



**Chimwani v Diamond Trust Bank Limited (Cause 2153 of 2017)
[2022] KEELRC 1223 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1223 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2153 OF 2017
SC RUTTO, J
APRIL 28, 2022**

BETWEEN

LYNDA VIHENDA CHIMWANI CLAIMANT

AND

DIAMOND TRUST BANK LIMITED RESPONDENT

JUDGMENT

1. The undisputed facts of the claim are that the claimant was employed by the respondent for a fixed term contract of two years with effect from 3rd January, 2012 to 31st December, 2013 in the position of officer-front office/receptionist. Her initial gross salary was Kshs 42,000/=. Vide a letter dated 2nd May, 2013, the claimant was awarded a bonus and salary review, thus increasing her gross salary to Kshs 49,000/= with a one-off performance bonus of Kshs 52,000/=. She was later confirmed to serve on a permanent basis with effect from 1st January, 2014. The claimant was further awarded a salary increment thereby bringing her gross salary to Kshs 55,000/=. The same was backdated to 1st January, 2014.
2. The claimant's growth momentum was interrupted, as she was issued with a suspension letter dated 14th August, 2014 on grounds of attempted fraud. She was subsequently terminated from employment on 30th October, 2014, thus marking the end of the employment relationship with the respondent. The claimant did not take the termination of employment lying down hence through the Banking Insurance Finance Union (BIFU), she referred the matter for conciliation before a Labour Officer but apparently, the matter did not end there hence the instant dispute.
3. The claimant has termed her termination as unfair and unlawful hence seeks the following reliefs through the instant claim which is dated 27th October, 2017: -
 - a. That the termination from employment was substantively and procedurally wrongful/unfair;



- b. Payment of twelve (12) months gross salary compensation for suffering wrongful/unfair termination equivalent to Kshs 935,640/=;
 - c. Underpayments as herein;
 - i. Basic salary and house allowance underpayments equivalent to Kshs 740,948/-;
 - ii. Compensation for 32 working annual leave days unpaid equivalent to Kshs 87,717/=;
 - iii. Compensation for annual leave allowance unpaid being 3 years x Kshs 7,111/= equal to Kshs 21,333/=;
 - iv. Compensation for overtime being 1332 hours equal to Kshs 868,277/=;
 - v. One (1) months' notice pay equivalent to Kshs 77,970/=;
 - vi. The total sum under (c) is Kshs 1,796,245/=;
 - d. Exemplary damages amounting to Kshs. 5,000,000/=; and
 - e. Interest and costs of the suit.
4. The claimant further cited underpayment of salary in that her remuneration was not in line with the existing Collective Bargaining Agreement (CBA) executed between BIFU and the Kenya Bankers Association.
 5. In opposition to the Claim, the respondent vide its Memorandum of Reply dated 23rd April, 2019, averred that the claimant's termination was based on investigations undertaken by its Security and Investigations Department which linked her to fraudulent transactions which had resulted in it losing a sum of Kshs 10 million. The respondent maintained that the claimant is not a member of any union hence her employment was not subject to any CBA. It further asserted that the claimant's termination was in accordance with her terms of service and the Employment Act. Consequently, it asked the Court to dismiss the claim with costs.
 6. The matter proceeded for trial on 14th October, 2021 and 22nd January, 2022, with each side calling oral evidence.

Claimant's Case

7. The claimant told court that she was considered lower management grade and that she was executing her duties as a front officer. She further averred that she was a member of BIFU by virtue of the fact that she was a clerical officer in the respondent bank. She contended that her employment terms were subject to the existing CBA between BIFU and the Kenya Bankers Association, which the respondent is a member of. That however, her salary was lower than what was stipulated under the CBA.
8. She further stated that she performed her duties diligently and to the respondent's satisfaction hence her salary was reviewed upwards.
9. It was the claimant's testimony that while she was on sick leave on 9th April, 2014, she received a call from her colleague, Mr. Joakim who informed her of an attempted fraud at the bank. That she was not given details of the fraud and neither was she notified of her role in the alleged fraud. It was her testimony that she later proceeded on maternity leave and two weeks later, she received a call from the respondent's human resources manager who asked her to report to the head office. That while there, she was directed to the Boardroom where she met the respondent's security team. That the security team interrogated her and asked her about the fraudulent transaction at the bank. That she



was informed that the fraud was undertaken from the desk where she normally sits hence she ought to have known of the fraud. That she was later allowed to go and upon completion of her maternity leave, she was instructed to be reporting to the head office as opposed to her work station. That she was later issued with a letter suspending her from duty for two weeks, so as to allow for forensic investigations.

