



**Wanga v Commercial Bank of Africa Limited (Cause 33 of 2019)
[2022] KEELRC 13288 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13288 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 33 OF 2019
AK NZEI, J
NOVEMBER 24, 2022**

BETWEEN

RAPHAEL ODHIAMBO WANGA CLAIMANT

AND

COMMERCIAL BANK OF AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted suit against the respondent herein vide a statement of claim dated June 21, 2019 and pleaded, *inter alia*:
 - a. that the claimant was employed by the respondent from October 5, 1998 on permanent basis and was deployed as a cashier in Mombasa.
 - b. that the claimant rose through the ranks, to operations assistant, relationship officer, relationship manager, senior relationship manager, and finally team leader, corporate banking/assistant general manager in the corporate banking department.
 - c. that in all the positions held, the claimant performed diligently and to the respondent's satisfaction until September 28, 2018 when the respondent unprocedurally, unfairly and unlawfully terminated the Claimant's employment on allegations of negligence.
 - d. that prior to the termination, the claimant was summoned by the respondent to a disciplinary hearing vide a letter dated August 27, 2018, subsequent to which a hearing was held on August 30, 2018 to receive responses in respect of the concerns raised.
 - e. that the grounds and reasons advanced by the respondent were devoid of any factual or evidential basis, did not constitute gross misconduct and did not warrant termination of employment under section 35 of the [Employment Act](#).



- f. that the respondent appealed against the termination in accordance with the respondent's policy guidelines, but which process the claimant faulted as having been a sham, prejudicial and unfair.
- g. that at the time of his termination, the claimant had worked with the respondent for more than twenty years, earning a basic salary of ksh 662,169, and was in the process of servicing a mortgage facility at staff rates.
- h. that unilaterally and to the detriment of the claimant, the respondent purported to review the terms of the mortgage facility by stating that the prevailing market rates would apply for 60 days whereafter recovery process would ensue, contrary to the agreement that provided for July 25 2029 as the maturity date for the facility.
- i. that at the time of termination, the claimant had pending leave days for the years 2016, 2017 and 2018, payable on a prorata basis, amounting to ksh 1,986,507.
- j. that the claimant is entitled to unpaid salary for the months between November 2018 and February 2019 as he awaited decision on his appeal, which was made on February 19, 2019 via an email received on February 21, 2019, amounting to ksh 1,324,338, which amount is calculated on half salary for the entire period.
- k. that the claimant is entitled to damages equivalent to one year's salary for unfair and unlawful termination amounting to a sum of ksh 7,946,028(i.e ksh 662,169X12 months) as provided for under section 49 of the Employment Act.

2. The claimant further pleaded:-

- a. that he (the claimant) was never truly given an opportunity to explain the reasons for the alleged breach of the bank's credit risk management policy, and that his termination is highly prejudicial, unfair and unlawful for contravening the Employment Act.
- b. that the claimant's termination was unfair because grounds for termination advanced by the respondent did not constitute grounds for termination and dismissal under the Employment Act.
- c. that non-payment of the claimant's terminal dues amounted to violation of mandatory provisions of the Employment Act and other applicable law.
- d. that the claimant's appeal against termination was determined on grounds of termination not raised at the disciplinary hearing.

3. The claimant set out his claim against the respondent as follows:-

- a. Damages for unfair termination of employment (662,162x12)ksh 7,946,028
- b. Unpaid salary between the months of November 2018 to February 2019(Ksh 662,149X4)x1/2Ksh 1,324,338
- c. Unpaid overtime for a period of 26 days, approximately 4 hours each for the 26 days at the rate of ksh 3,448.79 per hour (ksh 3,448.79X4X26).....ksh. 358,675
- d. A declaration that termination of the claimant's employment was unfair and unlawful.
- e. Costs of the suit and interest at court rates.



