



**Asetto v Faulu Microfinance Bank Kenya Limited (Cause
754 of 2017) [2022] KEELRC 4113 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 754 OF 2017

M MBARŪ, J

MAY 12, 2022

BETWEEN

FLORENCE ACHIENG ASETTO CLAIMANT

AND

FAULU MICROFINANCE BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant is a female adult. The respondent is a limited liability company and licenced to conduct banking business in accordance with the *Banking Act*.
2. On August 29, 2014 the respondent employed the claimant as the relationship manager – SME with effect from October 10, 2014. The claimant was placed on probation for 6 months and her salary was Ksh 259, 943 per month.
3. The claimant was appointed as acting branch manager, Kimathi branch on March 10, 2016 where she worked but in a letter dated February 28, 2017 the respondent terminated employment.
4. The claim is that in January, 2016 the respondent introduced new ways of dealing with asset finance. Under the new rules, the claimant could only ensure the loan application was correctly filed and supporting documents authentic.
5. The respondent also introduced a sales consultant whose responsibilities included sourcing for customers and processing of loan application. The sales consultant/agents were hired on commission.
6. In June, 2016 a customer successfully made an application for credit. The loan application was presented by a sales consultant hired by the respondent and the claimant was required to verify the supporting documents after confirming the authenticity.
7. The claimant confirmed the accuracy of the borrower’s bank statements and established the ownership of motor vehicle given as security with Kenya Revenue Authority. The loan application went through



and the borrower started making repayments but after a few repayments the borrower stopped the repayments of the loan.

8. The claimant investigated the account and the security provided and established that the motor vehicle was not registered in Kenya contrary to what KRA had misrepresented before. She sensed fraud and reported the matter to the respondent's security department and requested for investigations and the security team asked the claimant to write her statement and the team did investigations led by George Bommet.
9. The fraud was also reported to the banking fraud investigations and the claimant recorded her statement.
10. Upon investigations, the police arrested and charged one Julius Okeyo Odhiambo with conspiracy to defraud and stealing who was a sales consultant who had been hired by the respondent to process the loan.
11. By letter dated February 17, 2017 false allegations were made against the claimant and she was suspended from duty. The letter of suspension did not disclose any allegations made against the claimant but was accused of not following the respondent's credit policy which was revised in November, 2016 a period of 3 months after the policy in question was processed to include the risk analysis.
12. On February 22, 2017 the claimant was taken through the disciplinary process that was biased present was the security officer who conducted investigations. The claimant did not participate in any fraud and instead had done due diligence akin to criminal investigations but the respondent was hell-bent on terminating her employment and out of 13 employees recommended by the security team to face disciplinary hearing, only the claimant was dismissed. The defence given was ignored and the claimant was not allowed an appeal.
13. In a letter dated February 28, 2017 the respondent dismissed the claimant for alleged gross misconduct and without any justifiable cause. There was malice for the reasons that the claimant had no notice, no fair reason was given, there was victimisation and termination was unlawful.
14. For the period of employment, the claimant was not paid her due house allowance; there was wrongful termination of employment and should be paid damages and also claims the following;
 - a. One month notice pay Ksh 215,000;
 - b. Compensation at 12 months Ksh 2,480,000;
 - c. Service pay Ksh 2,480,00;
 - d. House allowance for 51 months Ksh 2,149,800;
 - e. Off days 4 per month Ksh 4,885,000;
 - f. Overtime;
 - g. Underpayments from March 10, 2016 Ksh 1,914,000;
 - h. Certificate of service;
 - i. Gratuity Ksh 10,965,000; and
 - j. Costs.



