



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO.734 OF 2015

(CONSOLIDATED WITH CAUSE NO.585 of 2015)

SYLVIA MUTUTI MAGOTSI.....CLAIMANT

-VERSUS-

UBA BANK KENYA LIMITED.....RESPONDENT

JUDGMENT

1. This judgment is in respect of this suit and Cause No. 585 of 2014 having been consolidated on 1st September, 2016. Cause number 585 of 2015 was filed on 14th April, 2015 by UBA Kenya Bank Limited (Hereinafter referred to throughout as “the Respondent”) against Sylvia Mututi Magotsi (hereinafter referred to throughout as “the Claimant”). The instant suit, on the other hand was brought on 30th April, 2015 by the Claimant against the UBA Bank Kenya Limited.

2. Cause number 585 of 2015 seeks the following reliefs: -

- i. A permanent injunction restraining the claimant by herself or through her agents’ servants or otherwise howsoever from using and exploiting the Bank’s Confidential information.**
- ii. General damages due to breach of contract, negligence and confidentiality.**
- iii. Aggravated and punitive damages due to breach of contract, negligence and confidentiality.**
- iv. Cost of the suit.**
- v. Interest on (ii), (iii), (iv) at court rates from the date of filling this suit until payment in full and,**
- vi. Any other relief that this Honourable Court may award.**

3. On the other hand the claimant’s suit seeks the following reliefs: -

- i. A declaration that the Respondent unfairly terminated the employment services of the claimant.**
- ii. A declaration that the Respondent wrongly dismissed the claimant.**
- iii. A declaration that the Respondent’s manner of termination of the claimant’s services constituted unfair labour practices.**
- iv. A declaration that the Respondent do unfreeze the claimant’s bank account.**
- v. An order directing the Respondent to make the following payments to the claimant; -**
 - a) Thirteen months gross salary in the sum of Kshs.6,220,500/-.**
 - b) General damages for unlawful and unfair loss of employment, discrimination and violation of constitutional rights, loss of pension, loss of life insurance, loss of medical cover and injury to reputation.**

c) Costs.

d) Interest on v (a) and (b) above.

e) Such other or further orders as the Honourable Court deems just and expedient to grant.

Factual background;

4. The claimant was employed by the Respondent vide letter of offer dated 12th May, 2009 to the position of company secretary and head of legal at the grade of Assistant manager effective from 18th May, 2009. Her duties were clearly spelt out in the said letter of offer and included; dealing with correspondences, minutes and other matters of the board of directors, review all contracts relating to the Respondent and 3rd parties, perfecting securities before approval of loan and general legal advice to the Respondent. Her annual remuneration was Kshs.4,200,000/- payable over 13 months. Her employment was confirmed on 25th November, 2009.

5. The claimant's salary was increased to an annual pay of Kshs.5,387,200 also payable over 13 months with effect from 1st August, 2012 and in April, 2013 she was recognized as the employee of the month. On 3rd October 2014 she was given more responsibilities in the Wholesale Banking Division as the head of Energy Banking and her annual salary rose to Kshs.6,220,500 still payable within 13 months equaling to a gross monthly salary of Kshs.478,500/-.

6. On 22nd October, 2014 the claimant received a query letter which required her to give an explanation as to how an entity known as Electricals and Engineering Limited(MITTs) was granted a standby letter of credit (SBLC) facility of USD 1 Million and a further sum of USD 1 Million short term loan without submitting standby letter of Credit from a first class bank as collateral; and also how PES South Africa (pty) Limited(PES) was granted an advance payment guarantee and performance bond (APGs and PBs) totaling to Kshs 67,040,205.88 and Kshs. 33,520,102.65 respectively without submitting standby letter of credit from a first class bank as collateral.

7. In response the Claimant averred that, the credit proposal for the facility to MITT was prepared by Local Credit Department and submitted to head office at UBA Nigeria; that the securities and collateral section of the Credit Approval Communication Memorandum (CACOM) expressly required the borrower to provide a guarantee from Africa Trade Insurance or SBLC from either Credit Suisse Bancorp or any first class bank acceptable to the Respondent, and the customer chose the former which the Respondent later noted that Credit Suisse Bancorp was not a first class bank; that she was not involved in the entire approval process and therefore denied the basis of the allegation that she caused risk to the bank.