4. The Claimant filed his written witness statement dated 21st June 2019, which basically replicated the averments made in the statement of claim, and an evenly dated list of documents listing sixteen documents. The listed documents included the Respondent's letter dated 27th August 2018 inviting the Claimant to attend a disciplinary meeting on 30/8/2018, termination of employment letter dated 28th September 2018, the Claimant's letter of appeal against termination dated 11th October 2018, minutes on hearing of the Claimant's appeal held on 22nd October 2018, Respondent's letter dated 19th February 2019 communicating the outcome of the appeal to the Claimant, among other documents.
5. The respondent entered appearance on July 19, 2019 and subsequently filed a statement of response on July 23, 2019. The respondent pleaded:-
 - a. that the claimant's contract dated October 1, 1998 provided that the claimant's employment could be terminated by either party giving one month notice or making one month payment in lieu of notice; and that the respondent had the right to summarily dismiss the claimant from employment for gross misconduct.
 - b. that the claimant's employment with the respondent was governed by, *inter-alia*, the respondent's group human resource management policy, the group credit risk management policy guidelines; and such standing orders issued by the respondent from time to time.
 - c. that as the respondent's team leader, corporate banking, the claimant was incharge of the respondent's Mombasa branch, and had the obligation to ensure that all the functions in his department, including those of the relationship manager and credit analyst, are properly performed and was expected to abide by all the respondent's regulations and procedures, including the group credit risk management policy guidelines.
 - d. that the respondent invited the claimant for a disciplinary hearing by its letter dated August 27, 2018 after it became apparent that as of July 30, 2018, the claimant had breached provisions of the respondent's group credit risk management policy guidelines in his handling of the review and extension of the facilities account.
 - e. that on August 27, 2018, the respondent clearly informed the claimant of the charges, the date, time and place of hearing which was on August 30, 2018 at 4.00pm at the respondent's head office in Nairobi, and that he would be expected to give response to the charges levelled against him during the disciplinary hearing and of his right to be accompanied to the disciplinary hearing by a representative who had to be an employee of the respondent Bank.
 - f. that on August 30, 2018, the respondent held a disciplinary hearing which the claimant attended and was afforded adequate time and an opportunity to respond to the charges against him. That the claimant confirmed that he had chosen not to be accompanied by a colleague, admitted having handled facilities accounts in breach of the group credit risk management policy guidelines, and confirmed that he was aware of his obligation to comply with all the respondent's rules and regulations, and that he regretted mistakes and took responsibility for his actions.
 - g. that after the disciplinary hearing, the claimant appended his signature to the minutes of the disciplinary hearing, confirming their correctness.
 - h. that the disciplinary committee considered the grounds put forward for the disciplinary action against the claimant and the responses during the hearing, and reached a conclusion that the grounds were valid, and that the claimant's conduct amounted to gross negligence that



exposed the respondent to loss, and that the respondent lawfully terminated the claimant's employment vide a letter dated September 28, 2018.

- i. that the claimant was dissatisfied with the respondent's decision to terminate him, and lodged an appeal which was heard by a different panel on October 22, 2018, and which affirmed the earlier decision of the respondent to terminate the claimant.
 - j. that the claimant worked for the respondent for 19 years, and that at the time of his dismissal, he earned the salary pleaded, and further had a mortgage facility from the respondent, and that it was within the respondent's right to review the interest rate for the mortgage facility. That the review was done in accordance with the staff policy on loans.
 - k. that the claimant is not entitled to any of the reliefs sought.
6. The respondent filed an index and bundle of documents along with its aforesaid statement of response, listing some eight documents. The listed documents included the claimant's contract of employment dated October 1, 1998, the respondent's group human resource management policy 2016, the respondent's group credit risk management policy guidelines and minutes of the disciplinary meeting held on August 30, 2018, among others.
7. The claimant also filed a witness statement of Wycliffe Ontumbi dated July 22, 2019; which to a great extent replicated the averments made in the respondent's statement of Response.
8. On August 5, 2019, the claimant filed a Reply to the respondent's statement of response dated August 2, 2019 and a further list and copies of documents evenly dated.
9. When trial opened on May 5, 2021 before L Ndolo J, the claimant adopted his filed witness statement as his testimony and relied on the documents filed. He further testified, both in chief and under cross examination:-
- a. that he (the claimant) was unfairly terminated, that there was 90 days delay in submitting credit proposals for which he sought an extension on July 20, 2018. That extension was granted on the same date, upon which the claimant sought information from customers and completed the report; and that the bank was not affected negatively.
 - b. that after the disciplinary hearing, the claimant was not supplied with the minutes of the disciplinary hearing, and that he signed the minutes under duress on the date of his termination September 28, 2018). That the claimant protested verbally and sought an appeal.
 - c. that minutes of the disciplinary hearing are partly correct, and that the claimant took up that issue on appeal; and that the appeal decision was communicated to him several months after.
 - d. that the claimant had been paying the bank loan even at the time of the hearing.
10. Hearing of the respondent's case proceeded before me on May 12, 2022. The respondent called one witness, Angella Njoroge (RW-1), who adopted her filed witness statement dated March 9, 2022 as her testimony and produced in evidence the respondent's documents referred to in paragraph 6 of this judgment. Cross-examined, the witness testified:-
- a. that she (the witness) was not working with the respondent bank when the claimant worked there, and that what she had stated in her witness statement was what she had been told.
 - b. that from the records, the claimant was a diligent employee.



