



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 544 OF 2013**  
**BANKING INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT**  
**V**  
**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. This action is brought by the Claimant Union on behalf of its member **Jacqueline Karenya Abwao** (the Grievant) who was an employee of the Kenya Commercial Bank, the Respondent herein. The Grievant's employment with the Respondent was governed by a Collective Bargaining Agreement (CBA) negotiated between the Claimant and the Kenya Bankers Association whose umbrella covers the Respondent.
2. The claim is contained in a Statement of Claim dated 17<sup>th</sup> April and filed in Court on 18<sup>th</sup> April 2013. The Federation of Kenya Employers filed a Memorandum of Defence on behalf of the Respondent Bank on 12<sup>th</sup> July 2013. The matter was heard on 29<sup>th</sup> May and 22<sup>nd</sup> October 2014, with the Grievant testifying for the Claimant and **Margaret Omuse** and **Joel Barmao** testifying for the Respondent.
3. The brief facts of the case are that the Grievant, while working as a teller at the Respondent's **Marigat Branch**, mishandled a customer by the name **Katuwet J. Kiboino**. The Grievant was also accused of previous acts of misconduct. Following the incident involving **Kiboino**, the Grievant was dismissed from employment.

**The Claimant's Case**

4. The Claimant pleads that the Grievant was initially employed at the Respondent's **Narok Branch** as a Graduate Clerk effective 3<sup>rd</sup> January 2006. She was subsequently confirmed in her appointment with effect from 3<sup>rd</sup> January 2007 and was transferred to **Njoro Branch** in December 2010 and to **Marigat Branch** in June 2011. At the time of her dismissal on 8<sup>th</sup> February 2012, the Grievant worked as a **Biashara Club** teller at **Marigat Branch**.
5. Prior to the incident at hand, the Grievant had received a memo dated 12<sup>th</sup> July 2011 from the Acting Operations Manager on allegations of a cash difference of Kshs. 1,863.50 and use of abusive language in the office. She received a similar memo from the Branch Manager on 13<sup>th</sup> July 2011. The Grievant duly responded to the allegations made against her and on 8<sup>th</sup> August

2011 she was issued with a 1<sup>st</sup> warning letter.

6. On 9<sup>th</sup> January 2012, the Grievant was serving as a teller at the Respondent's **Biashara Club** queue when a customer who was not a **Biashara Club** member jumped the queue and went straight to the counter. The Grievant explained to the customer that the queue was reserved for **Biashara Club** customers who were charged a monthly premium fee of Kshs. 1,000.

7. The customer then complained to the Branch Manager and the Grievant was asked to explain what had transpired, which she did. The Grievant's employment was subsequently terminated on 8<sup>th</sup> February 2012. Her appeal against the dismissal was unsuccessful.

8. The Claimant seeks the following reliefs on behalf of the Grievant:

- a. A declaration that the Grievant's dismissal was wrongful and unfair;
- b. Payment of salary from the date of dismissal to the date of the award;
- c. Re-engagement;
- d. Exemplary damages for malicious dismissal (Kshs. 5,000,000) ;
- e. Refund of loan overpayment (Kshs. 700,000);
- f. 12 months' salary in compensation for unfair termination;
- g. Costs and interest

### **The Respondent's Case**

9. In its Memorandum of Defence filed on 12<sup>th</sup> July 2013, the Respondent admits having employed the Grievant effective 3<sup>rd</sup> January 2006, initially as a Graduate Trainee at a consolidated monthly salary of Kshs. 32,000. At the time of her dismissal on 8<sup>th</sup> February 2012, the Grievant worked as a teller at the Respondent's **Marigat Branch**.

10. According to the Respondent, the Grievant shouted at and used insulting language towards the Respondent's customer, **Katuwet J. Kiboino** who had entered the bulk cash cubicle to count his cash at the Branch on 9<sup>th</sup> January 2012. The customer proceeded to the banking hall where he joined the queue. When his turn to be served came, the customer went to the counter which was manned by the Grievant who declined to serve him directing him to another teller, **Judith Koech**. The customer then started complaining loudly in the banking hall prompting the Respondent's Customer Service Consultant to inquire what the matter was.

11. The customer was eventually referred to the Acting Branch Manager, **Karen Kendagor** who attended him in the presence of the Manager, Service Quality and Compliance, **Margaret Omuse**. The Great Rift Regional Office then made a report to the Respondent's Director of Human Resources.

12. In its Memorandum of Defence, the Respondent details the Grievant's disciplinary record citing letters to show cause and a caution issued on diverse dates between February 2007 and August 2008 on allegations of declining to serve a customer, absenting herself from work without permission and occasioning an error in giving out change to a customer. Further, the Respondent cites an incident on 25<sup>th</sup> February 2011 where the Grievant was accused of mishandling an elderly and illiterate customer, **Grace Kabura Wanjohi**. Additionally, the Grievant was issued with a show cause letter on 12<sup>th</sup> July 2011 on allegations of use of abusive and insulting language towards the Operations Manager on 11<sup>th</sup> July 2011.

### **Findings and Determination**

13. The issues for determination in this case are as follows:

- a. Whether the Respondent had a valid reason for terminating the Grievant's employment;
- b. Whether in effecting the termination the Respondent observed due process;
- c. Whether the Grievant is entitled to the reliefs sought.

