



**Fadhil v Diamond Trust Bank Kenya Ltd (Cause 489 of 2018)
[2022] KEELRC 13008 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13008 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 489 OF 2018
AK NZEI, J
OCTOBER 27, 2022**

BETWEEN

SUAAD SALIM FADHIL CLAIMANT

AND

DIAMOND TRUST BANK KENYA LTD RESPONDENT

JUDGMENT

1. From what can be gathered from pleadings and submissions filed herein, the Respondent (Diamond Trust Bank), received the approval of the Central Bank of Kenya (the Respondent's industry regulator) to take over the operations of Habib Bank Kenya Limited (hereinafter referred to as the Bank) including all its assets and liabilities effective August 1, 2017. It is on this basis that the Claimant herein, formerly an employee of Habib Bank Kenya Limited (the Bank), sued the Respondent herein.
2. The Claimant pleaded as follows in her Memorandum of Claim dated October 11, 2018 and filed in Court on even date:-
 - a. that the Claimant was employed by Habib Bank Kenya Limited (the Bank) effective from April 11, 1988, initially as a clerk -cum-typist, and subsequently rose through the ranks to the position of Branch Operations Manager, Mombasa Branch.
 - b. that during the pendency of the acquisition of the Bank by the Respondent, the Bank, by a letter dated March 17, 2017, suspended the Claimant from service. That the suspension came after the Claimant had been called upon by the Bank to record a statement on matters forming the basis of her suspension, which she did.
 - c. that on the basis of the statement, the Bank caused the Claimant and two others to be charged with three counts of conspiracy to effect unlawful purposes, stealing by servant and obtaining by false pretence *vide* Mombasa Chief Magistrate's Courts Criminal Case No. 741 of 2017,



which concluded (on June 13, 2018) with the Claimant and the two others being acquitted without being put on their defence.

- d. that despite the pendency of the Criminal Case and a statement earlier recorded by the Claimant, the Bank wrote to the Claimant on May 17, 2017 requiring her to furnish the Bank with an explanation on the allegations levelled against her, something that the Claimant and her lawyers deemed unnecessary.
 - e. that by a letter dated June 28, 2017, the Bank summarily dismissed the Claimant from employment.
3. The Claimant further pleaded that her dismissal was unfair and discriminatory in that:-
- a. the Claimant did not do anything or commit any act to warrant termination of her employment.
 - b. the accusations levelled against the Claimant were false, and even the Court acquitted her on June 13, 2018 under Section 210 of the *Criminal Procedure Code*.
 - c. that there was no need for the Claimant to give another explanation in connection with the alleged offences as demanded by the Bank by a letter dated May 17, 2017, in view of an earlier statement recorded by her and which led to the Claimant's prosecution.
 - d. that the Bank's Branch Manager, Rukiya Abduljabbar, who was involved in the release of documents the subject of the Criminal case, was never charged and Mr. Alex Tsuma Sanga, a staff jointly charged in Court with the Claimant, was neither suspended nor dismissed, and continued working with the Bank throughout the prosecution period before being absorbed by the Respondent, hence the Claimant's plea of discrimination.
4. It was the Claimant's further pleading that she had been employed by the Bank in 1988 and that having worked in the Banking industry for thirty (30) years, she had made a career within the said industry which had been completely ruined, and that at age 53, she had no practical chances of securing any meaningful employment outside the said industry. She claimed loss of income for the eight years that remained before retirement at the rate of ksh. 247, 677 per month.
5. The Claimant set out her claim in the Memorandum of Claim as follows:-
- a. Loss of income for 8 yearsksh. 23,776,992
 - b. Three months' salary in lieu of noticeksh. 743,031
 - c. Severance payksh. 7, 282,633
 - d. Gratuityksh. 4,088,507
 - e. Prorated leave days.....ksh. 148,606
 - f. Costs of the suit and interest.
6. The Claimant further filed her recorded witness statement which basically replicated the averments made in the memorandum of claim and a list of documents dated October 11, 2017, listing twenty documents, both of which accompanied the statement of claim. Documents listed on the said list of documents included the Claimant's letter of appointment dated 5th July 1988, suspension letter dated March 17, 2017, extension of suspension letter dated April 13, 2017, notice to show cause letter dated May 17, 2017, summary dismissal letter dated June 28, 2017, the charge sheet in Criminal Case No.



