



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION E048 OF 2021

MERCY KAWIRA MITHIKA.....PETITIONER

VERSUS

KENYA WOMEN MICROFINANCE BANK PLC.....RESPONDENT

JUDGMENT

1. The Petitioner averred that she was employed by the Respondent in 2012 as a Business Development Officer. She averred that she was deployed to the Maua Unit and was later moved to the Emali Unit where she worked and was later moved to Kiambu Branch where her services were illegally terminated. The Petitioner avers that she received a show cause letter on 6th November 2017 while she was on maternity leave and working at Emali Branch. She avers the allegations of fraud were general and did not refer to any specific incident. She averred that 2 days later she received a letter for invitation to attend a disciplinary hearing scheduled for 10th November 2017 to answer issues of fraud. The Petitioner avers that she informed the Respondent she was on maternity leave and would not attend the disciplinary meeting. She averred that on 9th February 2018 she received another show cause letter and this time it invited her to answer charges of integrity issues. The meeting was scheduled for 13th February 2018 and that the invitation did not disclose any information to enable her to prepare her defence only referring to a letter from the Petitioner's Regional Manager Lower Eastern Region based at Emali Region Office. She avers she was not served with the letter and has to date never seen it. The Petitioner avers that respecting the call for the disciplinary hearing, she made arrangements to travel from Emali to attend the disciplinary hearing at Upperhil. She averred that she went for the disciplinary hearing and explained the manner she had handled the loan to one Teresia Wamaitha where Shadrack Kanoko was a guarantor. She stated that when the loan was non-performing they impounded the motorbike and alcohol stock in line with the loan agreement and that the Respondent's Regional Manager later released the impounded items to the defaulter without her involvement. She avers that the Respondent decided to investigate further and that was the last time she heard of the matter. She avers to her shock she was given a parallel transfer to Kiambu and despite her protest she was compelled to move to Kiambu where she worked diligently until March 2019 when she received another show cause letter making reference to allegations of fraudulent activities. The Petitioner avers the Emali Regional Manager wrote a memo dated 19th February 2019 alleging the Petitioner was involved in fraudulent activities. She avers she never saw the letter. She avers that she was issued a notice 27th March 2019 for a disciplinary hearing on 28th March 2019. The Petitioner avers that despite not knowing the accusation or subject she made arrangements to attend the disciplinary hearing scheduled for 28th March 2019. She averred that at the hearing she discovered the allegations were the same as the previous ones brought out in the disciplinary hearing on 15th February 2018. She averred she reiterated she had disbursed a loan of Kshs. 200,000/- to the client and later a top up of Kshs. 400,000/- to the client. The Petitioner averred the defaulter had a balance of Kshs. 267,977/- when she stopped paying the loan and that the Petitioner followed the guarantors as is the procedure. She denied that she had a share in the loan and sought proof from the Respondent as to this allegation. She averred that the disciplinary meeting did not lead to a comprehensive conclusion and even in the minutes it indicates in the conclusion that she did not accept the allegations made against her. The Petitioner avers despite denying the allegations and the lack of proof the Respondent placed her on one week compulsory leave and on 9th April 2019 when the Petitioner reported to work she was again called to the Head Office by the Human Resource Manager Caroline Mungai who informed her the allegations were serious and in order to be given her benefits she needed to resign. The Petitioner avers that she saw her file and in it there was no recommendation that she should separate with the Respondent though she saw a note from Credit Director who recommended that she should separate from the Respondent despite not being a part of the disciplinary meeting. She avers the Human Resource Manager went on to advise her that a decision had been made and that she would be frustrated and eventually fired so she better cooperate and resign to ensure she gets a good recommendation letter and her dues. The Petitioner avers she was given a sample letter of resignation and was told to copy the same inserting her details. She avers that she was given a letter directing her to clear with the Respondent and unknown to her and without her authority, the Respondent deducted monies from her terminal dues to pay the loan. She averred that the Respondent deducted Kshs. 103,823.44 and a further Kshs. 107,950.20. The Petitioner averred the Respondent went further to deduct monies from 15 SACCO guarantors to the tune of Kshs. 348,350/-. She avers the action of the Respondent resulted to defamation as she was branded as a defaulter, financially reckless person, and a cheat. She thus sought a declaration that the Petitioner's employment with the Respondent was terminated wrongfully, unlawfully and maliciously. She also sought a declaration that the termination was in violation of her rights under Article 41 and 47. She sought a declaration that her termination was in violation of her rights under Section 47 of the Employment Act, a declaration that the actions of the Respondent to deduct monies without justifiable cause from the Petitioner's guarantors defamed and injured the Petitioner. She sought an order that the Respondent refunds the money deducted from the Petitioner's guarantors amounting to Kshs. 348,350/-, a refund of Kshs. 211,773.64 deducted from the Petitioner's terminal dues, 12 months compensation for the unlawful and illegal termination, damages amounting to Kshs. 1,026,900/- being the 21

