

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 24 OF 2017

LYDIA KAGURU MAKATHIMO.....CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued seeking to recover for the wrongful and unfair termination from employment. The Claimant was a customer service officer at the time of the dismissal on 7th August 2017. She was issued a show cause letter and asked to explain the vault cash deposit procedures. She explained that the officer concerned was the then quality manager of the Respondent's Maua Branch one Moses Ngelel who owned up and made good the loss. She was called for a disciplinary hearing over the matter and subsequently issued with another show cause letter alleging she had stolen money from a customer's account an allegation the Respondent knew to be untrue as the customer had withdrawn the cash himself. The Claimant was heard on 18th July 2017 having been invited on 14th July 2017 for the hearing. She was able to table supportive and documentary evidence to counter the allegations but remained on suspension till her dismissal on 9th August 2017 vide a letter dated 7th August 2017. She sought for payment of her salary up to the date of retirement – 20 years amounting to Kshs. 36,848,640/-, 12 months salary compensation – Kshs. 1,842,432/-, unpaid half salary for 3 months – Kshs. 230,304/- costs of the suit and interest. She also sought reinstatement without loss of benefit.

2. The Respondent in its defence averred that the loss occurred during her watch as a joint vault custodian and was required to count the cash in the vault to confirm it was intact. The Respondent submitted that Moses Ngelel never admitted to stealing the money but he took the responsibility for the loss as a custodian of the vault and repaid it. The Respondent averred that a customer named Jacob Koome made a complaint that the Claimant had debited his account with Kshs. 20,000/- and that the Claimant had caused the customer to be charged with false pretences while he was a witness to an agreement where the Claimant had lent Kshs. 300,000/- to a Geoffrey Kimathi. The Respondent averred that the Claimant had engaged in a business that was in direct competition with the Respondent. The Respondent averred that it followed the disciplinary process as required and the Claimant granted an opportunity to present her defence. The Respondent sought the dismissal of the Claimant's suit with costs.

3. The Claimant testified and reiterated that she was innocent of the charges levelled against her by the Respondent. She stated that the loss she was accused of was owned up to by a colleague who made good the loss. She also indicated that the Respondent's customer made the withdrawal from the account and the Respondent had evidence of this on the banking system. She stated that she did not have teller rights and thus was unable to withdraw any money from the account. She thus sought her dues as claimed in the suit. The Respondent failed to avail a witness and parties were directed to file submissions.

4. The Respondent filed submissions on 10th December 2018 and the Claimant filed her submissions on 11th December 2018. The Claimant submitted that she was not properly dismissed as the reasons given for termination were not established against her. She cited Section 43 and 45(2) of the Employment Act and the case of **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** where the court stated the legal fairness requirements for termination of employment on grounds of misconduct (including gross misconduct), poor performance or physical incapacity as set out in Section 41 of the Employment Act. She submitted that her termination from employment was not only substantively but also procedurally unfair. The case of **John Wafula Simiyu v Star Publications Limited [2016] eKLR** was also cited in support of these arguments. The Claimant submitted that she was entitled to the relief sought calling to aid the case of **James Kariuki Wanyamba v Kagumo Teachers College [2015] eKLR** on the doctrine of partial reinstatement. She urged the court to grant her prayers as sought in the statement of claim.

5. The Respondent submitted that the Claimant had failed to adhere to the operational procedures for the Bank and thus caused the loss which Moses Ngelel settled. The Respondent submitted that did not absolve her from blame as she was a co-custodian of the bank's vault as she was the dual custodian in charge of the vault alongside Moses Ngelel. The Respondent submitted that the Claimant allowed Moses Ngelel to man the vault alone contrary to bank regulations hence the losses. The Respondent asserts the Claimant was given a fair hearing and that the Claimant was found guilty of breaching the code of regulations for the bank whilst also engaging in a money lending enterprise. The Respondent submitted that the term unfair labour practices was not defined in statute or the Constitution and citing **Black's Law Dictionary Ninth Edition**, stated that the term 'fair' refers to impartial, just, equitable, disinterested, free of bias or prejudice. The Respondent submitted that the dismissal of the Claimant was thus not unfair or contrary to the provisions of Section 45(1) or 45(4)(b) of the Employment Act. The Respondent cited the cases of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** on procedural and substantive fairness and submitted that the Claimant was accorded the safeguards in law. The Respondent submitted that the Claimant had a burden to prove there was unfair termination or wrongful dismissal and if *prima facie* she discharges the burden, the employer has a burden to rebut that evidence by demonstrating that there was a valid reason to terminate the employment of the Claimant and in effecting the dismissal, fair procedure was followed. The Respondent submitted that the Claimant did not prove there was unfairness in her dismissal and that there was evidence the Respondent followed the procedure prescribed in law and the Bank's disciplinary process. The Respondent cited the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** where the court dismissed a suit despite there being no witness for the Respondent as the

Claimant in that case had contradicted his own testimony while on oath. The Respondent urged the court to dismiss the Claimant's suit with costs.

6. I have considered the testimony of parties, their pleadings and the submissions filed in coming to this determination. The Claimant's dismissal though procedural, was not justified. The Claimant was not guilty of any of the reasons advanced by the Respondent to justify the termination thus disentitling the Respondent to the protection of Section 43 and 45 as the dismissal was not for a valid reason. The Respondent therefore would be liable to the Claimant for the unlawful and unfair dismissal. The Claimant seeks the payment of her salary till retirement date. That cannot be possible as held in the case of **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR** where Rika J. emphasized proportionality and fairness in evaluating the suitability of employment remedies. While dismissing the claim by the Claimant in relation to future earnings, Rika J stated that the Claimant in that case was not entitled as he would not have rendered any service to the Respondent for those years and the claims for unpaid salaries in future were therefore untenable. Similarly, the claims for payment whether stated to be 'partial reinstatement' a doctrine of dubious provenance in employment law. The only partial reinstatement in the realm of law is in relation to mortgages. In my view, the Claimant attempted to introduce a new concept without legal foundation. As courts have held, only remedies prescribed in law can be availed. There is only compensation in terms of Section 49(1) of the Employment Act for the loss the Claimant asserts she suffered. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. Compensation in terms of Section 49(1) for the maximum 12 months Kshs. 1,842,432/-,
- b. Unpaid half salary for the 3 months of suspension Kshs. 230,304/-
- c. Costs of the suit.

It is so ordered.

Dated and delivered at Meru this 6th day of February 2019

Nzioki wa Makau

JUDGE