15. The claimant testified in support of her case that she was employed as the relationship manager-SME and in February, 2016 appointed the acting branch manager, Kimathi branch. At this time, the respondent introduced a new process for credit access by appointing consultants/agents to source for business with the claimant's acting manager only serving as the officer to assess the credit documents and approve. Under the asset finance facility, the agents would recruit customers and get borrowers upon which they would earn a commission as self-employees.
16. The claimant testified that the consultant/agents would take documents and authenticate, visit the client and assess the business, residence and then check on creditworthiness. This was to assist in the client getting credit facility. The agent would then present the client/customer/borrower at the branch before the credit team to check if the documents presented were authentic and then approve the application. A unanimous decision would be required from such team. Any objections from any member would result in rejection of the application.
17. The claimant testified that as the branch manager she had no power to direct the branch credit committee on its work and it had to make a team decision. Part of the team members included the branch manager, relationship officer, team leader sales, and the consultant. The team would rely on the consultant on the verification of document and statement of the borrower. The risk manager, credit and security managers would then be required to check on the application for approval.
18. On February 17, 2017 the claimant was suspended from duty on the grounds that she had approved a loan facility without following the laid down procedures. She was not involved in the investigations save she was called by the police to write a statement and also the internal security team where she did a detailed account on what she had done. She noted that she had raised the alarm after noting one borrower had a loan application approved but the motor vehicle used as security which was not authentic despite KRA confirming that the vehicle had proper documents. The respondent alleged that the asset finance was done through fraud.
19. The claimant was invited to a disciplinary hearing but was not allowed to call any witness. The investigations report done by the security team was not shared with her and only saw the copy filed in court together with the response. The documents said to have been forged and leading to alleged fraud were not disclosed or submitted in evidence. The records filed were not signed and cannot be authenticated.
20. The claimant testified that in response, the respondent has filed a counter-claim that she breached the loan agreement but her loan was based on her salary and has not been in employment through which her loan was secured through the salary paid and a title deed charged and when she is able to get cash, all these is submitted to the respondent in an effort to pay. The respondent has tried to sell her property and a valuer called her over intended sale while the respondent knew the matter was in court and has a counter-claim.
21. Upon termination of employment, the claimant has been unable to secure new employment since upon background check; possible employers are able to see that she was terminated from her employment and unable to secure new employment. She has since been listed with CRB and cannot get a new financier and has been forced to remain at home without employment and the claim made should be allowed with costs.



Response

22. In response, the respondent filed a response and counter-claim on the grounds that the claimant was employed as the relationship manager – SME and on March 10, 2016 her role changed to acting branch manager, Kimathi branch.
23. About February 17, 2017 it came to the attention of the respondent that some staff members had on June 27, 2016 willingly or negligently facilitated an irregular disbursement on an asset finance loan of Ksh 4, 760,000 at Kimathi branch. An investigation was conducted with a view to establish the suspected irregular disbursement of funds and the staff involved.
24. At the end of investigations, the investigations team established that the sum of Ksh 4,760,000 had been fraudulently disbursed to a customer one Job Mwita Muniko and the acting branch manager, relationship manager could have been negligent in performing duty especially the claimant who was overall responsible and leading factor in processing the asset finance loan and loss of funds.
25. On February 22, 2017 the respondent called for a disciplinary hearing with the claimant present and following which her employment was terminated with effect from February 28, 2017 for the reasons that she was negligent in the performance of her duties by failing to conduct proper due diligence in processing the asset finance loan; appraising and approving a loan on forged documents; failing to obtain additional information regarding the loan applicant's request for change of unit; failing to do a risk analysis as regards the asset finance loan; failing to ensure adequate KYC analysis; and failing to adhere to the respondent's bank credit risk policy.
26. Upon employment the claimant had agreed to be bound by the applicable policies of the respondent. in failing in her duties, the claimant was in breach of the employment contract on the grounds that she failed to follow the given policy, conduct a due diligence before processing the asset finance loan, approving a loan on forged documents and allowing change of unit and leading to loss of funds.
27. The claimant was at all material times required to undertake her duties as required under her job description and to ensure a loan application was completed and accompanying documents authentic and to ensure full compliance with the respondents' credit policy. She failed to be diligent in processing the Ksh 4, 760,000 loans which was a loss to the respondent. following information received regarding the claimant's negligence, the claimant was suspended followed by investigations which confirmed during the hearing when the claimant admitted that there was a lapse in the manner the asset finance loan application was appraised, approved and funds disbursed. The claimant apologised for the lapse and that given a chance, she would be careful.
28. The disciplinary conducted by the respondent was fair and justified, the claimant was issued notice and invited to attend hearing which she did and was able to interrogate the evidence. the allegations of malice are without foundation and the alleged loss and damage is without evidence. The claimant was paid one (1) months' notice even though this was a case of summary dismissal, compensation is not due in a case where termination of employment is justified, service pay, house allowance, off duty pay, overtime for work during public holidays these are claims made without merit and all should be dismissed with costs.