### **Reason for Termination**

14. Section 43(1) of the Employment Act, 2007 provides that:

***(1) In any claim arising out of termination of a contract , the employer shall be required to prove the reason or 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.***

15. Section 45 itself provides as follows:

***(1) No employer shall terminate the employment of an employee unfairly.***

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employees conduct, capacity or compatibility ;or***

***(ii) based on the operational requirements of the employer and that***

***(c) That the employment was terminated in accordance with fair procedure.***

16. The Grievant's letter of dismissal dated 8<sup>th</sup> February 2012 states *inter alia*:

***“This has reference to the correspondence exchanged and discussions held with your line Manager.***

***We advise that it has been established that you committed acts of gross misconduct, details of which are well within your knowledge.***

***As a consequence, you have been dismissed from employment with effect from today's date in terms of Clause A5a(iii) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical, Technical and Subordinate Staff.***

***Yours faithfully,***

***JOEL BARMAO***

***BRANCH MANAGER MARIGAT***

17. From this letter, it would appear that the termination of the Grievant's employment was motivated by acts amounting to gross misconduct. These acts were however not specified in the termination letter. Further, from the Respondent's pleadings, it emerges that the Grievant was accused of many acts spanning a period of over a year.

18. From the evidence on record, the Court noted that the Greivant was issued with show cause

letters on all past allegations to which she duly responded. The Court therefore found it strange that the Respondent would raise these past issues as justification for the termination of the Grievant's employment.

19. In proper human resource management and practice, disciplinary cases against employees are to be dealt with decisively and in a timely manner. Once an employer issues a show cause letter to an employee to which the employee responds, the disciplinary process kicks in and the employer is under an obligation to move the process forward and bring it to closure one way or another. An employer who for some reason abandons a disciplinary process mid stream cannot be allowed to use the same accusations made against an employee to justify future disciplinary action.

20. To my mind, once an accusation is made the subject of some form of a disciplinary process whether completed or not, the accusation is quenched and cannot be used as a justification for future disciplinary action. To rule otherwise would be to allow employers to pile allegations against an employee much like an unforgiving spouse. Such practice has no place in the workplace.

21. This does not however bar an employer from considering an employee's past record in determining the severity of disciplinary action for future wrongs. The Court may also consider such past record in determining an industrial dispute arising from disciplinary action taken against an employee.

22. That said, I must reiterate the holding of this Court in *John Otieno Mukabi Vs Kenya Builders & Concrete Ltd [2014] eKLR* that:

***“an employer is required to provide the reason for termination of employment of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause. Once an employer decides to take the ultimate disciplinary action of terminating the employment of an employee, the reason for the termination must be clearly stated in the letter of termination. By the time an employee exists from employment on account of termination, the reason for their termination must be clear.”***

23. My analysis of the circumstances surrounding the termination of the Grievant's employment does not reveal any valid reason for the termination. Moreover, since the Grievant was not afforded an opportunity to face her accusers in a disciplinary setting, the Court was unable to establish whether in fact the allegations made against her by **Kiboino** were true. Further, none of the Respondent's employees who were said to have witnessed the incident and whose written statements were filed in Court were called to confirm their statements *viva voce*.

24. For the foregoing reasons, the Court finds that the Respondent failed to establish a valid reason for the termination of the Grievant's employment and the termination was therefore unfair for want of substantive justification.

### **Termination Procedure**

25. The termination of the Grievant's employment was triggered by a complaint made against her by the Respondent's customer **Katuwet J. Kiboino**. A reading of the termination letter however reveals that in taking the decision to dismiss the Grievant, the Respondent took into account past acts of misconduct assigned to the Grievant.

26. Section 41 of the Employment Act 2007, establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the

employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the  
employee or their representative;

27. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

28. According to the Grievant's letter of termination dated 8<sup>th</sup> February 2012 the termination was effected pursuant to Clause A5a(iii) of the CBA which provides for summary dismissal in the event of use of abusive or insulting language. There was however no evidence that in effecting the Grievant's termination, the Respondent observed the disciplinary procedure set out in the CBA and Section 41 of the Employment Act, 2007. Indeed, the Respondent's Service Quality and Compliance Manager, *Margaret Omuse*, told the Court that prior to the termination of the Grievant's employment, there was no disciplinary hearing. The Court therefore finds that the termination was unfair for want of due process as well.

### **Reliefs**

29. Having found the termination of the Grievant's employment unfair both substantively and procedurally, I award her six (6) months' salary in compensation. In making this award, I have taken into account the Grievant's length of service but also her negative employment record, which denies her an order for reinstatement. The claims for exemplary damages and refund of loan overpayment were not proved and are dismissed. Since none of the parties pleaded the Grievant's salary as at the time she left employment, I direct the Respondent to tabulate this claim based on the last monthly gross salary payable to the Grievant subject to statutory tax only.

30. Each party will bear their own for costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT NAIROBI THIS 20<sup>TH</sup> DAY OF  
JANUARY 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Munoru (Union Representative) for the Claimant

Mr. Molenje for the Respondent