months balance of the contract at Kshs. 48,900/- a month. She sought Kshs. 10,000,000/- as damages for defamation and costs of the Petition as well interest and any other relief the honourable court may deem fit to grant.

2. The Respondent filed a replying affidavit sworn by Caroline W. Mungai the General Manager Human Resource. She deponed that the Petitioner sought damages for unlawful termination yet the Petitioner wilfully resigned. She avers that the Petitioner was at all material times aware of her obligations under her contract of employment. The Respondent avers the Petitioner was issued with a show cause letter dated 6th November 2017 which did not elicit a response from the Petitioner prompting her to issue an invitation on 9th February 2018 to attend a disciplinary hearing on 13th February 2018 but which meeting was held on 15th February 2019. She deponed that the Petitioner made a raft of admissions as shown in the disciplinary meeting minutes of 15th February 2018 and the Petitioner stated she would cooperate in the investigations. She deponed that the Petitioner requested for a transfer which was accepted by the Respondent and she was posted to Nairobi North Region Kiambu Branch. Having left the station, the investigations were undertaken and the Petitioner was issued with another show cause letter on 20th March 2019. She deponed that the meeting deliberated and considered her defence and evidence against her. She deponed that the committee retreated to make a finding and before it could come to a conclusion the Petitioner tendered her resignation on 8th April 2019. The Petitioner offered to serve one month but having been hamstrung the Respondent accepted the resignation but instead paid a one month notice so as to end the employment relation immediately. She deponed that the Respondent undertook to remit all the Petitioner's dues and issue her with a certificate of service and a recommendation letter upon completion of the clearance process. The Respondent asserts that the dues were tabulated and presented to the Petitioner together with the certificate of service and a recommendation letter. The Respondent asserts that upon termination of the contract, it is the Respondent's policy to deduct monies owed by an exiting employee from her terminal dues. She denied the Petitioner was coerced to resign from the Respondent's employment and avers it was the Petitioner's choice to resign.

3. In response to this the Petitioner filed a further affidavit where she avers that her resignation was not voluntary and that she was under duress to enable her get her benefits. She depones that she was never made aware of the complaints made against her while she was working at the Emali office. She deponed she was never given the written complaint at any time while serving at Emali or to date. She denied the contents of the annexure in respect to Shadrack Kanuko and she termed it a lie and misrepresentation. She deponed that she received a show cause letter dated 6th November 2017 and that the letter did not disclose any particulars of the allegation. She avers the letter made reference to correspondence between her Regional Manager and the General Manager Human Resource one Caroline Mungai which the Petitioner was not privy to. She deponed that she was not able to make an adequate response for the disciplinary hearing which was only 2 days after she received the invitation. She averred that she did not know the allegations against her and therefore she could not find any employee to accompany her at the disciplinary hearing. She denied that she sought a transfer and that she accepted to have the investigations carried out after denying all the allegations made against her. She avers the deduction made against her dues was unlawful as she is not the one who borrowed the money but the Respondent's clients.