8. With regards PES South Africa (pty) Limited the Claimant denied that she approved the SBLC/ Guarantee and contended that when the borrower provides a SBLC/Guarantee from a first class bank, her work was only to review the same and forward to Chief Risk Officer who in turn ensures the security documents are in compliance with the bank Policy and approval conditions then endorse the same.

9. On 15th December, 2014, the Claimant while allegedly nursing a jet lag from an official trip to France, received another query from the Managing Director/CEO requiring her to respond to the following issues by 1pm same day; -

i. That during the course of the last two and a half months, your dealings on the perfection of security for our client Roben Aberdare have been wanting.

ii. That the customer is aware of confidential information that was only shared internally to the effect that despite the loan being approved with his title deed being held on soft deposit, UBA Kenya insisted on perfecting the same and taking a legal charge over the property to secure the guarantee provided. This has led to a breakdown in the relationship with the client who now says we don't trust him by our insistence on charging his title:

iii. That despite clear instructions to go ahead and take a legal charge over his property more than two months later, this is yet to be done:

iv. That despite the constant reminders and pressure to perfect, it was not until the 1st week of December that you discovered that the title deed was still in your possession and had never been passed onto the lawyer to secure the charge. This is despite several confirmations from you that the charge was in progress and we should receive it any time;

v. This delay in perfection has unduly exposed the bank and its worrying with the increased volumes expected whether you are ready to handle the anticipated growth:

vi. Lastly, that despite several requests from the board in the 3rd quarter meeting, that the board packs should be error free, the board packs for this quarter had numerous errors which begs the question whether you bothered to review the same.

10. The claimant responded to the said query on time and in attempt to exonerate herself from any wrongdoing and blamed the lapses on their collective responsibility.

11. On the same day at 1:30 pm a disciplinary hearing was convened to discuss the claimant's role with regard to the query of 22nd October, 2014 which meeting was attended by the CEO, Issac Mwigie, Director Wholesale Banking-Vincent Lubia, Chief Operating officer-Ina Kingara, Treasurer-Kevin Nganga and Human Resource Ann Karanu. The hearing was abrupt and the claimant was not served with the investigations report which was relied upon by the Respondent.

12. While the claimant was waiting for the outcome of the disciplinary committee, the Human Capital Manager fired another query dated 13th January, 2015 requiring the claimant to respond by 5 pm the same day on issue of alleged absenteeism and insubordination. The said query was sent to her when she was on 10 days sick off granted by Doctor Thomas M. Mutie on 12th January, 2015. Nevertheless, the claimant responded to the query on the same day and the Respondent further summoned her to the office for a disciplinary hearing scheduled for 15th January, 2015 being aware that she was away on a sick off. The agenda of the meeting was to discuss an alleged investigation report which was never served on the claimant. The claimant's services were later terminated vide letter of termination dated 16th January, 2015 on the basis of absenteeism, negligence of duty, insubordination and failure to observe company rules.

13. After the separation, the claimant was then paid one-month salary in lieu of notice, pro-rata pays for the year 2015, unutilized leave of 62 days and pro-rata status car allowance all adding up to Kshs. 2,245,237.69.

14. The claimant contends in her suit that she was discriminated against and her dismissal was unfair since the same was arrived at when she was serving her sick off, and that she was the only one who was dismissed when the chain of approval was made up of several persons who continue working for the Respondent.

15. However, the Respondent contends that the claimant did not carry out her duties to the required standard, but rather conducted her duties carelessly and negligently as the head of legal department. According to the Respondent the claimant failed to advise it, that the standby letter of credit (SBLC) received from Suisse Credit Bancorp for facility advanced to MITTS and PES South Africa (pty) were fatally defective as the same had a clause that required the respondent to seek consent of the Guarantor before issuing a demand Notice; and further that Suisse Credit Bancorp was a non-financial institution, that was not rated under bank of first class. It blamed the claimant for failure to carefully peruse and evaluate any legal risk impacting on the bank, which was her duty to do so.

