



**Kiilu v Standard Chartered Bank (K) Ltd (Cause 2191 of 2017)
[2023] KEELRC 2426 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2426 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2191 OF 2017
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

JOSEPH MUTINDA KIILU CLAIMANT

AND

STANDARD CHARTERED BANK (K) LTD RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed as a Messenger/Clerk on 13th January, 1991 on a permanent basis. According to the Claimant, he applied himself dutifully and ardently to the Respondent's service. It is his case that he was suspended and later subjected to a disciplinary hearing. That he was subsequently terminated from the Respondent's employment. The Claimant has termed his termination as premeditated and discriminatory. He further contends that the termination was irregular, unfair hence unlawful and meant to deny him future employment in the banking industry. On account of the foregoing, the Claimant seeks against the Respondent the sum of Kshs 6,202,213.69 being notice pay, compensatory damages, unutilized leave days, *pro rata* leave and compensation for discrimination.
2. The Claim was opposed with the Respondent stating that the Claimant was first employed as a subordinate staff effective 13th January, 1992 until his initial termination on 5th August, 1998. That the Claimant was later re-employed effective 14th August, 1998 and confirmed on 27th February, 1999. Putting the Claimant to strict proof, the Respondent has denied treating the Claimant in any discriminatory manner and/or premeditating his termination. The Respondent further denies acting in bad faith and avers that the Claimant's termination was on account of gross misconduct in breach of his contract. In the Respondent's view, it was justified in terminating the Claimant's employment and maintains that the decision to terminate him was properly communicated and procedurally executed. Consequently, the Respondent has asked the Court to dismiss the Claimant's suit in its entirety with costs.



3. During the hearing which took place on 3rd May, 2023, both parties called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and at the outset, adopted his witness statement and the bundle of documents filed together with his Claim, to constitute his evidence in chief.
5. Recounting his employment history with the Respondent, the Claimant stated that in 2006, he was promoted to a Clerk. During this period, he was assigned duties of passing internal entries i.e paying police officers, buying items to be used in the bank like sugar, tea leaves and other beverages. During the same period, he was entrusted with the Bank's keys and was also assigned duties at enquiries counter where he was to print statements for customers and give them their balances.
6. It was his further evidence that he supervised the contractors when there was any construction going on e.g renovation and any other minor repairs like changing of the lights, servicing of the machines and maintenance of the alarm.
7. He was later moved to the counters to work as a teller and to do back office work when there was shortage of staff.
8. The Claimant further stated that in 2015, there was a retrenchment and the Branch Manager and Operations Manager gave out his name and when asked why they had chosen him, the Branch Manager could not give any answer hence he was retained. According to the Claimant, it is now apparent that he was marked for termination.
9. He further averred that he had worked with many Branch Managers and nobody had any complaint against him.
10. Regarding the events leading to his termination, the Claimant stated that on 29th February, 2016, he received a letter from the Respondent suspending his services for an unspecified duration. That however, during the disciplinary hearing which was conducted on 1st April, 2016, there were no charges leveled against him or minutes taken. According to him, it appeared to be an information sharing session.
11. He stated that the allegation of the missing cash that was deposited on 25th February, 2016, to a customer's account who actually was a former staff of the Respondent, did not arise. Yet it was the supposed cause for his suspension.
12. According to the Claimant, the Respondent's practice in similar instances of a short fall at the counter, was to recover from the staff's salary.
13. It was his evidence that the drastic action of terminating him without investigations and proof is a complete departure from the Respondent's operating procedures and was discriminatory against him. That the Respondent for an unknown reason did not exercise the option of recovering and or warning him as it has always done in similar circumstances.
14. He is surprised by the Respondent's action as it was an unfair application of its own operational rules.
15. He further stated that during the purported disciplinary hearing, there were no witnesses called. Despite being granted an opportunity to have a union representative at the hearing, he was shocked as the meeting did not have specific issue or facts and dwelt on general issues. In his view, this as a clear indication that there was a pre-determined motive to terminate him by all means available.



16. That it is not a surprise that by a letter dated 6th May, 2016, the Respondent proceeded to unlawfully terminate his services. The said letter was signed by the Head of Client Relationship, Kenya who did not grant him any hearing.
17. The Claimant further added that the Respondent conducted retrenchment and the retrenched staff were paid one month salary for every completed year hence his termination during the exercise was discriminatory as he could have benefited more.