4. The matter was disposed of on the basis of the pleadings, documents filed, the affidavits and annexures adduced in evidence and submissions of parties. The Petitioner submitted that she was employed by the Respondent in 2012 until her unlawful termination in 2020. She submits that the Respondent acted maliciously by

- a) Issuing the Petitioner with Notice to Show Cause letters despite lack of evidence against her.
- b) Failing to issue the Petitioner with communications and documentary evidence that was to be used against her.
- c) Failing to give the Petitioner ample time to prepare a defence for the disciplinary hearings.
- d) Illegally transferring the Petitioner without her knowledge and without due reason.
- e) Failing to undertake internal investigations.
- f) Bringing up false allegations after inactivity for one year.
- g) Coercing the Petitioner to resign in order to get her dues.
- h) Unlawfully deducting money from the Petitioner's account.
- i) Causing the Petitioner to be defamed as a defaulter.

5. The Petitioner submits that the issues for determination are whether the Petitioner's termination unlawful and whether the Petitioner entitled to reliefs as sought out in the Petition. The Petitioner submits that the Employment Act is replete with provisions on termination of employment and that Section 45 of the Employment Act provides that no employer shall terminate the employment of an employee unfairly. She submits the law further provides the termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure. She submitted that the resignation tendered by the Petitioner was coerced and that it is the Human Resource Manager, Caroline Mungai who coerced the Petitioner into drafting a resignation letter in order for her to get a recommendation letter and her dues. The Petitioner cited the case of **Steve Mutua Munga v Homegrown Kenya Limited & 2 Others [2013] eKLR**, where Ongaya J. adopted the definition of the term coercion to compromise compulsion by physical force or threat of physical force and includes where a person acts out of fear. She also cites the decision in **Chitechi Mwaro v Sasini Limited & Others [2015] eKLR** where Radido J. held that the Petitioner's resignation was not voluntary as he inveigled by the Senior Management into resigning on threat of dismissal and this pressure was operative cause of resignation as well as the case of **Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018] eKLR** where Rika J. made comparisons with jurisdictions all over the globe to draw conclusions as to whether a letter of resignation constitutes clear and unequivocal evidence of the end of the employment relationship and came to the conclusion that the Petitioner was indeed coerced into writing a resignation letter. The Court further stated the actions of the Bank Managers and other top employees of the Bank by doctoring documents,

failing to conduct investigations and failing to provide reports of the investigations acted as undue pressure which made the Petitioner write the resignation letter. It was submitted that in that case the Court also took notice that the Petitioner had worked for the Employer for multiple years, had a mortgage with the Bank and a family to fend for therefore there would be no good reason for him to wake up one morning, without provocation, or sight of greener pastures to tender his resignation and ruled that the resignation was coerced thus termination was unlawful. The Petitioner prays that this Honourable Court rules the same. The Petitioner submits that the resignation letter written by the Petitioner was handwritten and even the Petitioner herself was not and does not have any copy of it for her records. The Petitioner relied on the the English case of **Kwik-Fit vs Lineham (1992) IRLR 156**, where it was held that if an employee resigns in the heat of the moment and special circumstances exist, the employer should investigate the matter and ascertain the employee's true intention. The special circumstance can include pressure on the employee.

6. The Petitioner submits that Section 45 of the Employment Act also states that the reason for termination has to be fair and procedure of termination have to be followed. On procedure it was submitted that the Respondents sent the first Notice to Show Cause on 6th November 2017 and that in addition to the Notice being sent to the Petitioner while she was on maternity leave, the Notice made reference to a letter from the Petitioner's Manager on allegations of fraud. Two days later, still on maternity leave, the Petitioner received an invitation to a disciplinary hearing dated 8th November, 2017 and that it was at this point that the Petitioner called the General Human Resource Manager and informed her that she was on maternity leave. She submits that when she resumed her duties she was again given an invitation to a disciplinary hearing dated 9th February 2018 to answer charges on integrity issues. The Petitioner submits that she still had no idea why she was being summoned to the Head Office for disciplinary hearing despite being stationed in Emali. She submits she was accorded no documentary evidence to enable her to defend herself or any particulars. She submits that she was only informed of the full charges brought against her during the disciplinary hearing that she had benefitted from a loan she had processed and that the Respondent still did not produce any documentary evidence during this hearing to support their allegations. She submits it was therefore resolved that independent investigations were to be undertaken and she was ready and willing to cooperate. The Petitioner relied on the Court of Appeal decision in **Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**, where while upholding the decision of the Employment and Labour Court, held that the fact that the Respondent, David Wanjau, had no knowledge of the audit findings meant he had no chance of preparing a defence and thus the termination process was unfair. The Petitioner submits that the Court took notice that the Respondent only knew general information on the allegations he was to face but that did not suffice and the Court of Appeal also espoused that the Appellant re-scheduling the disciplinary hearing so as to enable the Respondent to go through the audit reports was inconsequential as the time to prepare the defence was still inadequate negating the principle of fairness in hearings.