741 of 2017 and the Court's Ruling delivered on June 13, 2018, promotion letters dated August 19, 2009 and April 1, 2014 respectively, and six performance reward letters, among others.

7. On March 11, 2019, the Claimant filed a further list of documents dated March 8, 2019, listing one document, her statement dated March 23, 2017.
8. The Respondent entered appearance on October 25, 2018 and filed a Memorandum of Reply on March 4, 2019. The Respondent admitted having taken over the operations and liabilities of Habib Bank Limited as pleaded by the Claimant, and to having suspended the Claimant, extended the suspension and to having summarily dismissed the Claimant on June 26, 2017 as pleaded by the Claimant.
9. The Respondent further pleaded:-
 - a. that between December 28, 2016 and February 10, 2017, fraudulent transactions were reported at the then Habib Bank Nkurumah road within Mombasa where the Claimant was the Operations Manager, involving a sum of USD 1,575,427.60 (equivalent of ksh. 160,000,000).
 - b. that on or about May 11, 2017, the Claimant, alongside other accused persons, were charged before the Chief Magistrate's Court Mombasa, but the process of internal investigations within the Bank regarding the Claimant's case were not founded on the criminal proceedings.
 - c. that the Claimant's dismissal was not founded on her criminal culpability, but on her being liable for negligence in carrying out her duty.
 - d. that during the period between December 28, 2016 and February 10, 2017, certain sight import collection documents that had been received from CIMB Bank Malaysia through Habib Bank Pakistan in respect of goods worth USD 1,575,427.60 (equivalent of ksh. 160,000,000) were irregularly released to one Ali Abdulkadir Mohammed by the Branch Manager, Rukiya Abdul Jabbar, and the Claimant who was the Operations Manager at the time without any corresponding payment being made, contrary to the Bank's procedure.
 - e. that in a meeting held on March 15, 2017 attended by the Claimant, the Claimant admitted having received the import collection documents together with the Branch Manger Rukiya Abdul Jabbar and that they gave out the document in collusion with the customer, one Mr. Ali Abdulkadir Mohammed alias Adawe, contrary to the Bank's procedures on collection of sight documents without receiving payment for the same from the said person; and that the Claimant recorded a hand written statement on March 16, 2017 in that regard.
 - f. that in accordance with the Bank's Industrial Relations and Disciplinary Action Policy, Staff Service Rules and Disciplinary Policy, the Claimant was on March 17, 2017 placed on suspension for a period of one month pending investigations into circumstances surrounding the said fraudulent transactions.
 - g. that on March 18, 2017, upon the request of Mr. Ali Abdulkadir Mohammed alias Adawe, a meeting was held with the Claimant in attendance, where the said person admitted to having received the sight collection documents without making payment for the same and acceded to making full payment of the sums owing.
 - h. that the Bank carried out independent internal investigations in relations to the Claimant's case and issued the Claimant with a show cause letter dated May 17, 2017, receipt whereof the Claimant's Advocate acknowledged on May 23, 2017.