16. It is stated also that the claimant shared confidential information and documents to third parties without the consent of the Respondent or its customers, when the said information was only shared internally. The said documents include a customer's bank statement, internal memos, transaction details between the bank and a customer which acts ruined the reputation of the Respondent in the eyes of its customers.

17. The Respondent also stated that the claimant had on several occasions absented herself from work without informing his superiors or filing a sick off chit contrary to the Respondent policy which requires that any sick employee should furnish it with the sick off chits within 24 hours.

18. The Respondent also stated that the disciplinary hearing was conducted in accordance with the law in strict compliance with the rules thereof and the Respondent accorded the claimant fair chance of hearing which led to her dismissal. The Respondent averred that the claimant admitted the said negligence during the disciplinary hearing.

19. It further averred that the claimant was paid all her terminal dues and thus she is not entitled to any claim against it. Besides the claimant acted so negligently that the Respondent suffered on a loss of USD.1,641,737.217. Consequently, the Respondent urged this Court to dismiss the Claimant's suit and allow its claim as prayed in Cause No. 585 of 2015.

Evidence

20. This matter proceeded for hearing on the 31st October, 2019 where the claimant (CW-1) testified that she worked for the Respondent from May 2009 to January, 2015 when she was fired for alleged negligence that costed the Respondent loss of 2 Million. Thereafter a notice of her dismissal was published in the business daily and since then she never secured another job. To support her case she adopted her written statement dated 28.10.2018 and the bundles of documents filed on 20.6.2017 which basically reiterates the above facts.

21. On cross examination, the claimant testified that her duties were to advise the Respondent on the applicability of securities offered to the Bank in Kenya. She testified that the securities given by MITTS and PES South Africa (pty) were in the form of Standby letter of Credit (SBLC) from Suisse Credit Bancorp, however it was discovered later by the Executive Officer Mr. Ouseyi, based in Nigeria, that the said institution was non-existent. The effect of the said irregularity meant the guarantee was unenforceable and therefore loss to the Bank.

22. She testified that the credit proposal were prepared and approved by Local Credit department and submitted to head of UBA in Nigeria for approval. According to her, once the said credit proposal is approved at the head office, the Respondent's Group Credit Department reviews the proposal and reduces the terms and conditions for the facility into Communication Memorandum (CACOM). That before the CACOM is drawn the Respondent's Group Legal Counsel and Trade Department were required to interpret the terms of the SBLC to confirm that the bank had a reliable collateral. That the interpretation of the said terms was done by the head of legal in Nigeria and as such her role was to merely forward the securities to the head office.

23. As regards the disciplinary hearing, she contended that the minutes of the disciplinary meeting was not a reflection of what transpired in the said hearing.

24. On further cross examination, she testified that she provided proof of her sick off by forwarding to Anne Karanu a soft copy of her sick off sheets as requested, and she was to submit the original copy to her when she returned to work. She received another sick off on 8th January, 2015 from Doctor Omina of Nairobi Hospital who directed her to rest for 3 days and on return to hospital on 12th January, 2015 she was given a 10 days sick off by Doctor Muite.

25. As regards her employment benefits, she confirmed that she was paid her terminal dues after the separation.

26. On re-examination, she testified that the Notice of disciplinary hearing was very short as she was served at 9am in the morning and the hearing proceeded at 1 pm the same day which did not give her adequate time to prepare. She also contended that the Respondent did not

inform her of the need to be accompanied by a representative. The Claimant testified that she was not served with the Investigations Report that was relied upon by the Respondent. As regards the subsequent email requiring her to appear before a disciplinary committee on 15th January, 2015 the claimant stated that the notice was too short and that she was still on sick off. She maintained that the sick off sheets were submitted to the employer through email.

27. Finally, she maintained that she was not to blame for the loss of the Respondent money as she was not the approving officer nor did she sign anywhere on the said document. Further that the approvals were made by Michael Medoghwe, the Head of securities and Legal Services in Lagos Nigeria and not herself.

28. The Respondent called Mathias Ninga, the current Country Head Public Sector and Institutional Banking based in Tanzania who testified as RW1. He stated that he previously served as the Regional Head Human Resource for East and Southern Africa. He adopted his witness statement of 27th February, 2020 together with documents filed by the res as his exhibit D.1 and 2.