7. The Petitioner submitted that she went back to work on the understanding that investigations would be carried out. She submits that however, one year later, she received a Notice to Show Cause letter dated 20th March, 2019 making reference to fraudulent activities and the notice made reference to a memo from the Kiambu Regional Manager and at this point, the Petitioner had been transferred from the Emali Branch to the Kiambu Branch. The Petitioner submits that the Respondent's Kiambu Branch Manager never mentioned any allegations to the Petitioner during the whole time she was working there. The Petitioner submits that the Respondent then sent her an invitation to disciplinary hearing dated 27th March 2019 and the hearing was scheduled for the next day, 28th March 2019. Again, she was given no particulars nor documentary evidence in order for her to prepare a defence. She cited the case of **Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR** where the Court held that procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as there is a pending threat of losing a livelihood. The Petitioner also cited the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where Ndolo J. held that the employee is entitled to documents in the possession of the employer which would assist them in preparing their defence and to call witnesses to buttress their defence. The Petitioner submits that the failure of the Respondents to call Shadrack Kanoko and even failure to inform her of the complaints levelled against her was a fundamental breach to fair administrative action as enshrined in the Constitution. The Petitioner urged the Court to draw the only possible inference from the Respondent's failure to call the defaulter or guarantor as witnesses, produce investigation reports and even documentary evidence like memos as was done by the court in **Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR** was to frustrate the Petitioner and served as an agenda for her termination. The Petitioner submits that during the disciplinary hearing, the Respondents made no reference to any investigations having been done within the one year of inactivity. The Petitioner submitted that a year of inaction on the disciplinary process, is an inordinate delay and infringes on the Petitioner rights protected under Article 47 of the Constitution as held in the case of **Grace A. Omolo v Attorney General & 3 Others [2012] eKLR**. On the matter of fair reason, the Petitioner submitted that the disciplinary process was founded on the allegations that the Petitioner benefitted from a loan that the Petitioner processed. She submits that the Respondents did not provide any documentation by Teresia Wamaitha or Shadrack Kanoko linking the Petitioner to the processed loan. Additionally, the Respondents did not prove or show any evidence that the Petitioner received any amounts. She submits that it is trite law that suspicion is a mere suspicion however strong cannot amount to proof of theft as the Respondents wants the Court to believe. She relied on the case of **Samuel Kamau Kariuki v Teachers Service Commission [2020] eKLR**, the Court held:

“the termination that was proposed by the Disciplinary panel was not backed by the evidence the Respondents asserts it had in its possession. Suspicion however strong never takes the place of evidence and the dismissal was therefore unlawful as there was no proof availed of the impropriety the teacher was accused of.”

