



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 53 OF 2018**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT**

**VERSUS**

**WELLS FARGO LTD.....RESPONDENT**

**JUDGMENT**

1. The Kenya National Private Security Workers Union (the Union) sued Wells Fargo Ltd (the Respondent) on 7 March 2018, alleging that the dismissal of Josephat Andala Ashiono (the Grievant) was unfair.

2. The Respondent filed a Response on 7 May 2018, and the Cause was heard on 24 January 2022. The Grievant and the Human Resources Director with the Respondent testified.

3. The Union filed its submissions on 9 February 2022 and the Respondent on 21 March 2022.

4. The Court has considered the pleadings, evidence, and submissions.

**Unfair termination of employment**

**Procedural fairness**

5. On 15 April 2015, the Grievant and other employees of the Respondent were tasked with collecting and depositing a customer's monies with the Co-Operative Bank of Kenya Ltd, Kakamega branch.

6. Although the Grievant and the other employees collected the monies from the customer, the monies were never banked.

7. Consequently, on 22 April 2015, the Respondent requested the Grievant to respond to or record a statement over an incident.

8. The Grievant recorded the statement and on 28 April 2016, he was invited to attend a disciplinary hearing on 30 April 2016. The Grievant was informed of the right to attend with a colleague.

9. The Grievant attended the hearing with a witness.

10. The Respondent then notified the Grievant of his summary dismissal on 18 May 2016. He was informed of a right of appeal.

11. The Grievant appealed on 25 May 2016, and an appeal hearing was held on 16 June 2016. Union representatives attended the appeal hearing. The Respondent declined to uphold the appeal.

12. The Union was dissatisfied and it reported a trade dispute to the Cabinet secretary, Labour, and the Conciliator issued a Certificate of Unresolved dispute on 14 March 2017.

13. The Union then moved the Court.

14. The Respondent informed the Grievant of the allegations to confront and afforded him an opportunity to be heard, including up to appeal.

15. In terms of sections 35(1)(c) and 41 of the Employment Act, 2007, the Court is satisfied that the Respondent complied with the requirements of procedural fairness.

### **Substantive fairness**

16. Sections 43 and 45 of the Employment Act, 2007 require the employer to not only prove but prove as valid and fair the reasons for dismissing an employee.

17. The reason the Respondent gave for dismissing the Grievant was that:

on 15<sup>th</sup> April 2016, while assigned duties as a crew commander/cash officer, you unprocedurally and unlawfully handed over to CIT Escort Isaac Lusweti Kshs 807,500, which was client money (NETCO Malava) entrusted to you by the Branch Manager (Kakamega branch) for banking.

18. This was the reason the Respondent was expected to prove.

19. To discharge the burden, the Respondent's witness produced a copy of the Banking Support Procedures.

20. The procedures required the Grievant as the crew commander/cash officer and an escort to proceed to the banking hall and submit the monies and appropriate documents to a bank cashier, ensure there was an acknowledgement by the bank cashier and then leave together back to the vehicle.

21. In his recorded statement, the Grievant stated that he left the escort Isaac Lusweti at the Co-Operative Bank Kenya Ltd at the executive banking hall/lounge and proceeded on other errands upon the instructions of a Manager called Edgar Mwangi.

22. The Grievant stated that after finishing the assignments, he went back to the Respondent's offices, whereupon he got information that Isaac Lusweti had not been seen. He stated that when he attempted to call the said Lusweti, his phone was off and that he could not trace him at the Co-Operative Banking hall, and he reported to the Branch Manager.

23. The Respondent had procedures that the Grievant did not follow. The Grievant's explanation was that he had instructions from the Branch Manager to proceed to other assignments.

24. Considering that the Grievant was aware of the written instructions on handling customers' monies, it was reckless of him to ignore the written procedures and follow the alleged verbal instructions of the Branch Manager and leave the monies with an escort officer. It is suspicious that the escort officer did not bank the monies and that he disappeared.

25. The Court finds that the Respondent had and established valid and fair reasons to dismiss the Grievant.

### **Dismissal or termination?**

26. The Union had alleged that there had been an agreement that the Grievant's employment be terminated in lieu of summary dismissal. The Union did not prove the existence of such an agreement.

27. Compensation and salary in lieu of notice are thus not remedies available to the Grievant.

### **Breach of contract**

#### **Salary for May 2016**

28. The Union prayed that the Grievant be paid Kshs 20,277/- on account of earned wages for May 2016.

29. The Respondent offered the Grievant earned wages of Kshs 7,434/- being wages up to date of dismissal as part of the terminal dues, but he declined to accept the same.

30. The Union did not interrogate the computation by the Respondent, and the Court will allow the head of the claim in the sum of Kshs 7,434/-.

### **Accrued leave**

31. On account of accrued leave, the Union pleaded Kshs 20,277/- being commuted leave for the last year of service.

32. In the submissions, the Union indicated that it was seeking the equivalent of 15-accrued leave days.

33. The Respondent asserted that the Grievant had 15-days of accrued leave amounting to Kshs 8,816/-.

34. The Court will allow the head of the claim as computed by the Respondent and conceded by the Union in the submissions.

### **Gratuity**

35. The Union also pitched for Kshs 305,169/- as gratuity and reliance was placed on Legal Notice No. 53 of 2003.

36. The Grievant was summarily dismissed and, by virtue of Regulation 17(2) of the Regulation of Wages (Protective Security Services) Order, is not eligible for gratuity.

### **Certificate of Service**

37. The Respondent issued a Certificate of Service to the Grievant, and he produced a copy in Court. Nothing turns on this relief.

### **Conclusion and Orders**

38. The Court finds and declares that the summary dismissal of the Grievant was fair, and save for the award of dues as set out in the dismissal letter, the Cause is dismissed.

39. Due to the social partnership between the parties, the Court orders each party to bear its own costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 11<sup>th</sup> day of April 2022.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Union Mr. Madegwa, Branch Secretary

For Respondent Ms. Odiero instructed by Hamilton Harrison & Matthews Advocates

Court Assistant Chrispo Aura