- i. that a follow-up letter was later sent to the Claimant inviting her to attend a disciplinary hearing on June 16, 2017, but the Claimant opted not to participate in the hearing despite having been invited.
 - j. that the disciplinary committee resolved that the Claimant's actions amounted to gross negligence and gross misconduct, and the Respondent lawfully terminated the Claimant on account of negligence after following due process.
10. The Respondent further filed a witness statement of one Francis Kariuki dated February 28, 2019 which basically replicated the averments made in the Respondent's Memorandum of Reply and a list of documents dated the same date, listing some thirteen (13) documents. The documents listed included Minutes of a disciplinary meeting held on March 15, 2017, the Claimant's statement dated March 16, 2017, Minutes of a disciplinary meeting held on March 16, 2017, a copy of suspension letter dated March 17, 2017, a copy of the Bank's Industrial Relations and Disciplinary Action Policy, a copy of the Bank's Staff Service Rules, a copy of the Bank's Disciplinary Policy, Minutes of a disciplinary meeting held on March 18, 2017, and a letter extending the Claimant's suspension, among others.
11. On March 25, 2019, the Respondent filed a supplementary list and bundle of documents dated March 15, 2019 listing two documents, these being a letter dated June 12, 2017 inviting the Claimant for a disciplinary hearing and Minutes of a disciplinary hearing dated June 16, 2017.
12. When trial opened on November 11, 2021, the Claimant adopted her recorded and filed witness statement as her testimony in chief, and produced in evidence the documents referred to in paragraph 6 of this Judgment. The Claimant further testified:-
- a. that only the Bank's (Branch) Manager had the power to release the documents she was accused of releasing and that she, the Claimant, had not seen such documents.
 - b. that the Claimant was arrested and prosecuted over the alleged documents, which were taken to (the criminal) Court, and that the documents taken to the Criminal Court did not belong to Mr. Adawe but were for other clients, and that the Claimant was acquitted without being put on her defence.
 - c. that the Branch Manager was not arrested and prosecuted along with the Claimant.
 - d. that the Claimant was arrested alongside Mr. Alex Tsuma, a customer Service Officer and that both of them were charged and acquitted; upon which Mr. Alex Tsuma was taken back and still works with the Respondent.
 - e. that she, the Claimant, recorded statements with the Bank on being called upon to do so with the Respondent's staff and that she told them all that she knew, only to realize later that there were police officers.
 - f. that she had not been paid the amounts stated in her dismissal letter, and that she did not leave any outstanding loan with the Respondent.
 - g. that the Claimant was earning ksh. 247,000 per month at the time of her dismissal.
13. Cross-examined, the Claimant testified:-
- a. that payment of gratuity was in the Bank's policy.
 - b. that she recorded a statement with the Bank on March 16, 2017.



- c. that the Claimant and the Branch Manager had a conversation with Mr. Adawe, who was then in Mecca, and it was agreed he would make payment when he came back in a months' time. That the money was in the account and Mr. Adawe was given the documents against that money; him having been a very valued client of the Bank.
 - d. that a meeting was held at Nairobi on March 18, 2017 after Mr. Adawe came back and he attended; admitted that he had taken the documents and agreed to pay.
 - e. that Mr. Adawe paid when he came to Mombasa, but by that time the Claimant had already been suspended.
 - f. that Mr. Adawe had not paid by the time the Claimant recorded the statement dated March 23, 2017.
 - g. that the (Branch) Manager allowed Mr. Adawe to take the documents before payment because she gave him a facility.
14. Re-examined, the Claimant testified that she had stated in her statement dated March 16, 2017 that the documents in issue had been released to Mr. Adawe in full trust and at the discretion of the Branch Manager. That the Branch Manager was not arrested and charged with her although both the Bank and the police had the Claimant's statements dated March 16, 2017 and March 23, 2017 respectively.
15. The Respondent called one witness, Francis Kariuki (RW-1), who adopted his recorded and filed witness statement dated February 28, 2019 as his evidence in chief, and produced in evidence the documents referred to in paragraph 10 of this Judgment.
16. Cross-examined, RW-1 testified:-
- a. that as stated in his witness statement, the claimant was summarily dismissed for failing to attend a disciplinary meeting after being given time and show cause letter to do so.
 - b. that the Claimant attended disciplinary meetings held at Mombasa on March 15, 2017 and March 16, 2017 respectively, and also attended a third disciplinary meeting held at Nairobi on March 18, 2017 (Respondent's exhibit nos. 2,4 and 9 being copies of the disciplinary committee's minutes for the three disciplinary meetings).
 - c. that it was during these disciplinary committee meetings that a decision was reached that a complaint be lodged with the police against the Claimant and Rukiya, the Branch Manager, with the Bank being the complainant.
 - d. that those charged in the criminal Court were the Claimant and a junior administrative staff in the Bank, Alex Tsuma.
 - e. that the documents in issue related to goods imported from Malaysia to Kenya, but documents produced in Court by the Respondent indicated that the consignment was destined for Somalia.
 - f. that the Bank had made a decision that the Claimant be paid as per the letter of summary dismissal.
17. Upon considering the pleadings filed and evidence adduced by the parties, issues that present for determination, in my view, are as follows:-
- a. whether termination of the Claimant's employment was unfair.