8. The Petitioner cited the case of **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K) [2017] eKLR** where the Court of Appeal stated in certainty the importance and mandatory nature of an employer having valid and justifiable reason for termination and that the burden of proving that the reasons for termination was valid always rests on the employer. On the matter of the transfer the Petitioner submits she received a letter dated 23rd March 2018 for a parallel transfer from the Respondent's Emali branch to its branch in Kiambu where she was to report on 3rd April 2018. It is the Respondent's contention, through its Replying Affidavit, that the Petitioner requested for the transfer but they have not brought any documentation to support the same and is bound by its pleadings. The Petitioner placed reliance on the case of **Henry Ochido v NGO Coordination Board [2015] eKLR** where Mbaru J. held that despite transfer being a prerogative of the employer, it is subject to reasonable and sufficient notice to enable the employee report to the new station with requisite facilitation. When this prerogative is used for collateral or arbitrary purposes, it becomes unfair labour practice. The Petitioner submits that the Court in the **Henry Ochido** case (*supra*) espoused that most employment relationships thrive in an atmosphere of good faith and consultations. The Petitioner submits the Respondent herein failed to consult and give sufficient notice to the Petitioner. The ambush embodies the lack of due process and procedural fairness. The Petitioner submitted that based on the foregoing she prayed that this Court finds that the transfer was unprocedurally done and infringed on the Petitioner's rights. On defamation the Petitioner submits her monies

were enough to cater for all the subsisting dues. However, the Respondent cunningly, unreasonably and unlawfully chose to deduct a total of Kshs. 211,773.64 from the Petitioner and Kshs. 348,350/- from the Petitioner's guarantors to repay a loan that she did not benefit from. The Petitioner submits that the Respondent has defamed the Petitioner in three ways – i) By listing her as a defaulter at the Credit Reference Bureau. ii) Causing her reputation to be tarnished as she was labelled as a defaulter, a financially reckless person and a cheat. iii) Causing lost employability. On listing the Petitioner to the Credit Reference Bureau, the Petitioner relied on the case of **Eunice Nganga v Higher Education Loans Board & 2 Others [2020] eKLR** where Makau J. held the Petitioner's name had been unlawfully forwarded to the Credit Reference Bureau. The learned Judge stated;

“This court takes judicial notice to the fact that whoever is ever listed by any of the CRB following an adverse information or report cannot be taken as a person worthy granting loan or doing business with otherwise CRB listing would have no meaning in the business world. It would therefore be extremely difficult for such individual to produce evidence to demonstrate that she applied for a loan with any Bank or Financial institution or business or lost potential clients as no one would wish to give such an individual any chance to initiate such a process for fear of losing finances or being conned. The person loses all respect and dignity”.

9. The Petitioner submits that the Court in the **Eunice Nganga** case (*supra*) went on to award Kshs 10,000,000/- as damages. On causing the Petitioner's reputation to be tarnished, the Petitioner relied on the case of **Jamlick Gichuhi Mwangi v Kenya Commercial Bank Ltd [2016] eKLR** where Aburili J. stated;

“A publication without justification or lawful excuse which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule... even without executing such strong feeling as hatred, contempt or ridicule, a statement may amount to defamation if it tends to lower a person in the estimation of right thinking people generally or tends to make them shun or avoid him.”

10. On the issue of lost employability, **Naqvi Syed Omar v Paramount Bank Limited & Another [2015] eKLR** the Petitioner relied on the holding by Rika J. who stated:

“In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Petitioner had the potential to damage his employability..... in employment related, defamation is based on the old tort of defamation but with a new spin: the employee's injured or damaged employability and not merely the personal stigmatization must be compensated.”