Counter-claim

29. In counter-claim, the respondent's case is that the claimant was advanced a loan facility of Ksh 5, 400,000 on December 16, 2014 and expressly undertook to repay the same and which was to be repaid over a period of 300 months at a staff interest rate of 9% on a reducing balance but she has failed to



- repay. The claimant signed a loan agreement regulated under the staff loan policies and the human resource manual for the loan to be repaid from her salary in a check off system.
30. To secure the loan, the claimant charged the property in land parcel No Kajiado/Kaputei North/22522 created and registered a legal charge over the property in favour of the respondent as security for the loan facility advanced on March 24, 2015. Under the charge, the claimant was obliged to pay interests on any delayed repayments as and when these became due and should now be compelled to repay the same as agreed at the prevailing rates on all defaulted amounts.
 31. The claimant agreed that upon termination of employment, the respondent did, as per the loan agreement, have discretion to charge interests on the loan at commercial rates. The respondent has exercised this discretion and required the claimant to repay the loan at commercial rates.
 32. On August 17, 2017 the claimant filed application requesting to be allowed to service the loan at staff rates as opposed to the contractual and agreed commercial rates and in a ruling delivered on March 21, 2018 the court directed to continue paying at the rate of 9% and despite the loan agreement, the court ruling and the policies of the respondent, the claimant has failed to repay the loan. The loan is now due for over 500 months, more than a year with a balance of Ksh 5, 471,452.78 and despite demand to pay, the claimant has neglected to oblige in breach of her commitment to do so.
 33. The respondent is seeking for judgement against the and orders that;
 - a. Payment of Ksh 5,493,798.14;
 - b. Interests on the loan dues at commercial rates;
 - c. Costs; and
 - d. Interests on the awards.
 34. In evidence, the respondent called Sammy Njeru Njau the human capital manager who joined the respondent on October 18, 2021 and based on the records testified that the claimant as the branch manager and owing to her position on the branch credit committee, she was required to exercise a high level of diligence before advancing credit. The record of the disciplinary hearing can confirm that the claimant failed in her duties.
 35. Mr Njau also testified that the claimant was issued with notice addressing allegations made against her and was invited to the disciplinary hearing but failed to give satisfactory responses leading to termination of employment which s fair and justified.
 36. The witness also testified that the notice to show cause letter issued to the claimant was generic and did not outline the particulars of matters facing the claimant particularly the asset financing she was alleged to have neglected to ensure due diligence.
 37. The subject notice to show cause is not filed. The claimant was invited to the disciplinary hearing and accorded all rights. The invitation notice to the disciplinary hearing is not filed.
 38. The fraud investigations were conducted by George Bommet and Onesmus Hindi who also sat in the disciplinary hearing to present the findings. They interrogated the claimant but they are not witnesses herein. The investigators found out that 5 employees had conspired with the borrower to defraud the respondent but the claimant is not among them. The alleged forged documents that the claimant is said to have used to approve the loan were not filed. The claimant had no capacity to tell if signatures had been forged.
 39. It was noted that the claimant had no knowledge of the investigations report.



40. The disciplinary committee recommended to the respondent that the claimant be separated from the respondent and termination of her contract.
41. Mr Njau also testified that the claimant had a loan facility which she has failed to repay. She had secured the loan using her property and title deed charged, the respondent has tried to sell the property but the claimant obtained an injunction but has failed to abide the conditions issued. The loan is outstanding unpaid.
42. At the close of the hearing, both parties filed written submissions which have been put into account.

Determination

43. On February 28, 2017 the respondent terminated the employment of the claimant on the grounds that she was found to be negligent in the performance of her duties by failing to conduct a proper risk analysis and verification of documents involving the Asset Finance facility. Such action was found to be gross misconduct leading to termination of employment.
44. Prior to this notice, the claimant was suspended on February 17, 2017 for the reasons that this was to facilitate investigations on allegations made against her concerning the processing and recommendation of a fraudulent asset finance loan.
45. Section 47(5) and 43 of the *Employment Act*, 2007 (the act) places the burden of proving the ingredients of unfair and wrongful termination of employment upon the employee and the burden of justifying the grounds leading to termination of employment upon the employer respectively.

(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.
46. And in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the court held that;

There can be no doubt that the act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.
47. In this regard, when an employee is suspended from duty to allow for investigations, such is just but an initial step towards addressing the allegations made and upon conclusion of the investigations, the subject employee must be recalled back if there is no matter to be addressed further and if the employee is required to respond to any given matter therefrom, a notice to show cause with an outline of the matters to be addressed must issue.
48. This is the essence of section 41 of the act. notice must issue to the employee with an outline of matter she must respond to before the employee can be subjected to a disciplinary hearing.