- b. whether the Claimant is entitled to the reliefs sought.
18. On the first issue, Section 41 of the *Employment Act* sets out a mandatory procedure that must be adhered to by any employer contemplating termination of an employee's employment for whatever reason. The Section provides as follows:-
- “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
19. It is apparent from the evidence before me that the Bank commenced disciplinary proceedings against the Claimant on March 15, 2017 without any form of compliance with the aforesaid provision. The Claimant is not shown to have been notified in a language that she understood, the reasons for which her employer (the Bank) was considering terminating her employment or subjecting her to disciplinary proceedings. She was not notified of her right to be accompanied to the disciplinary meeting held on March 15, 2017 by a fellow employee and/or a witness of her choice. The minutes of the said disciplinary meeting do not show that the Claimant was given an opportunity to make her representation on the matters in issue for consideration by the Bank (Respondent's exhibit no. 2). The minutes do not indicate what the Claimant told the disciplinary panel if at all, and the minutes are in form of a report written by a person whose identity is not discernable from the minutes. The same situation applies to the minutes for the disciplinary meetings held on March 16, 2017 (Respondent's exhibit no. 4) and March 18, 2017 (Respondent's exhibit no. 9).
20. The foregoing situation was a departure from not only the statute but the Bank's Disciplinary Policy (Respondent's exhibit no. 8) as well. Section iv(a) of the Respondent's Disciplinary Policy states as follows:-
- “a) when an employee is reported to have committed any act of misconduct, the authorized person will write a letter detailing the reasons for the disciplinary action to be issued to him/her. The employee shall be given an opportunity to explain the circumstances alleged against him/her in the presence of another employee of his/her choice.
- If the explanation thus submitted is not found satisfactory or no explanation is submitted, the authorized person shall involve the disciplinary committee to hold an inquiry in the case. A letter detailing the reasons for disciplinary action should be issued within 3 working days of the date of misconduct or of the date on which the alleged misconduct comes to the notice of the Bank.



It is classified that whenever the fact is discovered as a result of audit/ investigation, knowledge shall be presumed with effect from the date the report of audit/investigations is submitted.”

21. In the present case, the Claimant was subjected to disciplinary proceedings before a disciplinary committee without prior written and/or detailed written disclosure by the Bank of reasons or circumstances leading to the proceedings before a disciplinary committee, and was not given an opportunity to explain the circumstances alleged against her for consideration by the Bank or the authorized person before being subjected to a disciplinary committee. This was both procedurally unfair and prejudicial on the part of the Claimant.
22. The “statement” alleged to have been written by the Claimant at the disciplinary proceedings of March 16, 2017 was shrouded in, and was anchored on an illegality as the disciplinary proceedings during which the same is said to have been written were held in contravention of both the statute and the Bank’s Disciplinary Policy which, under Section 12 of the *Employment Act*, has the force of law.
23. Evidence adduced by both parties indicated that after the disciplinary committee meetings of March 15, 2017 and March 16, 2017, the Claimant was suspended from duty by the Bank vide a suspension letter dated March 17, 2017, which reads in part:-

“RE: SUSPENSION FROM EMPLOYMENT PENDING INVESTIGATIONS

We write further to our meeting on March 17th 2017 when we discussed your gross misconduct in relation to unprocedural release of a client’s import documents.