11. She submitted that the court in the **Naqvi Syed Omar** case above was also of the view that where an employee's attractiveness to potential employees is damaged or diminished as a result of the actions of the employer in the process of termination, the court may grant damages to compensate the lost employability. The Petitioner submits that she is therefore unable to get employment or even get any financial assistance from financial institutions due to the listing on the Credit Reference Bureau. The Petitioner cites the decision of the Court of Appeal in **Miguna Miguna v Standard Group Limited & 4 Others [2017] eKLR** where it was held that a Petitioner in defamation ought to establish that there is a defamatory statement and that the defendant himself published or caused another to publish the statement that refers to the Petitioner as the law of defamation is concerned with the protection of reputation. The Petitioner submits that the Respondent failed to conduct independent investigations despite the same being the recommendation during the disciplinary hearing held on 15th February 2018 and also failed to present any evidence as to whether the Petitioner indeed benefited from the processed loan and without consultations, deducted the loan amount of Kshs 211,773/- from her account and Kshs. 348,350/- from the guarantors. She submits that the monies deducted did not form part of any deductible monies in calculation of terminal dues but was a plot by the Respondent to recover loan amounts that were not paid by the necessary account holders. The Petitioner submits that the Court of Appeal in the **Miguna Miguna** case (*supra*) further held that the Respondents therein had not rescinded the defamatory statements or tried to rectify the situation, the Appellant would also be entitled to aggravated damages in addition to the general damages. She submits that taking into account the matter at hand, the actions of the Respondent, past and present, warrant the damages as prayed in the Petition. The Petitioner submits that Section 49 of the Employment Act makes provisions for appropriate remedies for wrongful dismissal. The Act further states that in deciding remedies, the court has to take into account the circumstance of the termination including whether the employee contributed to the termination, length of service with the employer, the reasonable expectation of the employee as to the length of time in which the employment should have continued and expenses incurred by the employee as a consequence of the termination. The Petitioner submits that the Court of Appeal in **Minnie Mbue v Jamii Bora Bank [2019] eKLR** upheld the decision of the Labour Court in granting the Appellant Kshs. 38,666,666/- being the remainder of her contract period. The Petitioner thus urged the grant the prayers as stated in the Petition.

12. The Respondent on its part submitted that the termination was not unlawful as the Petitioner resigned of her own volition. The Respondent submitted that there was no evidence tendered of the alleged coercion by its Caroline Mungai to compel the Petitioner to resign. The Respondent submitted that the Petitioner failed to demonstrate the allegations. It submits that the cases cited in support by the Petitioner stand distinguished as there was no proof of the purported forced resignation. The Respondent submits that the Petitioner sought an upward review of her salary when she moved from Emali a request that the Respondent genuinely considered and effected. The Respondent submitted that further distinguishes her case from those she cited as the Respondent had good intentions and will to get to the root of the allegations made against the Petitioner. The Respondent submits that it was not in the Respondent's control the manner, copies and reasons for tendering the resignation. It submits it was incumbent upon the Petitioner to keep a copy of the resignation. The Respondent submitted that the UK decision in **Kwik-Fit v Lineham** is at odds with the decisions she cites as in one case the employer is to down its tools once the employee resigns while in another the employer is required to inquire into the nature and manner and reason for the resignation which is at odds with judicial precedent in our realm. The Respondent submits that it is on record that the Petitioner resigned in the middle of an ongoing disciplinary process and that she had the option of allowing the process to be concluded, then appeal if dissatisfied and that it was clear the inference was the Petitioner did not want to go through the process for reasons best known to her. The Respondent submits that the resignation was very friendly as the Petitioner thanked the Respondent for the experience, opportunity, wished it the very best in its future and offered to do anything that would be required for a smooth transition. The Respondent submitted that this is not in keeping with a coerced resignation.

13. On procedure, the Respondent submits that the chronology of events is backed by documents which it enumerated as the allegation of

fraud levelled, the letter asking the Petitioner to show cause, the invitation to disciplinary hearing on 10th November 2017, having not received a response the Respondent deferred the disciplinary hearing for February 2018. It asserts that at all times the Petitioner was aware of her right to be accompanied by an employee of her choosing to the disciplinary hearing pursuant to Section 41 of the Employment Act, the disciplinary committee eventually sat on 13th February 2018 and at the meeting the Petitioner admitted to some of the facts leading to the disciplinary process and it was unanimously decided at her request for investigations to be undertaken. The Respondent asserts the Petitioner sought a transfer which was acceded to and even subsequently obtained a salary increment which do not demonstrate bias on its part. The Respondent submits that having left the station where the fraud was alleged the investigations took off in earnest and a disciplinary hearing was held where the Petitioner was heard and having taken the evidence for and against the Petitioner retreated to consider the matter. It asserts the Petitioner then tendered her resignation which the Respondent submits was with a one month notice. It submits it had no choice but to accept the resignation. The Respondent cited the case of **Moses Chavangi v Barclays Bank Ltd Cause No. 694 of 2010 (unreported)** and submitted that the Respondent could not keep on its payroll an employee whose conduct was laced with fraud and impropriety. The Respondent submits that the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** stands distinguished in this case. The Respondent submits that if at all the Petitioner felt that the timelines given during the disciplinary process were not sufficient, it was open to her to request for a review of the same or extension of relevant periods and that she did not do so, and once again, perhaps was happy to await a chance to utilize this as a demonstration of alleged unfairness. The Respondent submits the Petitioner however participated in the process until her resignation and that her letter of resignation did not capture this as one of the reasons she resigned. The Respondent submits this effectively distinguishes the authorities of **Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR**, **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** and **Grace A. Omollo v Attorney General & 3 Others [2012] eKLR**.