- c. that as a team leader, the claimant was supported by two people, the relationship manager and the credit analyst, and that the witness could not confirm that the relationship manager left the respondent bank in 2014 while the credit analyst resigned in 2016 and there were no replacements.
 - d. that the witness was not aware that the claimant had complained of under-staffing and that the respondent never addressed the issue.
 - e. that the witness admitted having stated in her statement that there were only eleven customers in the Mombasa branch, and denied knowledge that the claimant was handling over sixty accounts.
 - f. that the witness could not ascertain whether the respondent bank had suffered any loss.
 - g. that the claimant failed to submit customer review reports on time, and offered an explanation for that mistake.
 - h. that the respondent delayed in giving appeal outcome to the claimant, and no explanation was given for that.
11. Re-examined, RW-1 testified that the respondent bank is a corporate entity with perpetual succession and relies on its official documents that it has, and that the respondent's witness had relied on the same.
12. Having considered the pleadings filed by both parties and evidence adduced during the trial, issues that present for determination, in my view are:-
- a. whether termination of the claimant's employment by the respondent was unfair.
 - b. whether the claimant is entitled to the reliefs sought.
13. Before delving into the two issues that I have isolated for determination, it is important that I first address some pertinent issues. The respondent's letter dated August 27, 2018 inviting the claimant for a disciplinary hearing on August 30, 2018 states, in part:-
- “...it has been noted that as at July 30, 2018, you have failed to adhere to the provisions of section 2, section 3.1.2 and section 3.4 of the group credit risk management policy guidelines with respect to the following accounts for which you are the responsible relationship manager, whose facilities review dates were on March 31 2018...
- It has also been noted that you have failed to adhere to section 2 and 3.1.2 of the above mentioned policy guidelines with respect to the following accounts under your responsibility whose facilities review dates were on May 31, 2018...
- Under the circumstances, we find there is a case for you to answer and therefore you are required to attend a disciplinary meeting between you and management to be held in head office upper hill Nairobi on August Thursday 30, 2018 at 4.00pm where management will receive any response that you wish to give regarding the concerns specified above.
- You are entitled to be accompanied at the meeting, by a representative who should be an employee of the bank. Depending on the outcome of the meeting you may be subject to a disciplinary action and you should therefore attend the meeting fully prepared to state your case.”
14. The respondent pleaded at paragraph 4 of its statement of response that the claimant's employment with the respondent was governed, by among others, the respondent's group human resource



management policy 2016, the group credit risk management policy guidelines and such standing orders issued by the respondent from time to time.

15. I have perused the claimant's contract of employment dated October 1, 1998, which the respondent listed and produced as its exhibit no 1, and I have noted that it does not mention or even refer to the respondent's human resources management policy (which the respondent pleaded included disciplinary procedure) and the group credit management risk policy guidelines. Under section 12(1) of the [Employment Act](#), a written contract of service shall specify the disciplinary rules applicable to the employee or refer the employee to the provisions of document which is reasonably accessible to the employee which specifies the rules.
16. It was not enough for the respondent to seek to demonstrate that the said two policy documents existed and that the claimant's employment was governed by them. The respondent should have demonstrated that the said two policy documents formed part of the claimant's contract of employment, either by dint of the contract of employment as signed on October 1, 1998 or by dint of subsequent agreements or communication.
17. The claimant was not served with a show cause letter requiring him to give a written response to the charges levelled against him by the respondent before he could be invited for a disciplinary hearing. The charges were communicated to the claimant vide the invitation letter dated August 27, 2018, inviting the claimant to attend a disciplinary hearing on August 30, 2018 at the respondent's head office in Nairobi. According to the evidence presented by both parties, the claimant was based at the respondent's branch in Mombasa. There were only two days between the date of the said invitation letter and the scheduled date of the disciplinary hearing at Nairobi. The notice given was unfairly short, and the claimant stated as much in his evidence in court. I do agree with him.
18. The respondent produced in evidence minutes of the disciplinary meeting held on August 30, 2018. It is stated in the minutes as follows:-

“...Raphael while appreciating the comments from John advised the panel that in terms of staff resources, he worked alone. The credit analyst who left was never replaced and he didn't have a relationship manager or relationship officer. That meant he was handling all their roles on a day to day basis. To be able to maintain the customers that CBA had under the Mombasa Portfolio, he found himself running up and down chasing transactions, client services, business development etc. He had been assured by his supervisor that this would be sorted out. That contributed to these issues in one way or another.

Raphael observed it had reached a time when he did not have a normal life. He carried work home from the office and even worked over the weekends. This had not been possible lately because his mother was sick and she required his attention. He did not have a social life because customers had to be sorted out. John acknowledged there was a resourcing gap in Mombasa. He said a structure had been put in place and there will be support from the credit analyst team...”