29. On Cross examination by Kilonzo Advocate, RW-1 testified that he joined the Respondent in Tanzania in November, 2013, UBA Kenya in the year 2018 and UBA Nigeria in the year, 2016. He was not present at the claimant's disciplinary hearing and he never saw the investigation report that informed the termination of the claimant's employment. He stated that the policy of the bank is that disciplinary hearing are done on Fridays at 4 pm but that the claimant's case was done on a Monday. He contended that the procedure was flexible in consideration of the urgency of the case.

30. On further cross-examination he testified that the claimant was dismissed from employment for gross negligence based on the hearing conducted on the 15th December, 2014 not the investigations report. He contended the offending transactions were forwarded by the Claimant to Michael Head of Legal in Nigeria for approval, who then forwarded to General Counsel for approval. Rw1 admitted that he did not know how many people were involved in the transaction and whether any other person was subjected to disciplinary action.

31. On further cross examination, RW1 testified that the committee recommend that the claimant be dismissed from employment as she was found guilty of insubordination among others offences, but the same was not reflected in the minutes. He then testified that Clause D-2 of the Respondent policy gives circumstances, including breach of confidentiality, when an employee can be encouraged to resign.

32. He testified that the meeting of 15th January, 2015 which lead to the claimant dismissal was conducted in absence of the claimant and affirmed that there are emails that showed that the Claimant's supervisor was aware that the claimant was sick. He then testified that the transactions were originated in Kenya and funds were released in Kenya and thus placing more responsibility on the claimant being the head of legal in Kenya. However, he admitted that the responsibility of providing technical advice was on the Group Legal and Trade department and not the claimant.

33. On re-examination RW-1 testified that the Group legal counsel relied on the various head of legal in the different countries to approve the said documents. It is stated that the termination letter did not refer to the investigation report. On the sick off sheet the he testified that the claimant failed to submit the sick off sheet from December, 2014 to 13th January, 2015 informing the insistence by the Respondent on the same to ascertain whether the claimant's allegation of being unwell is justified.

Submissions.

34. The Claimant submitted that the terms and conditions of her employment were govern by the Respondent's HR Disciplinary process and sanction policy, credit sanction and disciplinary process policy, the staff Handbook Kenya and the Credit empowerment/Approval framework. It was argued that the sanction for negligence in vetting and verifying legal documents which she was charged with attracts a sanction of caution to final warning as provided for under clause 3.4.0, and 5.3 of the Credit Sanction and Disciplinary process policy. Further that Clauses 2.0(ii) and 3.0(i)(a) of the Credit empowerment and Approval framework credit approvals of CACOM was conferred on the Board's Credit Committee, executive credit committee, managing director and credit officer therefore the claimant always acted in a team and a chain in the approvals.

35. The claimant submitted also that the Respondent did not give her adequate time to prepare her response to the query of 15th December, 2014 as she was only given 3 hours to respond to some issue. She further submitted that the hearing was conducted on the same day without being accorded an opportunity to seek company of a representative. It was argued also that the agenda of the meeting was different from the query send and therefore defeating the tenets of fair hearing.

36. With regard to the second hearing allegedly conducted on the 15th January, 2015, the claimant submitted that she was summoned for the meeting while she was on sick off and she could not attend. Therefore, the hearing was conducted in her absence by the ordinary Disciplinary committee members contrary to Clause 18 of the Human Resource Disciplinary Process and sanction policy which requires that disciplinary hearing for members of the disciplinary committee (like herself) were to be conducted by the Board of directors, and all disciplinary hearings were to be conducted on Fridays. Further, under clause 23.2 disciplinary report had to be implemented within 6 days of the disciplinary hearing. In the case in which an employee was found negligent he was to be cautioned and or ordered to refund the lost money not a resignation and or termination in accordance with clause 5:3 of the Respondent Credit sanction and Disciplinary process policy.

37. The claimant further submitted that the she was singled out and punished when everyone else in the chain, both in legal department and other departments were untouched. It was argued further that an investigation was carried out in which the persons liable for the loss occasioned by the guarantee for MITTs and PES were to be brought to book. However, the Respondent failed to produce the said report as exhibit, and as such the failure to produce the document ought to be construed against him under section 112 of the Evidence Act. The Claimant then supported his argument by citing the case of **Chase Bank Kenya Limited -v- Cannon Assurance (K) Limited [2019] eKLR**.