49. in *Elizabeth Cheronu Kurgat v Kenya Literature Bureau* [2014] eKLR held that;

The claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the respondent termed this action as compulsory leave, instead of suspension or interdiction under the terms and conditions of employment. All are terms that may be used by an employer on sending an employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a trade union representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.

50. A suspension is issued to remove the employee from the shop floor to allow for investigations. Such should not be an end to itself. The motions of section 41 of the Act are mandatory. The employee must be issued with notice and allowed to attend hearing in the presence of another employee of choice and which rights must be secured by the employer. Whatever misconduct or gross misconduct the employee is alleged to have committed, the rights secured under the act once ignored, any sanction issued becomes unlawful and leading to unfair termination of employment.
51. On August 29, 2014 the respondent employed the claimant as the relationship manager – SME with a detailed job description. In a letter dated July 13, 2015 the employment was confirmed.
52. On March 10, 2016 the claimant was appointed in a new role and the following terms;
... I am pleased to inform you of management’s decision to appoint you as acting branch manager – Kimathi branch with effect from March 10, 2016 until June 10, 2016. As the acting branch manager you will be expected to grow the business in the overall business strategy. ...
53. On the records filed, there is no further communication from the letter dated March 10, 2016 confirming the claimant as branch manager or extending the acting role after the 10th of June, 2016 end date.
54. The respondent’s case is that around February 17, 2017 it came to its attention that some employee may have willingly and negligently facilitated fraud in asset finance loan around June 27, 2016 in Kimathi branch leading to a loss of ksh 4,760,000.
55. That the claimant as the acting branch manager failed in her duties particular failed to follow the credit policy dated November 9, 2016 and the human resource manual of June, 2016.
56. The case that the claimant was appointed acting branch manager, Kimathi branch is without any written confirmation.
57. Substantively, the claimant’s core role with the respondent was relationship manager – SME.
58. Even though the letter terminating employment referenced the claimant as the acting branch manager, the substantive role remained that of relationship manager – SME. Letter terminating employment was specific, acting branch manager & relationship manager – SME. The claimant was not confirmed as the branch manager, her role and job description remained that of her original role, relationship manager – SME.
59. On the investigations report conducted with regard to asset financing – Kimathi branch it was noted that on February 25, 2016 one Job Mwita Muniko submitted his application for a loan as the client



of one Julius Okeyo, a sales executive based at Kimathi branch and who took charge of his application and assisted him in the process. There were changes to the loan application 3 months later all under the supervision of Julius Okeyo. The customer was loaned ksh 4, 760,000 but he defaulted in the repayments.

60. The investigations team made a conclusion that the asset financing for Job Mwita Munio was fraudulent and Job Mwita, Julius Okeyo, Bartholomew Onyach and Reuben Ngigi Karanja had conspired to commit fraud against the respondent bank. That the Kimathi BCC led by the branch manager, Florence Asseto negligently recommended and approved the second loan based on forced documents whose source they did not verify.
61. As noted above, the claimant was the acting branch manager. The documents and records said to be recommended and approved negligently have not been filed. The court is denied key records with regards to dates, timelines and the exact role the claimant played as the relationship manager – SME or the acting branch manager, which role she had no job description and was not her substantive role.
62. Even in a case where the claimant carried the responsibility as the acting branch manager, such term was specific and running from 10th March to June 10, 2016. The records said to have been approved and disbursed a loan facility would have carried more weight.
63. Such put into account, the investigations report dated February 17, 2017 and its findings ought to have outlined the allegations the claimant faced for her to be able to respond. There is no evidence on record that the claimant was issued with the investigations report which bears the same date with the letter of suspension on February 17, 2017.
64. The lack of a hearing notice to the claimant to attend before the disciplinary hearing with her rights under section 41 of the act secured was the last blow to the defence. such notice is a mandatory legal requirement and with it carries the mandate of due process. Without it, any sanction that followed, it was unlawful and unjustified.
65. There was unfair termination of employment. The sanction of termination of employment instead of summary dismissal cannot sanitise the unlawful and wrongful process undertaken by the respondent. it was unfair termination of employment.
The claimant is seeking various remedies.
66. On the finding that there was unfair termination of employment, compensation is due pursuant to section 45 and 49 of the act. a compensation of 6 months gross salary is herein found appropriate all at Ksh 215,000 x 6 = Ksh 1,290,000.
67. On the claim for notice pay, in the letter terminating employment dated February 28, 2017 the respondent offered to pay one months' notice pay and which has been acknowledged.
68. Service pay is not due where the employer is compliant to the provisions of section 35(6) of the act. on the payment statement filed by the claimant at her page 16 of the memorandum of claim, this is sufficient evidence that the respondent was compliant and service pay is not due.
69. House allowance claimed, the letter of offer dated August 29, 2014 was clear to the extent that the salary paid was 80% basic pay and 20% housing allowance. The claimant was not earning a minimum wage to justify a claim for a house allowance, off days' pay, overtime as outlined under her claim. Such is not due.