19. The claimant (Raphael), being a team leader who apparently had no team to be led in his department at the respondent's Mombasa branch, in my view, adequately explained the cause of the delay he was being accused of, a situation which the disciplinary panel appreciated and promised would be rectified by support from the credit analyst team.
20. The respondent did not deny that the claimant worked alone at the Mombasa branch as the credit analyst and relationship manager who were supposed to work with and/or under the claimant (the team leader) had left the respondent bank years earlier and had not been replaced, leaving the claimant



to do both his work and their work on daily basis. So, was the claimant guilty of gross negligence as alleged in the termination letter dated September 28, 2018? In so far as the alleged gross negligence was constituted by alleged breach of policy caused by staff - shortage associated delays in the performance of some duties, I do not think so.

21. The respondent did not prove, during the disciplinary proceedings and before this court, that the alleged failure to adhere to the respondent's policy was as a result of negligence or inaction on the part of the claimant. Section 43 of the [Employment Act](#) provides:-

- (1) (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

22. The claimant testified that the minutes taken in the disciplinary meeting held on August 30, 2018 were not given to him, and that the same were signed by him under duress on the date of his termination September (28, 2018). The minutes were produced in evidence by the respondent, and I have noted that the minutes were, indeed, signed by the claimant on September 28, 2018, the date of his termination. The two disciplinary panel members, Wycliffe A Ontumbi and John Okulo, are shown to have signed the minutes on September 28, 2018 and October 19, 2018 respectively. One disciplinary panel member had clearly not signed the minutes as at September 28, 2018 when the claimant's employment was terminated. The panel member is shown to have eventually signed the minutes over three weeks after the claimant's employment had been terminated on the basis of the panel's findings/recommendations.

23. The claimant testified that the minutes were partly correct, that he signed them on September 28, 2018 under duress on his termination date (a month later), and that he lodged an appeal after protesting verbally.

24. I recently stated as follows in the case of [Peter Mutuku Kiilu vs Isinya Resorts Limited](#) [2022] eKLR:-

“ 17. An employee is entitled to be given adequate notice to respond to a show cause letter and adequate notice to attend a disciplinary hearing/meeting. An invitation letter must always inform an employee of his right under section 41 of the [Employment Act](#). Minutes of a disciplinary meeting must be clear on the issues discussed thereat, and must clearly indicate whether the employee was given an opportunity to be heard, and what representation the employee and his fellow employee or union official made.

18. Issues to be discussed at the disciplinary hearing/meeting must be the same as in the show cause letter, and minutes ought to be signed at the meeting during or in which they are taken, but not in a separate or subsequent meeting.”

25. It was held as follows in the case of [Walter Ogal Anuro vs Teachers Service Commission](#) [2013] eKLR:-

“...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.”



26. Section 45 (4) (b) provides that termination of employment shall be unfair where it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. In the present case, the respondent did not act in accordance with justice and equity.
27. On the first issue, it is my finding that in all the circumstances of the case, the respondent did not act in accordance with justice and equity in terminating the claimant's employment. It is also my finding that termination of the claimant's employment by the respondent was substantively unfair for reasons that I have stated herein above. I so declare.
28. I decline to address the issue of review by the respondent of interest chargeable on a mortgage facility given to the claimant by the respondent, as such facility is not part of the employment contract between the parties herein which is the subject in the proceedings in this court. The alleged mortgage is definitely a subject in a different contract all together, which is not before this court.
29. On the second issue, I award the claimant the equivalent of seven months' salary being compensation for unfair termination of employment. That is ksh 662,169X7 = Ksh 4,635,183. The claim for unpaid salary for the months of November 2018 to February 2019 is declined as the claimant's employment was terminated by the respondent on September 28, 2018.
30. The claim for overtime payment was neither pleaded by the Claimant nor proved. The same is declined.
31. On the claim for leave pay, the claimant pleaded and testified that he did not take leave for three years, that is 2016, 2017 and 2018 although he was entitled to such leave. He claimed ksh 1,324,338 for unpaid leave days. The respondent did not present any documents to controvert this claim. Section 74(1) (f) of the Employment Act provides that an employer shall keep written records on an employee's annual leave entitlement, days taken and days due specified in section 28. I allow the claim.
32. Finally, and having considered submissions filed by counsel for both parties, judgment is hereby entered for the claimant against the respondent for:-
 - a. The equivalent of seven months' salary being compensation for unfair termination of employment.....ksh 4,635,183
 - b. Unpaid leave days for 3 years.....ksh 1,986,705

Total Ksh 6,621,888
33. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.
34. The claimant is awarded 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 24TH DAY OF NOVEMBER 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:

Mr Wafula for claimant

Mugambi for respondent