38. The claimant argued that she was discriminated against contrary to the provisions of section 5(3) of the Employment Act when the Respondent singled her out and subjected her to disciplinary hearing and later dismissed her when the negligence she was found culpable of resulted from collective work done by a chain of persons in the Respondent's employment of which no one else was questioned. Consequently, she argued that the discrimination herein rendered the termination unfair and cited the case of **David Wanjau Muhoro –v- Ol Pajeta Ranching Limited [2014] eKLR**.

39. Finally, it was submitted that the termination was unfair in the circumstances and the claimant urged this Court to allow the claim as prayed.

40. On the other hand the Respondent submitted that the claimant's employment was terminated for the reason that she failed to advise the Respondent on the enforceability and suitability of the security instruments received by the Bank with respect to facility issue to MITTs and PES, and for her absenteeism. It was argued that the failure of the claimant on those areas informed the basis for her dismissal and therefore that the reason for termination was valid.

41. The Respondent cited the case of **Trans-National Bank of Kenya Ltd V Charles Kimita Willy and another [2006] eKLR** where the cited with approval the decision in **Bolam –vs- Friern Hospital Management Committee [1957]1WLR 582** at page 586 where McNair J. held that;

“Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act.”

42. In the case of **Said Ndege V Steel Makers Limited [2018] eKLR** Justice Rika Held that;-

“The Claimant was correctly summarily dismissed, for an employment offence, which he owned up to having committed. Once an Employee has conceded to wrongdoing, latter-day complaints about lack of valid reason and fairness of procedure, in the process of termination, can only be of academic value”

43. Accordingly, it was submitted that the claimant admitted during the disciplinary hearing conducted on 15th December, 2014 and during cross-examination herein that she forwarded the guarantee documents without reviewing them and therefore cannot be allowed to go against her word at this stage.

44. On whether the claimant was accorded fair hearing, it was submitted for the respondent that the claimant was given adequate time to defend herself in accordance with the law. Consequently, the Respondent prayed for the claim to be dismissed with costs.

Analysis and determination

45. I have carefully considered the pleadings, evidence and the rival submissions presented by both sides and the issues that commend for determination are the following; -

- a) Whether the dismissal of the claimant was grounded on valid and fair reason.**
- b) Whether a fair procedure was followed.**
- c) Whether the claimant breached the Respondent's contract and confidentiality.**
- d) Whether the claimant is entitled to the reliefs sought.**

Reasons for the termination

46. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

“(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.”

47. Courts in this country have firmly enforced the above law in various pronouncements including the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

48. The same principle was restated in the case of **Osman Abdullahi Sheikh v Garissa County Public Service Board [2021] eKLR** where Onyango J stated that dismissal or termination must meet the requirements of substantive and procedural fairness.

49. In the present case the termination letter dated 15th January 2015 set out the reasons for the termination as follows:

“1. Negligence in performance of duties by failing to apply sound professional judgment in the discharge of your assigned responsibilities;

2. Failure to observe Company rules, regulations and procedures;

3. Insubordination;

4. Absenteeism.”

50. Under section 43 and 45 of the Employment Act, the burden of proving that the above reasons were valid and fair rests with the employer. The respondent has produced minutes of the claimant’s disciplinary proceedings and her responses to the Query letters served, to demonstrate that the reasons for the dismissal were valid. However the claimant has denied the validity of the said reasons and maintained that she was punished for a wrong done collectively by many officers of the respondent.

51. I have carefully considered the evidence and the submissions by the parties. With regard to MITTs and PES issues, it is evident that the claimant admitted during the disciplinary hearing that, she forwarded the said documents to the head of legal without reviewing them for the reason that she had a lot of work at the time. She also admitted that she relied on her able assistant and even the work of an intern before transmitting the same to the Group Counsel for approval of the securities. The typed proceedings states that:

“Findings

1. ...

2. ... she mentioned that at the time she relied on her “capable assistant” to assist as she handled the Business Development side. She further stated that since the Guarantee was going to be reviewed by the Group Counsel and other senior counsels in the Group, she did not have to review it thoroughly as the buck stopped with them and not with her since they were the approving authority.