14. The Respondent submits that the length of the disciplinary process as well as the communication and documents exchanged is on all fours with the case of **Justus Wambua Kavyu v Kenya Commercial Bank Ltd [2016] eKLR** on which it placed reliance. It was submitted that the prayers in one of the bands of relief sought is for a declaration to be made that the alleged termination was unconstitutional and violated her constitutional rights under Articles 41 and 47 of the Constitution of Kenya and Section 47 of the Employment Act, 2007. The Respondent submits that the Petitioner did not particularize or reveal the rights violated or the manner in which the rights were violated and as such the Petitioner is litigating in the air.

15. As to fair reason, the Respondent submits that there existed fair reason evidenced by documents on record to take the action contemplated against the Petitioner in line with the two authorities cited hereinabove of **Cause No. 694 of 2010 – Moses Chavangi v Barclays Bank Ltd** and **Justus Wambua Kavyu v Kenya Commercial Bank Ltd [2016] eKLR**. The Respondent submits that the conduct of the employee and her fiduciary duty to her employer and the employer's customers required her to act in a manner that is beyond reproach. The Respondent submits it had in its possession documentary evidence from one of its customers alleging fraudulent dealings by the Petitioner.

16. On the matter of the parallel transfer, the Respondent submits that as hereinabove, transfers are an administrative tool and a prerogative of the employer to organize its work place and workforce for maximum efficiency and productivity. It submits the allegation by the Petitioner that she did not seek the parallel transfer is unsupported by any evidence. If it is indeed true that she did not wish to be transferred, she ought to have resigned rather than seek a pay raise and proceed to report to her new stations. In any event, she did not cite this in her letter of resignation which casts more doubt into her allegations. As to the issue of defamation, the Respondent submits that a party cannot bring a claim for defamation through a petition. As such, the limb of defamation ought not to be entertained in the petition as the Petitioner should bring it through the legitimate forum. It further submits that be that as it may, the Petitioner has not pleaded the particulars of defamation and she has not adduced any evidence or demonstrated how her person and character have suffered as a result of the alleged actions by the Petitioner. It submits she has not called any evidence of injured reputation from any witness, or any result of suffering financial ignominy or rejection from employment. It submits her claim for defamation therefore remains unsupported besides being lodged vide the wrong forum. The Respondent further submits that it is the Petitioner who resigned on her own volition. How then can she proceed to lay blame for this upon the Respondent? It would have been different if she had gone through the entire disciplinary process and for the Respondent to terminate her employment and publicize or cause to be publicized her termination and labelling her as a defaulter, cheat or fraudster, she did not give the parties a chance to determine this to its logical conclusion. The Respondent submits the cited authorities are therefore distinguishable in this case for the sole reason that it is the Petitioner who resigned. On the matter of violation of her Constitutional rights, the Respondent submits other than try and impute blame upon the Respondent for her resignation, the Petitioner has not demonstrated by concise pleading and particularization of what rights were infringed and the manner in which they were infringed and the Petition is based on generalized allegations without factual basis or evidentiary support. The Respondent relies on the case of **Augustino Mbugua v Inspector General of Police & Another [2020] eKLR** in which the Court of Appeal quoted the case of **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where the Court stated;

“... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also Meme v Republic & Another [2004] 1 KLR 637) 20.