In accordance with the Bank’s disciplinary procedures, we confirm that from today, March 17th 2017 you are suspended from work to facilitate a thorough and speedy investigation into the circumstances surrounding your conduct and the extend of the damages to be suffered by the Bank in that regard. We reserve the right to change or to add these allegations as appropriate in the light of investigations. The result of the investigations and any decision made will be communicated to you...”

24. The period of the Claimant’s suspension from duty was subsequently extended by the Bank vide a letter dated April 13, 2017 (the Respondent’s exhibit no.10) which reads in part:-

“...we refer to the letter dated March 17th 2017 concerning your suspension from work and advice you that the investigation is still ongoing. We are writing to inform you that the period of suspension with pay has been extended for a further period of up to 30 calander days. The investigating officials will endeavor to conclude the investigation within this time scale. However, should an extension be necessary thereafter, you will be kept informed of progress and advised immediately...”

25. The results of the investigations were never communicated to the Claimant. According to the evidence presented by both parties, the Claimant, jointly with two other persons, were on May 11, 2017 charged in Mombasa Chief Magistrate’s Court Criminal Case No. 741 of 2017 with the offences of conspiracy to effect an unlawful purpose contrary to Section 395(f) of the *Penal Code*, stealing by servant contrary to Section 268(1) as read with Section 281 of the *Penal Code* and obtaining by false pretenses contrary to section 313 of the *Penal Code*. The Claimant and her co-accused, Abdulkadir Mohammed Ali and Alex Tsuma Sanga, were on June 13, 2018 found to have no case to answer, and were acquitted under Section 210 of the *Penal Code* (Claimant’s exhibit no. 8).



26. As already stated in this judgment, the Claimant was subjected to three disciplinary hearings without prior disclosure of the allegations levelled against her, and without being given an opportunity to be heard or to call a witness. The Respondent initiated a fourth disciplinary hearing by issuing the Claimant with a show cause letter dated May 17, 2017, which read in part as follows:-

“...investigations have been carried out to ascertain whether there were incidents of gross negligence of duty on your part and attempted fraud by yourself or actions contrary to the Bank’s Policies, procedures and applicable law. The investigations have revealed that you violated laid down policies and procedures of the Bank, Uniform Rules for Collections (1995 Revision) of the International Chamber of Commerce and terms of the collection instructions by releasing 17 sight import collection documents with a value of USD 1,575,427.60 to a customer, Mr. Ali Abdulkadir Mohammed (Adawe), without payment. By your voluntary statement dated March 16, 2017, you confirmed the above and having undertaken the above with the assistance and full knowledge of your fellow colleague Rukiya Abduljabbar.

We hereby call upon your explanation within three (3) days from the date of receipt of this notice which is close of business on 24th May 2017...”

27. The show cause letter was responded to by the Claimant’s Advocates vide their letter to the Bank dated May 23, 2017, reminding them that since they opted to have the Claimant charged in Court after she had recorded a statement with them, corresponding on a matter in Court would be an illegality and therefore the Bank would have to await the outcome of the Court process.

28. The Claimant did not attend the fourth disciplinary hearing scheduled for June 16, 2017 (Respondent’s exhibit no. 14) and was summarily dismissed *vide* a letter dated June 28, 2017.

29. Whereas the Bank may have had valid reasons to terminate the Claimant’s employment, the procedure adopted towards achievement of that termination contravened both Section 41 of the [Employment Act](#) and the Bank’s Disciplinary Policy as already stated in this Judgment. It was stated in the case of [Walter Ogal Anuro -vs- Teachers Service Commission](#) [2013] eKLR as follows:-

“...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 in effecting the termination.”