10. That after completing her suspension period, she reported back to the respondent's head of human resource who informed her that there was no substantial evidence against her but the bank had lost trust in her. That she demanded for a fair hearing and was advised to wait. That her wait lasted two months and no feedback was forthcoming from the respondent. That all the while, she was reporting to the head office. That subsequently, she wrote a letter seeking feedback from the head of human resource who advised her that a disciplinary committee had been set up to consider her case. She attended the disciplinary hearing on 13th October, 2014 and answered all the questions put to her. That she later received a termination letter dated 30th October, 2014. That the said letter did not contain the reasons for her termination.
11. That she later reported the matter to BIFU, which in turn reported the trade dispute and a conciliator appointed. That the conciliator recommended that she be paid eight (8) months salary as compensation for loss of employment. That the conciliator further recommended that she be paid the underpayments in basic salary, house allowance, annual leave days, overtime and leave travelling allowance in accordance with the CBA in force at the time. That the respondent did not honour the recommendation. To this end, she asked the Court to allow her claim as prayed.
12. During cross examination, the claimant admitted that she did not have a membership number with BIFU and that she did not notify her employer when she joined the said union. She however maintained that her employer ought to have known as much since she had applied for membership with BIFU and forwarded the form.

Respondent's Case

13. The respondent called oral evidence through two witnesses Mr. Naphtali Mwangi and Ms. Yvonne Muchuru who testified as RW1 and RW2 respectively.
14. At the commencement of the hearing, RW1 who identified himself as the respondent's Head of Security, Fraud and Forensic Investigation Department, adopted his witness statement dated 23rd April, 2019, to constitute part of his evidence in chief. He further produced the investigation report, which had been filed by the respondent to constitute part of his evidence.
15. RW1 testified that the respondent received a complaint from one of its customers in relation to a disputed transaction in the sum of Kshs 10 million. That one of the respondent's customers had complained that money had been withdrawn from his account without his approval. That the withdrawals had been undertaken through cheques which the customer disputed.
16. That subsequently, the respondent through its Security, Fraud and Forensic Department conducted investigations on the allegations and a report was prepared. That the investigations revealed that some of the respondent's staff members were involved in the fraudulent transactions. That among the staff members, was the claimant who had allegedly introduced her colleague Mr. Joakim to a fraudster by the name Parks, who could delete the audit logs in the respondent's IT department. That Mr. Joakim further revealed that the claimant had mentioned that they were working with another officer at the respondent bank by the name Benjamin Ndegwa. That the bank lost money as a result of the fraud.
17. RW1 further testified that in the course of the investigations, it was established that the claimant had been involved in another fraudulent transaction that was also under investigations by the Capital



- Market Authority Investigations Unit and was in fact facing charges for having conspired with an intent to defraud another customer of approximately Kshs. 4 Million.
18. He further stated that his work ended at the investigation stage after he had prepared and submitted a forensic report which contained detailed findings and recommendations.
 19. On cross examination, RW1 testified that in the course of his investigations, he did meet and interrogated the respondent's members of staff mentioned in the fraudulent dealings, including the claimant. He further stated that he informed the claimant of the reasons for the investigation.
 20. RW2, Yvonne Murichu, introduced herself as a Senior Manager at the respondent bank. She also adopted her witness statement dated 23rd April, 2019 to constitute part of her evidence in chief. She also produced the documents filed on behalf of the respondent, excluding the investigation report, as exhibits before court.
 21. She stated that at the time of her separation with the respondent bank, the claimant was not unionized and cannot therefore benefit from the terms of the CBA executed between the Kenya Bankers Association and the BIFU.
 22. It was her testimony that the respondent initiated the disciplinary proceedings against the claimant upon receiving an investigation report which implicated her. That the claimant attended a disciplinary hearing and upon hearing her, the discipline panel determined that her employment should be terminated. That following her termination, the claimant was paid all her dues at the time. She further maintained that the claimant remains indebted to the respondent bank as she had a staff loan that remained unpaid as at the date of hearing and the same was in arrears.
 23. On cross examination RW2 stated that although she was not present at the disciplinary hearing, she was cognizant of the facts based on the records in respect of the case.