The Respondent also cited the Court of Appeal decision in **Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR**, which stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

17. The Respondent submits that this Petition and the reliefs sought therein must fail for the reasons it is the Petitioner herself who resigned and has not placed any material on record to prove otherwise; the Petitioner has not demonstrated to the required threshold the allegations of violation of her rights under the Constitution of Kenya 2010 and the Employment Act of 2007; the Respondent had justifiable reason to

effect deductions from her terminal dues for reasons demonstrated herein and as such no refund is merited to the Petitioner or her guarantors. In any event, the guarantors are not party to this suit and she has not demonstrated any authority or legal basis to sue and plead on their behalf; having resigned on her own volition, she does not merit compensation for unlawful and unfair termination; Section 49(4)(d) expressly ousts specific performance in employment contract unless for terms to that effect couched in the contract. None has been demonstrated by the Petitioner; Having failed to meet the threshold for proof of violation of her rights as alleged, she does not merit any damages; the claim for defamation is brought through an improper forum and cannot be entertained vide a petition and must thus fail. The Respondents thus submits that this Petition ought to be dismissed with costs.

18. The Petitioner seeks a raft of reliefs on account of the termination of the contract. She asserts the same was not voluntary but coerced. The Petitioner was taken through a disciplinary process that commenced in 2017 with a show cause. She received a letter to which she did not respond to and the reason given is that she was on maternity leave. The Respondent ought to have know this. She did appear for hearing in February 2018 and the outcome was that further investigations were to be undertaken. The Respondent did not call her for further enquiries and she continued to work in Kiambu Branch which was her new posting. Nevertheless, when she finally attended a disciplinary hearing in 2019 there was a reference to the previous hearing conducted in February 2018. From a reading of the disciplinary hearing minutes it is apparent there was an alleged complaint which both the Petitioner and the Respondent agree was never served upon her. She was notified of the alleged impropriety at the hearing since no other communication is exhibited giving particulars. The Petitioner cited the case of **Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another** (*supra*) where Radido J. held

78. Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood.

I agree with my brother Radido J. that the tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken but also documentation to prepare a defence as was held in the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where my sister Ndolo J. held that the employee is entitled to documents in the possession of the employer which would assist them in preparing their defence and to call witnesses to buttress their defence. The Petitioner did resign, however the process that precipitated the said resignation was one that would suggest the resignation was not entirely devoid of undue influence from the Respondent. The Petitioner has in the Court's view established there was unfairness in the hearing prescribed under Section 41 thus rendering the termination of the contract by her hand *fait accompli*. The Petitioner suggested the Respondent defamed her but in using a Petition to mount her suit the forum for finding she was defamed was not triggered appropriately. She did not particularise the defamation or adduce evidence from witnesses or persons who would consider her reputation as injured by the Respondent deducting the sums from the guarantors. The Petitioner could not be liable for the sums unpaid by the clients of the Respondent unless she was a guarantor. No such evidence was adduced in respect of the sum of Kshs. 211,773.64 deducted from the terminal dues. She did not indicate the extent of her liability to the Respondent and as such it would be difficult for the Court to determine whether the guarantors to her loan were inappropriately sanctioned by the Respondent by having shares deduction to meet the part of their obligations for guaranteeing the Petitioner's loan(s). The Petitioner did not demonstrate she was entitled to payment of the sums for the balance of her contract. The case of **Minnie Mbue v Jamii Bora Bank** *supra* cited by the Petitioner is distinguishable from that of the Petitioner as in the case where the Court of Appeal upheld this Court's determination related to an express term in the contract which the Court of Appeal found to be applicable as was held by the Court below. It would therefore not follow that the Petitioner herein is entitled to recover the sums claimed for the balance of her interrupted service which was 21 months.

19. In the final analysis the court enters judgment for the Petitioner as follows:-

- a) A refund of Kshs. 211,773.64 deducted from the Petitioner's terminal dues,
- b) 2 months salary as compensation for the termination – Kshs. 97,800/-,
- c) Costs of the suit limited to the sums granted in a) and b) above
- d) Interest at court rates on a) and b) above from the date of this judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021

Nzioki wa Makau

JUDGE