Respondent's case

18. The Respondent called oral evidence through Ms. Lorraine Adoli Oyombe who testified as RW1. She identified herself as the Respondent's Employee Relations Manager. Similarly, she adopted her witness statement and bundle of documents filed on behalf of the Respondent, to constitute her evidence in chief.
19. RW1 told Court that as an employee of the Respondent, the Claimant received the Bank's Code of Conduct as amended from time to time, to guide him in the ethical conduct of his duties.
20. It was RW1's evidence that on 25th February, 2016, a complaint was received from the Respondent's customer, one Peter Kamau, that although he had deposited Kshs 15,000/= with the Bank earlier that day, the amount had not been credited to his account. Peter also forwarded to the Respondent, the counterpart of the stamped deposit slip issued by the Bank's Teller as evidence of the said deposit.
21. On investigating the complaint, it was discovered that it was the Claimant who had stamped the said deposit slip and his written statement over the incidence was sought. He provided the same in form of a handwritten letter dated 27th February, 2016.
22. In the statement, the Claimant stated among other things, that he indeed stamped the said deposit slip and further, that he owed that particular client some monies which he had promised he would pay back the following day which is why he had gone ahead to stamp the deposit slip. Based on his admissions, the Claimant was suspended from duty pending further action by the Respondent.
23. It was RW1's evidence that as the explanation by the Claimant was found wanting, he was invited for a disciplinary hearing on 23rd March, 2016 and informed of his right to be accompanied by a colleague or a union representative.
24. The Claimant's disciplinary hearing was conducted on 23rd March, 2016 and he was given an opportunity to address the issues that had been raised touching on the incident of 25th February, 2016.
25. RW1 further stated that during the disciplinary hearing, the Claimant gave his consent for the meeting to proceed as constituted and also confirmed that he was okay to proceed without a witness.
26. That at the hearing, the Claimant confirmed inter alia that he had over 10 years' experience as a teller and he knew the process of depositing monies by a client yet he had flouted the Bank's procedures in relation to the material incident thus exposing the Bank to risk and that he also had previous infractions touching on his personal finances.
27. RW1 further stated that in the course of his employment, the Claimant received warning letters as follows;
 - a. a first warning on 24th September, 2010 relating to cash shortage incurred in June – August 2010 which were above acceptable thresholds and therefore negligent.



- b. on 11th January 2016 the Claimant received a Formal Verbal Warning for failure to meet his financial obligation to the bank.
28. The disciplinary panel considered the Claimant's representation at the hearing and recommended his termination on account of gross misconduct in relation to his poor financial conduct.
29. The Claimant was thereafter issued with a letter of termination dated 6th May 2016 outlining his terminal dues as one month's salary in lieu of notice, salary up to 9th May 2016 and any pending leave days which were made payable to him and also informing the Claimant of his right to appeal within 7 working days which option the Claimant failed to exercise for reasons best known to him.
30. It was RW1's further testimony that while the Claimant has argued that the incident was a shortfall, the practice of a shortfall refers to an inadvertent error by a teller leading to a short or an excess at their counter which was not the case as the Claimant's action was a deliberate act of failing to credit a customer's account and therefore completely out of the scope of a shortfall.
31. In RW1's view, the Claimant was not treated in any discriminatory manner and that it is the Claimant himself who authored his own misfortune.
32. She also believes that the company did not act in bad faith because the Claimant was terminated on account of gross misconduct in breach of his contract and was not declared redundant.
33. RW1 further averred that the decision to terminate the Claimant from employment was justified in the circumstances as it was grounded on a valid reason related to his conduct vis-à-vis banking procedures touching on handling cash and financial conduct and the Respondent had reason to lose confidence in the Claimant.
34. She maintained that the Respondent followed fair procedure in terminating the Claimant as he was given an opportunity to be heard throughout the disciplinary process and was also given an opportunity to appeal which he did not utilize.

Submissions

35. It was the Claimant's submission that the Respondent failed to adhere to the procedure envisaged under Section 41 of the *Employment Act* and unfairly obtained a written statement from him, admitting stamping a cash deposit slip, which was applied to his detriment. It was further submitted that the alleged statement of admission is not conclusive proof of the matters admitted but only operate as estoppel as per Section 17 read together with Sections 24 and 26 of the *Evidence Act*. The Claimant further argued that the Respondent failed to adhere to Section 4(3) of the *Fair Administrative Action Act* in so far as procuring a written statement from him.
36. The Claimant further submitted that one of the panelists, Eunice Waweru, introduced new issues during the disciplinary hearing regarding a separate incident.
37. It was the Claimant's further submission that the Respondent did not follow its own procedure and past occasions where there was any shortfall, the same could be recovered from the employee's salary. That there was no compelling reason to terminate him as he apologized and appeared remorseful to one incident in 25 years.
38. Urging the Court to award him compensation for unfair termination, the Claimant submitted that he had proved that the Respondent did not follow due procedure and lacked a valid reason to terminate him.