30. The Court of Appeal held as follows in the case of [CMC Aviation -vs- Mohammed Noor](#) [2015] eKLR:-

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the [Employment Act](#). In [Kenya Union Of Commercial Food And Allied Workers -vs- Meru North Farmers Sacco Limited](#) [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the [Employment Act](#). That applies in a case of termination as well as in a case that warrants summary dismissal. See also [Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited](#) [2014] eKLR”



31. Section 45(4) (b) of the *Employment Act* provides that:-
- “ (4) A termination of employment shall be unfair for the purposes of this part where:-
- (a)
- (b) it is found out that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”
32. In my view, and in view of all the foregoing, the Respondent did not act in accordance with justice and equity in terminating the claimant’s employment. I make a finding that termination of the Claimant’s employment was procedurally unfair.
33. On the second issue, I award the Claimant the equivalent of seven month’s salary in compensation for unfair termination of employment. The Claimant testified that she was earning ksh. 247,000 per month at the time of termination of her employment. Seven months’ salary will therefore be ksh. $247,000 \times 7 = 1,729,000$. I have taken into account the circumstances in which the Claimant’s employment was terminated, and the extend to which the Claimant’s conduct may have caused or contributed to the termination.
34. The claim for loss of income for 8 years is not available to the Claimant under Section 49(1) of the *Employment Act*, and is declined. The claim for three months’ salary in lieu of notice is declined, and the Claimant is awarded ksh. 247,000 being one month salary in lieu of notice in accordance with Section 35(c) of the *Employment Act* and paragraph 16 of the Claimant’s contract of service dated July 5, 1988.
35. The claim for severance pay is declined as termination of the Claimant’s employment was not on account of redundancy.
36. On the claim for gratuity, the Bank stated in the Claimant’s dismissal letter dated June 28, 2017 that the Claimant would be paid gratuity as per the Bank’s policy. The Bank did not, and the Respondent has not presented to the Court the amount of money payable to the Claimant as service gratuity. Section 35(5) of the *Employment Act* provides for payment of service pay for every year worked, the terms of which shall be fixed. Although the Act does not state specifically how and by whom the service pay (gratuity) is to be fixed, the foregoing provision is made within the context of employer-employee relationship; and the fixing can only be in the contract of employment or in an employer’s employment policy forming part of the employment contract.
37. Where neither the contract of employment nor the employer’s employment policy addresses the issue of fixing service pay/service gratuity, the Court has tended to revert to Section 40(g) of the *Employment Act* for guidance on calculation of service gratuity, and has calculated service pay at the rate of fifteen days’ pay for each completed year of service.
38. The Claimant was employed by the Bank with effect from April 11, 1988 and was terminated on July 28, 2017, after twenty eight complete years of service. I award the Claimant ksh. 3,458,000 under this heading, being fifteen days’ salary for each completed year of service. The Respondent did not present any evidence in proof of payment of the Claimant’s gratuity.
39. The claim for unpaid prorated leave days is allowed. The Bank indicated in the Claimant’s dismissal letter dated June 28, 2017 that the Claimant would be paid leave days due and not taken as at June 28th 2017. The number of leave days due was, however, not stated, and the amount payable was also



not stated in the dismissal letter. The Respondent and/or the Bank, which was the custodian of all documents regarding the Claimant's annual leave entitlement, including days taken and days due pursuant to section 74(f) of the Employment Act, did not adduce any evidence in the foregoing regard. The Claimant claimed ksh. 148,606 under the leave heading, and I ward the same.

40. In sum, and having considered submissions filed by Counsel for both parties, Judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. Equivalent of seven months' salary in compensation for unfair termination of employmentksh. 1,729,000
 - b. Notice pay.....ksh. 247,000
 - c. Gratuity.....ksh. 3,458,000
 - d. Leave pay.....ksh. 148,606
- Total ksh. 5,582,606
41. The sum awarded shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
42. The Claimant is warded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant

..... for Respondent

