



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 107 OF 2014**

**TERESIA WANJIRU NDEGWA.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK LTD.....RESPONDENT**

**JUDGMENT**

1. Teresia Wanjiru Ndegwa (Claimant) in a Cause commenced against Barclays Bank Ltd (Respondent) alleges that the termination of her employment through a letter dated 12 July 2012 was unfair.
2. In a Response filed on 11 June 2014, the Respondent asserted that the termination of employment was fair because it followed a fair process before the termination and that investigations had established that the Claimant was involved in fraudulent activities.
3. The Claimant testified while the Respondent called a Forensic Investigator to testify on its behalf.
4. The Claimant filed her submissions on 5 October 2016, while the Respondent filed its submissions on 24 October 2016.
5. The Court has given due consideration to the pleadings, evidence and submissions and identified the issues for determination as, *whether the termination of the Claimant's employment was unfair and if so appropriate remedies.*

**Procedural fairness**

6. The Claimant did not really challenge the procedural fairness of the termination of her employment.
7. However, the Claimant was notified of a disciplinary hearing through a letter dated 27 June 2012. The allegations as framed in the letter were a fraudulent loan application for Kshs 500,000/- at Gilgil branch and generation of a forged audit report.
8. The letter advised the Claim of her right to be accompanied during the hearing.
9. The hearing took place on 5 July 2012 and the minutes which were produced in Court show that the Claimant was present and was examined and made responses and signed the minutes as an accurate record of the hearing.
10. After the hearing, the Claimant's employment was terminated on 12 July 2012, and she was informed of a right of appeal which she exercised through a letter dated 18 July 2012.

11. An appeal hearing was held on 7 August 2012 and the Claimant attended. The decision to terminate the Claimant's employment was upheld.

12. The Court has considered the evidence presented before it and is satisfied that the Respondent was in compliance with the procedural fairness requirements of section 41 of the Employment Act, 2007 and finds the termination of employment procedurally fair.

### **Substantive fairness**

13. Pursuant to sections 43 and 45 of the Employment Act, 2007, an employer has the obligation to prove the reasons for terminating the services of an employee and that the termination was for valid and fair reasons.

14. The reasons given by the Respondent for terminating the services of the Claimant were fraudulent loan application for Kshs 500,000/- at Gilgil branch and generation of forged audited accounts.

15. In an attempt to prove the reasons and demonstrate that the termination was for valid and fair reasons, the Respondent called one of its Forensic Investigators to testify.

16. The Investigator produced an investigations report on the outcome of investigations he had carried out.

17. According to the report, the fraud was a syndicate or conspiracy within the Central Rift region to defraud the bank, and interviews and investigations involved suspects and employees of the bank.

18. The Court will examine whether the Respondent established or has proved the role played by the Claimant.

### *Generation of forged audit reports*

19. According to the investigations report, the trail on forged audit reports led to the Claimant, who allegedly openly solicited fellow employees to refer to her customers who required audit reports for purposes of business loan applications.

20. Further, an examination of an account the Claimant held jointly with her husband revealed a suspicious deposit of Kshs 18,000/- with a narration of AUDITED ACCOUNT FEES-TELIAN ADS, an entity which the Claimant admitted to owning.

21. The report noted that the Claimant had nevertheless denied knowledge of the Kshs 18,000/- deposit and which she assumed could have been a transaction involving her husband with whom she held the account.

22. The report captured the husband as owning up to knowing something about the audit report.

23. As to the beneficiary of the audit report (director of Shani Engineering), the investigations report revealed that the director indicated that he did not know either the Claimant or the husband. According to the director, the audit report was arranged through another employee Michael Maina who also authorised the transfer voucher for Kshs 18,000/- (he was subsequently dismissed and the Court found the dismissal unfair).

24. From this narrative given by the Investigator, the Court finds at most a tenuous link between the Claimant and the forged audit report. That link appears to be the Claimant's husband.

25. Even the Respondent's investigator stated that his investigations did not establish any link between the Claimant and the forged audit report allegedly originating from the audit firm of Kariuki Kinja & Co., and that there were grey areas.

26. The customer for whom the audit report had allegedly been prepared (director, Shani Engineering) pointed a finger at another employee and not the Claimant.

27. In the Court's view, there is a real probability of one joint account holder not knowing about the transactions in a joint account.

28. The Court also notes that the investigations report found out weaknesses in the systems and made recommendations for firming up of those processes.

### **Kshs 500,000/- loan application at Gilgil branch**

29. The investigations report did not establish any link, even a tenuous link between the Claimant and the application for the Kshs 500,000/- loan application at Gilgil branch.

30. The Respondent's witness categorically stated that his investigations did not show any involvement by the Claimant in regard to the loan application.

31. Upon consideration of the material placed before it, the Court reaches the conclusion that the Respondent has failed to discharge the burden placed upon it by sections 43 and 45 of the Employment Act, 2007 and finds the termination of the Claimant's employment substantively unfair.

### **Appropriate remedies**

32. The Claimant sought a declaration, damages for unfair labour practices, and damages for unfair termination of employment, and or in the alternative reinstatement.

### ***Reinstatement***

33. Reinstatement would not be an appropriate or effective remedy in this particular case because of the lapse of more than 3 years since separation.

### ***Damages for unfair labour practices***

34. The Claimant did not prove any unfair labour practice on the part of the Respondent to warrant the pleaded damages.

### ***Damages for unfair termination of employment***

35. This remedy is generally called compensation in the field of unfair termination law. It is a discretionary remedy and the factors that the Court should consider have been outlined in section 49(4) of the Employment Act, 2007.

36. The Claimant served the Respondent for about 7 years, and considering the period of employment, the Court is of the view that the equivalent of 8 months gross wages would be appropriate and fair (testimony that salary at separation was Kshs 126,000/- was not controverted).

### **Conclusion and Orders**

37. The Court finds and holds that the termination of the Claimant's employment was substantively unfair and awards her and orders the Respondent to pay her

(a) Compensation                      Kshs 1,008,000/-

38. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 28<sup>th</sup> day of October 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

For Respondent

Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant

Nixon