39. With regards to discrimination, the Claimant submitted that the Respondent's action was unfair in that it departed from the norm and terminated him without warning.
40. In support of the Claimant's arguments, the Court was invited to consider the determinations in *Peter Kamau & another v National Bank of Kenya* (2020) eKLR, *Joseph Alusiola Musabayi v Vibiga County Assembly & another* (2016) eKLR and *Peter Mutinda Ngei v Rentokil Initial Limited* (2022) eKLR.
41. On the other hand, the Respondent submitted that the Claimant was working as a teller at the time the incident occurred and he ought to have known better given his long experience in the role. That he was also required to have a high standard of financial integrity which he failed to display by his own admission and in breach of the Respondent's Code of Conduct.
42. The Respondent further submitted that it discharged the burden placed on it by dint of Section 43 of the *Employment Act*. The Respondent maintained that the Claimant was terminated for justifiable reason after due process in line with his contract and rules of natural justice. To this end, the Respondent placed reliance on the case of *Gilbert Michael Maigacho v Coast Development Authority* (2921) eKLR.

Analysis and determination

43. Flowing from the pleadings, the documentary evidence on record, testimonies before Court and the opposing submissions, the following issues stand out for determination:
 - i. Whether the Respondent had a valid and fair reason to terminate the employment of the Claimant.
 - ii. Whether the Claimant's termination was in accordance with fair procedure.
 - iii. Whether there is a case of discrimination.
 - iv. Is the Claimant is entitled to the reliefs sought?

Valid and fair reason?

44. In order to prove fair termination under the *Employment Act* (Act), an employer is required to prove that there was substantive justification to warrant termination of an employee. Substantive justification entails proof of reasons for termination of an employee and is addressed under Sections 43 and 45 (2) (a) and (b) of the *Employment Act*. Section 43 provides as follows:
 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.
45. While Section 45 (2) (a) and (b) provides that a termination of employment 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; ...

46. These provisions essentially set the standard for determining whether an employee's termination was substantively fair. Evidently, the burden of proof rests on the employer.

47. In the case herein, the reasons leading to the Claimant's termination are in respect to his conduct. This can be discerned from the letter of termination which reads in part:

“We refer to the disciplinary policy and the disciplinary hearing held on 01 April 2016.

You are in no doubt aware of the details of the case where a client complained about missing cash that was deposited into his account on 25 February 2016. The client explained that he had made a cash deposit at your counter for Kes 15,000 the previous day and provided a stamped copy of the deposit slip with your teller stamp acknowledging the deposit.

You were given an opportunity to explain your actions, where you explained that you had borrowed some money from the client, who is a former member of staff and your personal friend. You had promised to settle the debt the previous month, which did not happen. You admitted to have full knowledge of the client's demands that you settle the debt on 25 February, 2016 by depositing Kshs 15,000 into his account without provision of physical cash, contrary to the Global Process Standards that you confirmed you are aware of its provisions.

The above actions demonstrate gross misconduct on your part and resulted in reputation risk and potential operational loss to the Bank. The Bank considers this a serious failure on your part and consequently has taken a decision to terminate your employment with immediate effect under the provisions of your employment offer letter.

You will be paid your terminal dues as follows...”

48. In support of its case, the Respondent exhibited a copy of a letter dated 27th February, 2016 from the Claimant in which he addressed the issue as follows:

“It was on Thursday 25/2/2016 at around 1:30 pm when Peter Kariuki Kamau came into the Bank. He came with a cheque which I had given him for ten thousand for some money he had given me. He wrote a cash deposit of Kshs 15000, I told him to wait so that I can pay him later but he didn't want so he told me to stamp for him the copy so that he can go back to the office. I told him that I will not be able to deposit that day. On Friday I talked to him and told him that I will give him the money on Saturday. From there, I didn't know what happened. He scanned the copy to Chebon. I apologize for this will not happen again”

49. The record of the disciplinary hearing bears that the Claimant admitted that the said Peter Kamau wrote the sum of Kshs 15,000/= on the deposit slip instead of Kshs 10,000/= and that he even told the said Peter to adjust the amount. It was his further admission that that was not the amount deposited by Peter. In his defence at the disciplinary hearing, he admitted stamping the cash deposit slip out of pressure from the said Peter.

50. What's more, during cross examination, the Claimant admitted stamping the deposit slip in the sum of Kshs 15,000/= upon being told by Peter to do so. This was despite receiving Kshs 10,000/= as opposed to Kshs 15,000/=. Cross examined further, the Claimant admitted that it was something he should not have done.