Submissions

24. The claimant submitted that she is entitled to benefit from the provisions of the CBA executed between the Kenya Bankers Association and BIFU by virtue of the fact that she was a unionisable employee. She has placed reliance on the provisions of Article 27 of *the Constitution* of Kenya as read with Sections 10 (3) and 26 of the Employment Act, 2007. To fortify this argument the claimant further cited the provisions of Section 59 of the *Labour Relations Act* (LRA) and the case of *East Africa Portland Cement Co Limited v Kenya Chemical & Allied Workers Union* (2017) eKLR.
25. The claimant further maintained her innocence in respect of the charges of attempted fraud that were leveled against her and further submitted that the respondent's findings were largely based on hearsay evidence and thus her termination was unlawful and unjustified within the meaning of Section 45 of the Employment Act, 2007. To buttress this argument the claimant cited and relied on the findings in the case of *Fredrick Odongo Owegi v CFC Life Assurance Limited* (2014) eKLR, *John Ratemo Ondiek v Islamic Relief Food Worldwide* (2014) eKLR and *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR.
26. She further urged the Court to be guided by the report prepared by the Labour Office, in which the conciliator had made recommendations in her favour.
27. The respondent on the other hand, submitted that the claimant had not adduced any evidence to prove membership to BIFU either as having been registered as a member or having made payment for union dues at the time she was in its employment. The respondent supported this position with the case of *East Africa Portland Cement Co Limited v Kenya Chemical & Allied Workers Union* (2017) eKLR.



28. The respondent further submitted that there was substantive justification to terminate the claimant's employment as she had engaged in a fraudulent scheme that had led to the loss of Kshs 10 million. That as such, it acted lawfully and within its rights in terminating the claimant's employment.
29. It was the respondent's further submission that it had complied with the provisions of section 41 of the Employment Act in terminating the claimant's employment. It further urged that it had met the threshold of substantive justification and procedural fairness. The cases of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Pius Machafu Isindu v Lavington Security* (2014) eKLR were also cited in support of the respondent's submissions.

Analysis and Determination

30. Having carefully considered the facts herein, the evidence on record, submissions and authorities cited by the parties, the following issues fall for the Court's determination: -
 - i. Whether the claimant could derive benefit from the Collective Bargaining Agreement negotiated by the BIFU on behalf of its members?
 - ii. Whether the termination of the Claimant's employment was substantively and procedurally fair?
 - iii. Whether the claimant is entitled to the reliefs sought?
Whether the claimant could derive benefit from the Collective Bargaining Agreement negotiated by the BIFU on behalf of its members?
31. The claimant has alleged that since the respondent was a member of the Kenya Bankers Association, hence had entered into a CBA with BIFU which was representing all unionisable employees, she was entitled to benefit from the said CBA. She further argued that she ought to benefit from the CBA since she was a clerical staff hence by extension, was a unionisable employee. It is on the foregoing basis that the claimant has prayed for underpayments totalling Kshs1,736,245.00
32. The respondent disagrees and states that the claimant was not a member of BIFU hence could not draw benefit from any CBA negotiated between itself and the Union.
33. The claimant admitted during her testimony before court that she had completed the requisite forms to enable her join BIFU. However, she could not confirm her membership to the union as there had been no deductions from her salary. Further she could not provide her membership number to BIFU.
34. Membership to a union can be evidenced through various means, for instance, the register of members, proof of deductions etc. In this case, no evidence of membership was availed before Court. Indeed, she did not produce a pay slip for to indicate that she was remitting deductions to the union. Simply put, there is no proof of membership of the claimant to BIFU.
35. The question is whether in absence of membership to BIFU, can she benefit from the terms of the CBA?
36. On this score, I will draw guidance from the case of *East Africa Portland Cement Co Ltd v Kenya Chemical & Allied Workers Union* [2017] eKLR, the Court of Appeal held as follows: -