3. DC asked her to confirm if she reviewed the Consent Clause in the Guarantee with a view to protecting the bank but she responded saying that according to her, the Consent Clause was a Trade term and not a legal term. She reiterated that the “honest truth” was that she forwarded the draft to the Group Counsel without reviewing the same much due to her role in Marketing and that she was just following procedure which provided for the guarantee to be forwarded to her superiors.

4. She stated that this was a learning on her part and now she was keen on reviewing all the documents after the issues the bank had experienced with the two NPLs above.

5. ...”

52. The foregoing excerpt is from the minutes of the Disciplinary Proceedings which was produced as exhibit herein without any objection from the claimant. The same demonstrates an admission of negligence or improper performance of work that was her duty under the contract of employment to have performed carefully. I am convinced that the claimant failed to perform her duties of reviewing the documents especially on the clauses that made the securities non-performing and thereby caused her employer to suffer detriment.

53. The claimant contended that the said securities passed through a chain before being accepted by the Respondent and payment made. It was her submission that credit approvals of CACOM was conferred on Board Credit Committee, executive credit committee, managing director and credit officer. Therefore the claimant contended that she always acted in a team and a chain in the approvals and that none of the other employees in the said chain were sacked. This fact was affirmed by the Respondent’s witness and the claimant maintained that she was discriminated by being isolated for termination.

54. Discrimination against any employee is specifically provided for under Article 27 of the Constitution as well as Section 5 read together with Section 47 of the Employment Act. Article 27 of the Constitution at clause 4 and 5 provides that:

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) .”

55. Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) more particularly on account of health status or disability. Section 5 of the Employment Act (CAP 226) provides that:

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —

(a)on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.”

56. The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub-section (7) thus provides:

“In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

57. Section 47 (5) of the Employment Act further requires that:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

58. In view of my earlier finding that the claimant admitted negligence of duty and or failure to perform her work under the contract of service which she was supposed to have performed carefully, I am satisfied that the employer has proved on a balance of probability that the termination was justified by a valid reason. Considering the position of the claimant in the local bank and her job description, the bank stopped with her to ensure that the bank was fully secured from loss by the securities offered. Consequently, the issue of discrimination does not arise and especially considering the said admission of negligence on her part.

59. In view of the express admission of negligence, the Supreme Court decision in the case of **Law Society of Kenya v the Attorney General and Centrat Organisation of Trade Unions Petition No.4 of 2019** does not support her case. The Court held that;

“discrimination is, a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society.

60. As regards the case of insubordination and absenteeism, the respondent did not prove same as valid reasons for termination of the claimant’s employment. The evidence on record show that the employer was made aware of the claimant’s sickness and the sick off during the time she was charged with absenteeism and invited to disciplinary hearing which she was unable to attend.

61. The employer acknowledged in the termination letter of being made aware of the illness by the claimant in writing thus:

“That during the entire period you were absent, you only came in for a few hours before leaving the office on grounds of illness and would only forward sick sheets after several reminders despite knowing full well that the bank’s policy requires you to submit a sick sheet after 24 hours absence on account of illness. Again despite alleging to be gravely ill in your various correspondences to the bank, we noted that you were able to come to the office on several Saturdays, which is not an official working day for the Head office staff...”

Procedure followed

62. There is no dispute that the claimant was served with the first query (which is an equivalent of a Show Cause letter) on 22nd October, 2014 at 11.41 Hours, raising the issue of SLBC for MITTs and PES to respond by noon. The second Query was issued on the 15th December, 2014 raising the issue of perfection of security for Roben Abadare, failure to charge a title deed, and errors in Board packs, which required her to give a response within 3 Hours. Thereafter she was summoned to attend a hearing on the same day at 1 pm. The final query was dated 13th January 2015 and it reiterated the issues contained in the previous queries and added a new one of absenteeism from 16th December 2014 without presenting sick sheets to the office as required by the company policy.