51. What manifests from the foregoing is that the Claimant maintained his position on the issue, right from his statement dated 27th February, 2016, during the disciplinary hearing and at the trial. At no point did he deny stamping the deposit slip in the sum of Kshs 15,000/= . Further he did not contest receiving a lesser amount than the sum of Kshs 15,000/= from Peter.
52. It is therefore apparent that the Claimant's act of stamping the deposit slip was not a mere oversight and cannot be termed as inadvertent. He knew very well what he was doing, seeing that he admitted doing so upon being pressured by Peter.
53. From the Claimant's own testimony, he had served as a teller for over 10 years hence he was very much aware of the implication of stamping a deposit slip as it would be a confirmation that he had received the amount appearing on the face of the slip. In this case, he had not received the sum on the deposit slip, but nonetheless proceeded to stamp the same in acknowledgment. This action portrayed the Claimant as an employee who was not quite diligent and prudent in the performance of his duties. Moving forward, how could he be trusted to man the Respondent's counter?
54. Under Section 43(2) of the *Act*, the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. In this respect, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt.
55. From the totality of the evidence presented this case, it can very well be said that by his own actions, the Claimant led the Respondent to genuinely believe that he was imprudent as a Bank teller.
56. In the circumstances, I cannot help but find that the Respondent had a valid and fair reason to terminate the Claimant's employment on account of his conduct.

Whether the Claimant's termination was in accordance with fair procedure

57. The requirement of fair procedure is generally provided for under Section 45(2) (c) of the *Act*. The details of the specific requirements are well encapsulated under Section 41. These requirements are in respect to notification and hearing. Specifically, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations, in the presence of a fellow employee or shop floor union representative of his own choice.
58. This provision was echoed by the Court of Appeal in the case of *National Bank of Kenya v Anthony Njue John* [2019] eKLR, as follows:

“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 levelled against him by the employer.”
59. From the record, the Claimant was issued with a notification for a disciplinary hearing dated 15th March, 2016. The notification referred to the transaction of 25th February, 2016. In addition, the notification invited the Claimant for a disciplinary hearing and further informed him of the date, the time and the venue of the hearing. He was further informed of the identity of the panelists and advised



of his right to be accompanied by witness or a union representative. Upto that point, it is not in doubt that the Claimant was aware of the nature of the allegations that lay ahead of him.

60. The Claimant does not deny appearing before the disciplinary panel on 23rd March, 2016. Indeed, the record of the disciplinary hearing reveals that the Claimant was given an opportunity to articulate his case and give his side of the story.
61. In light of the foregoing, I am persuaded that the procedure applied by the Respondent prior to terminating the Claimant's employment met the minimum requirements of a fair hearing as envisaged under Section 41 of the Act. I say so because the Claimant was made aware of the reasons for which the Respondent was contemplating terminating his employment and further afforded him an opportunity to appear before a disciplinary panel to render his explanation in answer to the allegations.
62. The Claimant has contended that one of the panelists, Eunice, introduced a new issue during the disciplinary hearing. Be that as it may, the said issue did not constitute one of the reasons for which he was terminated.
63. The total sum of my consideration is that the Respondent has proved to the requisite standard that it had a valid and fair reason to terminate the Claimant's employment and in so doing, observed the basic requirements of a fair hearing. Therefore, the Claimant's termination was neither unfair nor unlawful.

Discrimination?

64. The Claimant has also cited the Respondent for discrimination. However, it is notable that the Claimant did not provide better particulars of the alleged discrimination. Even so, what I gather from the Claim generally, is the Claimant's assertion that the Respondent's practice in similar instances of shortfall at the counter was to recover the amount from the employee's salary.
65. What is discrimination? As per the *Black's Law Dictionary*, (10th Edition), the term "discrimination" is defined to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
66. As stated herein, the Claimant did not provide better particulars of the alleged discrimination by the Respondent. In this regard, he did not demonstrate the manner in which the Respondent treated him differently and less favourably than his counterparts, when faced with a similar incident to his.
67. Besides, the Claimant's case was not a case of an ordinary shortfall at the counter. Quite the contrary, it involved stamping and acknowledging a deposit slip in the sum of Kshs 15,000/=, an amount he knew very well he had not received.
68. In the circumstances, the Court returns that the Claimant has not proved his claim with regards to discrimination.

Orders

69. In the final analysis, I find that the Claimant has failed to prove his case on a balance of probability hence the reliefs sought do not lie. Consequently, the Claim is dismissed in its entirety, with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

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STELLA RUTTO

JUDGE



Appearance:

For the Claimant Mr. Ongicho

For the Respondent Ms. Bonyo

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