“Payment of union dues is a condition for membership in a Union. As the CBA applies to members, it goes without saying that non-members of a Union cannot be beneficiaries of negotiations for wages and conditions of service negotiated for members of a Union. Section 48 of the *Labour Relations Act* deals with the issue of payment of union dues and



membership in a trade union and it is implicit that terms negotiated by a Union on behalf its member's benefit all members on whose behalf the Union has negotiated. Can non-members on whose behalf the Union may negotiate legitimately claim benefit from such terms?"

37. As such, the provisions of a CBA are only enforceable by and against members of the union that is a signatory to the said CBA. Therefore, it is only logical that the claimant could only benefit from the terms stipulated under the CBA subject to proof of her membership to the union.
38. It will be very erroneous to infer that the claimant was an automatic member of the union on account of serving the respondent in the cadre of a clerical staff. Membership to a union is by choice and not by force or implied. The fact that she was unionisable did not guarantee her automatic benefit to the terms of the CBA executed by the union on behalf of its members.
39. It is on the foregoing premise that Article 41(1) (c) of *the Constitution* grants every worker the right to form, join, participate in the activities and programmes of a trade union. It therefore follows that the right to join a trade union also entails the right and freedom to leave a trade union.
40. Indeed, and on the flipside, were the claimant compelled to be a member of the union on the basis of her cadre without her consent, she could cite and rightly so, violation of her right under Article 41 of *the Constitution* which grants her choice to either join or leave a trade union. This is also reiterated under section 4 of the *Labour Relations Act* which stipulates that "every employee has the right to participate in forming a trade union or federation of trade unions; join a trade union; or leave a trade union".
41. Having worked for the respondent since 2012, it was upto her to formalise and regularise her membership to the union. Clearly, she did not do so. I reiterate that the mere fact that she was unionisable did not guarantee her automatic benefit to the CBA.
42. As I have found that the claimant has not proved membership to the union, it is the Court's finding that she cannot benefit from the terms of the CBA between the Kenya Bankers Association and BIFU. Whether the termination of the Claimant's employment was substantively and procedurally fair?
43. Under Section 45(2) of the *Employment Act*, termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee, fair procedure was not followed.
44. By dint of section 43 of the Employment Act, the employer has the burden of proving the reasons for termination. Further, section 47(5) of the Employment Act places the burden of justifying the grounds for the termination of employment or wrongful dismissal on the employer.
45. Overall, for termination to be fair, an employer must satisfy two elements, the first being substantive justification and second being, procedural fairness.
 - i. Substantive justification
46. Substantive justification entails proof of reason for termination of an employee's contract of employment. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. Section 43 specifically places the burden to prove that the termination was fair on the employer.