70. On the claim for underpayments, in the letter dated March 10, 2016 the claimant was appointed as acting branch manager- Kimathi with an allowance of Ksh 12,000. In the payment statement for January, 2016 there is an acting allowance paid at ksh 12,000.
71. The payment statement for November, 2016 there is an acting allowance arrears paid at Ksh 24,000. These findings shall suffice.
72. On the claim for gratuity pay, this is not benefits under the employment contract and the claimant was not unionised or a beneficiary under any collective agreement.
73. A certificate of service is due at the end of employment upon the employee undertaking clearance with the employer. Such is good practice to ensure that this is the last document the employee secures upon exit.
74. Accordingly, the claimant is entitled to compensation at ksh 1, 290,000 only. Other claims are hereby dismissed.

Counter-claim

75. On the counter-claim, the respondent's case is that while the claimant was in employment as relationship manager – SME she applied for a loan facility and was allocated one at Ksh 4,500,000 on December 16, 2014 at a staff repayment rate of 9%. At the end of employment she stopped the repayments which has continued to attract interest and total due is Ksh 5,493,798.14 is due.
76. The counter-claim is also that the claimant filed suit and application and the court in a ruling delivered on March 21, 2018 allowed the claimant to continue the repayment of the loan facility at staff rates of 9% but has refused to repay the same. She had secured the loan facility through her property. The claimant charged the property in land parcel No Kajiado/Kaputei North/22522 created and registered a legal charge over the property in favour of the respondent as security for the loan facility advanced on March 24, 2015.
77. It is not in dispute that the claimant was advanced loan facility by the respondent as an employee and the staff repayment rates apply. the claimant has not been servicing the loan since employment terminated as required. She urged the court to intervene to forestall the sale of her property for non-repayment and the court considered the merits and directed that pending herein and determination of the issue in dispute, the alleged unfair termination of employment, the claimant to continue repaying the loan facility at staff rates.
78. On the analysis and findings above, employment terminated unfairly and such addressed it is redressed. However, the claimant cannot take the view that since employment terminated unfairly, she will not repay the loan facility. The claimant enjoyed an employment benefit and employment has terminated. The application of staff rate was a preferential rate of 9% applied due to employment. Had employment terminated fairly, the claimant would have been given notice and allowed time to process the loan advanced. Even at the time of taking the loan facility, the claimant was notified that at the end of employment, she would have to repay the same at commercial rate. For being denied lawful and fair termination of employment, the claimant shall continue to repay the loan facility at staff rates of 9% save the conditions and terms and security deposited shall be recalled where the claimant fails to repay the loan advanced by the respondent.
79. For ease of reference, the claimant shall be given a grace period of 90 days from the date of this judgement to repay the loan balances due and owing to such date and where there is no compliance, the respondent shall be at liberty to move and recover the same as lawfully due. the claimant is hereby



given a chance to organise the loan repayment and the respondent's right to recover the same where there is non-repayment secured.

80. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a. A declaration that the claimants employment terminated unfairly;
 - b. compensation awarded at Ksh 1,290,000; and
 - c. 50% of costs.
81. The counter-claim is hereby allowed and judgement entered for the respondent against the claimant in the following terms;
- a. The respondent is hereby entitled to recover the loan advanced to the claimant at a staff rate of 9%;
 - b. The claimant shall continue to repay the loan advanced at the rate of 9% until payment in full;
 - c. On the loan balances due and outstanding to date, the claimant shall repay the same and continue to regularise the subsequent and due repayments within the next 90 days;
 - d. Where there is non-compliance (c) above, the respondent shall be at liberty to recall the full loan facility due and owing from the claimant with all due costs therefrom and in accordance with the applicable law(s); and
 - e. The dues owed to the claimant by the respondent shall be applied to off-set the loan facility due to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

