent shall within 30 days of this judgment supply to the Claimant a payment schedule that was applicable as at the time of the unlawful dismissal based on the preferential interest rate applicable to members of staff and the Claimant shall not be liable to pay any other or further amounts beyond those based on the applicable schedule.
  - d. Upon the tabulation in (c) above the Respondent shall be at liberty to demand payment in accordance with the terms of the facilities and in case of default proceed to realize the securities in accordance with the law.
  - e. Upon payment and settlement of the amounts due and payable the Respondent shall immediately notify CRB to delist the Claimant.
  - f. Having found that the dismissal of the Claimant was wrongful, unfair, and unlawful the Respondent is hereby restrained from circulating or giving negative or false information to prospective employers concerning the fitness of the Claimant for recruitment and employment.
  - g. The Claimant is awarded a sum of Kshs.2,875,500 /= made up as follows
    - i. One month's salary in lieu of notice ...Kshs.120,000/=
    - ii. Compensation for wrongful, unfair, and Unlawful dismissal .....Kshs.1,440,000/=
    - iii. Overtime pay .....Kshs.1,075,500/=
    - iv. Salary arrears ..... Kshs. 240,000/=
    - Total .....Kshs.2,875,500/=



- (h) The Respondent is ordered to deliver to the Claimant through his counsel a certificate of service within 30 days of this judgment.
- (i) The Claimant is awarded costs of the cause.
- (j) All the other claims are denied.

**DATED, SIGNED, AND DELIVERED VIRTUALLY, AT NAKURU THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**

.....

**DAVID NDERITU**

**JUDGE**

**JUDGMENT**