47. The respondent has justified the claimant's termination by stating that she was involved in an alleged fraud that was characterised by fraudulent cheque withdrawals that lead to loss of approximately Kshs. 10 million.
 48. It is notable that the reason was not indicated in the claimant's letter of termination. The same was only mentioned in the letter suspending her from duty. It referred to a fraudulent transaction which it maintained the claimant played a role in.
 49. The claimant denied any wrongdoing and maintained her innocence of all the allegations levelled against her by the respondent.
 50. The respondent placed reliance on the investigation report which was produced in evidence by RWI. The report implicates the claimant to the extent that she advised her colleague Mr. Joakim to contact an external fraudster who was to assist him delete the audit log trail from the bank system.
 51. The respondent further stated that investigations revealed that there was communication between the claimant, Mr. Joakim, who had confessed his involvement to the fraud and one Mr. Emmanuel Arusei, who was part of a previous fraud at the bank and who had introduced Joakim to another fraudster by the name Toro.
 52. It is notable that the alleged involvement of the claimant in the fraud was remote as the respondent did not establish a direct link between her and the alleged fraud.
 53. From the investigation report, it is Mr. Joakim who linked the claimant to the fraud but no witness statement from him was produced to that effect. The only evidence against the claimant is contained in the investigation report which is in reported form hence constitutes hearsay. Needless to say, the evidence against the claimant was not concrete.
 54. In this case, it was imperative to provide more evidence directly linking the claimant to the fraud. Further, there was no call log to establish communication between the claimant and the other alleged fraudsters.
 55. It was incumbent for the respondent to establish the fraudulent action on the part of the claimant. This was necessary in order to establish the validity and fairness of the allegations against the respondent.
 56. In absence of such evidence, there was no substantive justification to justify the claimant's termination hence the respondent did not discharge the legal burden as required by law.
 57. Indeed, and as stated above, the reasons for the claimant's termination were not provided for in the claimant's letter of termination. Further, the same did not refer to the claimant's suspension nor the disciplinary proceedings of 13th October, 2014.
 58. It was therefore not clear whether the claimant's termination flowed from the suspension and the disciplinary proceedings. It is not safe to assume that the reasons for the claimant's termination was the alleged fraud when the same was not indicated in the letter of termination. As a matter of fact, she was not informed of the outcome of the disciplinary hearing hence at the end of the day, she could only guess the actual reason for her termination.
 59. In light of the foregoing, I cannot help but arrive at the conclusion that the termination of the claimant's employment was unfair, the payment in lieu of notice notwithstanding.
- ii. Procedural fairness



60. The respondent contends that the claimant was accorded a hearing having conducted its independent investigations on her alleged involvement in the fraudulent transactions. It further states that it accorded the claimant a fair hearing in the presence of a member of staff of her choice on 13th October, 2014.
61. The claimant maintained that she was not accorded an opportunity to defend herself on the allegations levelled against her and that the respondent relied heavily on hearsay evidence in reaching its decision to terminate her employment. She argued that the respondent failed to follow due process as set out in Sections 41, 43 and 45 of the *Employment Act*.
62. After her suspension to pave way for investigations, the claimant was invited for a disciplinary hearing vide an email dated 13th October, 2014 at 1.51pm. As per the said invitation, the hearing was scheduled for the same day at 3 pm.
63. Despite the short notice the claimant did attend the hearing and was accompanied by a member of staff of her choice one Ms. Angela Murage.
64. I have perused the minutes of the disciplinary hearing and note that the claimant participated in the disciplinary proceedings. She does not dispute this fact.
65. Be that as it may, despite the respondent observing the rules of procedural fairness, the aspect of substantive fairness was not satisfied hence ultimately, her termination was unfair. The termination was vitiated by failure on the part of the respondent to link the claimant to any wrongdoing.
66. In this regard, the Court arrives at the finding that the respondent failed to discharge its burden by demonstrating justification in terminating the claimant's employment.
67. From the foregoing I opine that the claimant's termination was indeed unlawful and unfair within the meaning of section 45 of the Employment Act.

Reliefs

68. Having found that the claimant's termination was unfair, I will award her seven (7) month's gross salary as compensatory damages. This award has taken into consideration the length of the employment relationship and the fact that the respondent did not prove the reasons for the claimant's termination.
69. As I have found that the claimant was not entitled to benefit from the CBA between the respondent through the Kenya Bankers Association and BIFU, she is not entitled to the underpayments in respect of the salary she could have earned under the CBA.

Orders

70. Accordingly, I enter Judgment in favour of the claimant against the respondent in the following manner;
 - a. A declaration that the claimant's termination by the respondent was unfair and unlawful.
 - b. The claimant is awarded compensatory damages in the sum of Kshs 385,000/= which sum is equivalent to 7 months gross salary.
 - c. Interest on the amount in (b) at court rates from the date of Judgement till payment in full.
 - d. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.



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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kubai

For the Respondent Mr. Rabut

Court Assistant Barille Sora

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