63. She argued firstly that the composition of the persons tasked to carry out her disciplinary hearing were not Board members as envisaged under the Respondent’s disciplinary regulation. Secondly that he was not given sufficient time to respond to the queries neither was she

informed on the need to have a representative in the said meeting as such the disciplinary meeting was a sham. The Respondent on the other hand maintains that the disciplinary hearing was conducted as per the law and the Claimant was accorded fair hearing.

64. According to Clause 22 of the Respondent's Human Resource Disciplinary Process and Sanction Policy, the Claimant being the Head of Legal is a member of the Disciplinary committee. Clause 8 expressly provides that Disciplinary hearing of a manager and Disciplinary Committee member ought to be done by the next Higher Disciplinary Committee which is established under clause 20, namely the Corporate Disciplinary Committee.

65. The Corporate Disciplinary Committee is chaired by the MD/CEO or nominee and 5 other who must include Head of Legal, Head of Audit & Control and Head of HCM as the secretary. The committee sits only on Fridays at 4 pm. Having carefully considered the minutes of the Disciplinary hearing, I am satisfied that the committee involved was the Corporate Disciplinary committee which is the next higher committee after the Bank Disciplinary Committee established under Clause 19 of the HR policy. It was chaired by the CEO and the members contemplated by Clause 20 sat as the Disciplinary Committee.

66. However before the said hearing, the claimant was given about 20 minutes to answer to the query of 22nd October, 2014 and about 3 hours to answer to the query of 15th December, 2014. Somehow the claimant was able to respond to those queries within the required time but I must agree with her that the time given was too short and not in accordance with a fair procedure. Matters were made worse by summoning her to attend the oral hearing on the same day, 15th December 2014, shortly after submitting her written response. It was also unfair and against fair labour practices to send to her fresh charges and summon her for another disciplinary hearing on 13.1. 2015 when she was on a sick off.

67. It is now trite law that before terminating the services of an employee, the employer must afford the employee a fair opportunity to defend herself of the allegations of misconduct leveled against her. A fair opportunity, in my view should include giving the employee ample time to respond to the show cause/query letter and also to prepare for her oral defence, and seek the company of another employee to the hearing. That was not the case here as the claimant was summoned within a short time leaving no room for the claimant to adequately prepare her responses. Consequently, I find and hold that the respondent did not follow a fair procedure before dismissing the claimant.

Did the Claimant breach contract and Confidentiality?

68. The Respondent alleged in its claim that the claimant breached her contract and shared confidential information with third parties. The legal as well as evidential burden of proof of the said allegations lies with respondent. However, no evidence was produced before this Court by the Respondent towards prosecuting its suit number ELRC 585 of 2015 consolidated herewith. It seems that the Respondent abandoned the said suit and only defended the claimant's suit. Consequently, I find and hold that the alleged breach of contract and confidentiality has not been proved and it stands is dismissed with costs.

Is the claimant entitled to the reliefs sought?

69. In view of the finding herein above that the procedure followed to dismiss the claimant was unfair, I make a declaration that the Respondent's action of terminating the claimants' employment contract vide the letter dated 16th January, 2015 was unfair and unlawful. I further make a declaration that the said termination constituted unfair labour practices.

70. As a consequence of the said unfair termination, the claimant is entitled to compensatory damages under section 49 of the Employment Act. Considering that she served for 6 years but contributed to her dismissal through misconduct I award her 6 months' gross salary for the said unfair termination being Kshs. 478,500 X 6 = 2,871,000.

71. On the other hand, the prayer to compel the Respondent to unfreeze the Claimant Bank Account has been overtaken by events, because it was granted by this Court in the preliminary stage.

72. The claim for general damages for violation of Constitutional rights, loss of pension, life insurance and medical cover is declined because the said violation has been compensated above under section 49 of the Employment Act. In any event, any loss of pension, life insurance and medical cover has not been proved. I also decline to award the claimant 13 months' salary as the same is not provided in law.

73. In conclusion sum I enter judgment for the claimant against the respondent as follows:

- a. ***It is declared that the Claimant's dismissal was unfair and unlawful.***
- b. ***The Respondent shall pay to the Claimant Kshs. 2,871,000 as compensation for unfair and unlawful termination.***
- c. ***Costs and interest to the Claimant at Court rate computed from the date of delivery of this Judgment.***

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JANUARY 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE