



**Moreno v Credit Bank Limited (Cause 1366 of 2018)
[2024] KEELRC 2371 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2371 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1366 OF 2018
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN

CAROLINE NYAMBURA MORENO CLAIMANT

AND

CREDIT BANK LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Memorandum of Claim dated 7th August, 2018 and pleaded inter alia as follows:
 - a. That the Claimant was employed by the Respondent and through her diligence and honesty she rose through the ranks and was promoted on 22nd July, 2016. That the Respondent suspended her on 26th August, 2016 alleging mobile banking loss of a customer's account. That she was called upon to show cause which she complied with.
 - b. The Claimant averred that the Respondent thereafter vide a letter dated 20th September, 2016 terminated her employment on account of investigations conducted and disciplinary proceedings conducted. That she was not called upon to attend proceedings and tender her defence to the allegations. That her response to the show cause letter ought not to have been treated as a full defence in absence of personal attendance and oral presentations.
 - c. The Claimant further averred that apart from being informed of the allegations no formal/ Material documents relating to the accusations were availed to her so as to fairly and reasonably accord her a chance to defend herself. That the Respondent violated her rights to rule of natural justice, fair hearing and reasonable administrative action.
 - d. The Claimant averred that the disciplinary hearing was done suo moto in her absence without according her a fair hearing hence a violation of her rights to Constitution and *Employment Act*. That despite her asking to be supplied with minutes and/or proceedings of the disciplinary



hearing leading to her summary dismissal and notice the Respondent has refused/failed and / or neglected to do so.

- e. The Claimant averred that her summary dismissal was unlawful and unfair despite her diligent and honest dedication to duty for a period of over six years and the Respondent refused to issue her with certificate of service. That the manner and procedure her services were terminated was without legal and /or evidentiary basis hence against the law. That at the time of her termination she was earning a consolidated net salary of Kshs 111,119/=.
 - f. The Claimant averred that on account of the unfair termination she was unable to support herself and family financially and now seeks for damages/compensation as provided by the law.
2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. 12 month's salary compensation for wrongful and unfair termination
 - b. Costs plus interest of this Claim
 3. The Respondent filed its Response dated 26th October,2018 and averred inter alia as follows;
 - i. The Respondent admitted the fact that the Claimant was their employee who was promoted on 22nd July,2016 and denied all the other allegations.
 - ii. The Respondent averred that the Claimant was first suspended and thereafter dismissed from the Respondent's employment after investigations conducted by the Respondent revealed the loss of Kshs 1,237,600/= incurred by the Respondent was as a result of her negligence and failure to adhere to the Respondent's rules, policy and procedure.
 - iii. The Respondent further to the above averred that the Claimant in particular on 17th December,2015 activated a dormant account No. xxxxx of one Fiaz Shokatali Kurji (the customer) without any instructions from the customer or laid down process and procedure laid down by the Respondent. That she reviewed and approved a mobile and internet banking application form in respect of the said account without following the due process or following the Respondent mobile banking procedure Manual which failure facilitated transaction in the customer's said account hence the Respondent lost a sum of Kshs 1,237,600/= through the fraudulent transactions in the customer's account.
 - iv. The Respondent averred that prior to the Notice to show cause issued to her whose response was found not to be satisfactory the Claimant had been given audience on three different occasions but she failed to mend her ways. That due to the seriousness of the breaches committed by the Claimant of Respondent's Mobile banking procedure manual and other rules and regulations the Respondent was justified in summarily dismissing the Claimant.
 - v. The Respondent averred that the Claimant was given an opportunity to defend herself in respect of the said accusations but her response was found not satisfactory and her claim of breach of laws was without merit. That the Claimant was furnished with the necessary documents which led to her dismissal.
 - vi. The respondent averred that the Claimant's summary dismissal was lawful and fair in the circumstances since the Respondent lost a sum of Kshs 1,237,600/= which it reimbursed to the customer due to negligence of the Claimant in activating the customer's dormant account. That the Claimant's allegations that she could not support her family financially were baseless since the employment could be terminated by giving one month notice or payment in lieu of notice.



- vii. The Claimant averred that the Claimant's summary dismissal was in accordance with the Respondent's HR Policy and the provisions of section 44(3) and (4) of the [Employment Act](#).

Evidence

4. The Claimant's case was heard on 5th October, 2023 and 21st November where the Claimant herein (CW1) testified and adopted her statement and documents filed as her evidence in chief. CW1 testified that she was an employee of the Respondent from November, 2016 to August 2016.
5. CW1 testified that she was aware of the Mobile internet banking form such that if the form is taken to a branch where the account is not domiciled it will be traced and the form verified and sent to domiciled bank for further verification and that a stranger can bring the form but it has to be verified and the customer contacted to confirm if they sent the stranger.
6. CW1 testified that dormant account was activated by around five officers and she could not activate the account alone. That she was terminated on 26th August, 2016 given a Notice to show cause which she responded to. That she was never called to a disciplinary hearing or opportunity to defend herself before termination. That she was never given minutes of the decision of disciplinary committee despite asking for them and also not given certificate of service.
7. In cross examination CW1 confirmed that her contract provided for termination and she produced her termination letter which provided for summary dismissal. That she was conversant with the Bank procedure where the bank had a provision for Know your Customer (KYC). That KYC was not restricted to a branch and any time one is transacting, the customer information gets retrieved from the system including photo and ID.
8. CW1 confirmed that the bank had a mobile banking procedure and that she never had access to Banking Procedure Manual but she was conversant with account activation and banking procedure. That she was supposed to match information given by the customer and static data. That in case of variance the Bank would call the customer to update the information and staff were not authorized to act outside this.
9. CW1 confirmed that she was not at Koinange Branch when the customer purportedly delivered the documents himself. That she believed that the customer was the one who delivered the documents because the customer service officer at Koinange had signed the documents. That calling the customer was not contrary to regulations. That the front office customer service was responsible for updating customer data by calling the customer to come and do so.
10. CW1 confirmed that their branch was the implementing branch. That she was bound to comply with the regulations. That there was procedure for activating dormant accounts where the bank receives the request to activate from the customer. That the letter of request to activate was system print out and was not done by her. That it showed she was the inputter and the person checking which is not possible in banking as there is a different person checking/verifying. That she could not remember if the customer requested for activation of the account.
11. CW1 confirmed that she never shared her user ID with any person and for anyone to input on her behalf and that the system could not allow people to do the same thing and someone must have logged in the system as her and the bank lost around 1.3 M due to the fraud. That the number used was the number inputted in the mobile banking activation request. That she came across the number when her advocate shared with her the response to the claim and the signature was not hers.



12. CW1 confirmed that the form for mobile application was usually filed in the vault where a copy is usually retained and another sent to the head office and that where the form was kept was next to her. CW1 confirmed that she could remember the form titled Mobile activation form which was the one she got from Koinange and presumed it was the document used to register the mobile banking. The Court noted that CW1 disowned and owned parts of her statement at different times. At one point she stated that the signature on the witness statement was not hers as she recorded statement with security department and that she could not see her statement after the show cause letter in court. She further stated that she could recognize her signature but the handwriting was hers.
13. CW1 confirmed that the bank undertook investigations on the loss and the report was before the court. That Notice to show cause was issued after investigations were completed and she had no idea investigations had completed. It was her evidence that the Bank had a HR Manual governing employees and she was familiar with the same. CW1 confirmed that the bank lost money on accusations against her and that negligence was a gross misconduct offence and that the relationship between the bank and employee was to be based on utmost honesty and trust.
14. In re-examination CW 1 clarified that the form went to other officers since activation goes through a number of officers as per the procedure. That she could not do it alone. That she did not see the complaint by the customer or document refunding the money to the customer allegedly lost. That she saw investigation report after her dismissal and she did not participate in the fraud. That the static data did not have landline alone and it was not stated that she had to call customers on their cellphones.
15. The Respondent case was heard on 11th April, 2024 where the Respondent's head of legal Department (RW1) testified and he adopted his witness statement, Respondent's documents and response as his evidence in chief. RW1 testified that there were two forms of activation. The activation for mobile banking was submitted at Koinange branch and the account was domiciled in Westland Branch where the Claimant was the customer service officer.
16. RW1 testified that the Claimant activated the request without following the procedure. It was her evidence that the phone number in the application contradicted the static data by the bank and that in such cases the bank should contact the customer to physically present themselves to verify the information. The Claimant instead called the number provided and used it to activate the request.
17. RW1 testified that the customer's account had been dormant and they had written to the customer to activate it without any response but the Claimant proceeded to activate it without following the procedure. That the Account activation system print out done on 17/12/2015 was done by the Claimant since each staff had a unique code activated by password. That it was the Claimant's password that activated the account and passwords are maintained by the user.
18. RW1 testified that the bank reimbursed the customer the amount loss of Kshs 1,142,861.92 after the customer issued a cheque of Kshs 784,000/= which bounced yet the customer had sufficient funds. The account was found to have a balance was around Kshs 1,000/=. The bank honoured the cheque pending investigations.
19. RW 1 testified that the Claimant was given numerous opportunities to defend herself against the charges. That she was issued with Notice to show cause which she responded to, subjected to formal hearing and she provided two written statements. That she admitted that her activities were against the policy.
20. In cross examination RW1 confirmed that the request for activation had to go to domiciled branch. The Claimant was based at head office. The request is usually addressed to Customer service of domiciled branch. The Claimant was the only customer service officer at Westland branch and that no customer



- could activate any account not belonging to them and in this case the customer did not make the request even though the bank did not have evidence of who brought the form and that a customer could send someone to deliver the form.
21. RW1 confirmed that on the Mobile banking activation form there was no input by head office as it was blank but in the system the input was there, information relied on was in the system. That the Claimant activated the account. That the head office checks what the domiciled branch has done and approves. That the Claimant was in charge.
 22. RW1 confirmed that the system print out showed that other people apart from the Claimant accessed the account. It was further his evidence that he never participated in the disciplinary process and there was no physical disciplinary hearing. That it was done by correspondence. That there were investigations, the bank lost money and the customer was reimbursed.
 23. RW1 confirmed that the investigations revealed a gap in activation process. The verification by head relied on domiciled branch. That the signature had close resemblance with that held by the bank and emails to customers are system generated. That the Claimant admitted changing the static data which change was done after receiving the form. That when the account was reactivated the customer stopped receiving his email statement.
 24. In reexamination RW1 clarified that the receiving branch role was to receive requests and forward to domicile branches since they are the ones who knew the customer. That the domiciled branch had obligation to verify the request and contact the customer. They also verify the static data vis a vis the application.
 25. That the customer service officer had no discretion. They had to contact the customer if in doubt. That the head office verified if the static data coincided. That there were other officers who accessed the account and the report stated the reasons for access. That anyone could access an account provided it was in line with work. That Janet was at Koinange branch and her role was to receive and verify which branch the form related.

Claimants' Submissions

26. The Claimant filed written submissions dated 16th May, 2024 and further submissions and reply to Respondent's Submissions dated 4th July 2024. On the issue of whether her termination was wrongful, unfair and unlawful, the Claimant relied on Section 45- 51 of the Employment and Labor Relations Court Act on considerations the court should take while determining whether a termination was in line with the act.
27. It was the Claimant's submission that the Respondent in their statement outlined that she was not taken through the physical Disciplinary Hearing. The same was confirmed during cross-examination by the Respondent's witness which procedural hitch has been held to be one of the reasons that courts have held dismissals to be unlawful termination.
28. The Claimant relied on the case of *Walter Anuro v Teachers Service Commission* [2013] eKLR on requirement of both procedural and substantive fairness. It was the Claimant's submission that the process of termination of an employee as anticipated in the act is a process and not an event and which process ought to be according to the rules of natural justice and accord the Claimant a fair hearing. That the fair hearing would have ensured that the chain of approval of the bank form was cleared out.
29. It was the Claimant's submission that during the hearing, she stated that she did not receive the form nor verify the signature at the point of the same being dropped to the bank. The Respondent equally admitted that the Claimant was not the final approving authority in reactivating mobile banking



- applications making it questionable as to why the Claimant was the only person terminated despite her not being the initial verifier of the form nor the last approver of the same.
30. The Claimant submitted that the statement by Janet Muturi dated 29th August 2016, at Page 14 of the Respondent's list of documents stated that she verified the signature then forwarded the form which indicated that the signature on the form was similar to the one in the system or at least closely resembled, such that anyone looking at it other than the Claimant could believe it.
 31. It was the Claimant's submission that the Respondent singled her out and not officers at Koinange Branch where the alleged imposter presented himself physically, identified, confirmed and form approved. The said officers are the ones who ought to have been charged and not the Claimant. The Claimant submitted that the Respondent had not discharged the burden of proof by way of evidence as required under Section 43(1).
 32. It was the Claimant's submission that the Claimant was not given an opportunity to defend herself hence was condemned unheard, a clear violation of Claimant's rights under Article 50 of the Constitution.
 33. On the issue of whether the Claimant entitled to the relief sought, the Claimant relied on Section 49 of the Employment Act to submit that she was entitled to compensation as per her last salary which was not denied at Kshs 111,119/=.

Respondent's Submissions

34. The Respondent filed its written submissions dated 28th June, 2024 and on the issue of whether termination of the Claimant's employment was substantially fair, the Respondent relied on the case of Nugi Kabiga v Access Kenya Group Ltd [2022] eKLR on proof of reasons for termination as per sections 43 and 45 of the Employment Act. The Respondent submitted that there existed a valid reason for the termination of the Claimant's employment. The Respondent lost Ksh1,237,600/- due to the negligence of the Claimant and other Respondent's officers. The Respondent relied on the case of Kenya Revenue Authority v Reuwel Waitihaka Gitabi & 2 others [2019] eKLR and submitted that for a termination to be substantially fair, an employer has to prove that it genuinely believed that the reasons for termination validly existed at the time of termination.
35. On the issue of whether the termination was procedural, the Respondent submitted that the Claimant was given ample opportunities to be heard prior to her summary dismissal from employment contrary to her assertions.
36. The Respondent submitted that the Claimant was given two separate occasions to record a statement with the Respondent during the investigation phase of the said loss of funds and further, arising out of the investigations, the Claimant was issued with a show cause letter in line with Respondent's Human Resource policy. The Respondent submitted that in response to the show cause letter, the Claimant put in a response responding to the allegations raised against her but which were found to be unsatisfactory given the outcome of the investigations.
37. Despite the fact that the claimant had a right of appeal against her summary dismissal as provided in the Human Resource manual, she opted not to prefer any appeal and proceeded to receive her terminal dues arising out of her termination of employment. The Respondent relied on the case of Francis Mbugua v Smartchip Dynamics (2017) eKLR in submitting that it is mandatory requirement to hold a hearing either through correspondence or face to face.
38. On the issue of whether the claimant was entitled to the reliefs sought it was the Respondent's submission that the Respondent had proved that it had a valid reason to commence disciplinary



action against the Claimant and proceeded to terminate her employment after giving her sufficient opportunities to be heard. The Respondent relied on the case of *Thomas Sila Nzivo v Bamburi Cement Limited* (2014)eKLR in submitting that the summary dismissal of the Claimant was fair in substance and on procedure and the Claimant did not merit compensation for unfair termination.

39. It was the Respondent's submission that should the Court be inclined to hold otherwise, in the circumstances of the case and as mandated by Section 49 of the *Employment Act*, the Claimant is not entitled to the 12 months maximum amount of damages as prescribed by the *Act*.
40. The Respondent submitted that having demonstrated that it was the Claimant's negligent conduct which led to her dismissal and having been given an opportunity to be heard via written correspondence, the failure to conduct a physical hearing did not entitle the Claimant to the maximum amount of damages as prayed for in her statement of claim.
41. The Respondent relied on among others the case of *Matsesho v Newton* (Cause 9 of 2019) 120221 KEELRC 1554 (KLR) in submitting that the conduct of the Claimant in the loss made by the Respondent was to be considered.

Determination

42. The court has reviewed and considered the pleadings, testimonies, submissions and authorities relied on by both parties and has I have come up with two main issues: -Aa. aa.
 - a. Whether the Claimant's termination from employment was unfair and unlawful
 - b. Whether the Claimant are entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful

43. In the instant case, the Respondent alleged that they terminated the Claimant on grounds of failure to follow the laid down procedure in activating the dormant customer's account as well as mobile banking hence a loss of Kshs 1,237,600/= was realized and the Respondent had to reimburse the client.
44. The court from the pleadings notes that the Customer's account in question was activated in December,2015 while the mobile banking request done in February, 2016. It is also clear that the bank wrote to the customer in March 2015 requesting the client to activate their account. It is also clear that the Claimant received the Mobile Banking request from Koinange branch with a signature resembling that of the customer. The Claimant being in the domiciled branch had an obligation to do thorough investigation and verification as per the Respondent's Procedure Manual.
45. This court notes that in as much as the customer could not be reached through his landline number the Claimant ought to have required the Customer to appear in person in the bank to update their information before proceeding to register the mobile banking as per the Procedure Manuals. The Claimant admitted that the system had a user password which she did not share with anyone and it came out clear that she was the only customer service officer at Westland Branch hence the only person who approved the registration of the Mobile banking.
46. This court notes that the Claimant was not connected to the number she called on the application hence no collusion but she failed to do a proper investigation to realize it was not the customer requesting the mobile banking. The court has gone through the investigation report and is also of the view that the Respondent was also faulted for having gaps in its mobile banking/activation procedures. At the end of the day the customer lost Kshs 1,237.600/= to the fraudsters and someone had to be liable.



47. It is clear that this fraud was discovered when there was a cheque to be cleared from the Client's account of Kshs 784,000/= in August, 2016 where the account had no sufficient funds and upon requesting the client to top up it emerged that he ought to have sufficient funds in his account. It was there after discovered that there had been Mpesa withdrawals from the customer's account. The customer confirmed stopping receiving notifications of his account around end of 2015 when the account was activated. He denied ever requesting any mobile banking since he did not recognize the number supplied or the signature.
48. The court is of the view that the Claimant failed in her mandate to verify the mobile banking and activation application as per the Respondent's manuals resulting in to loss of the funds.
49. It is now established requirement that for termination to pass fairness test there must be both substantive and procedural fairness. This was the principle established in *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR among other cases.
50. On substantive fairness the Respondent is under duty to prove and justify the reasons for the termination as per section 47(5) of the *Employment Act* while the Claimant under the same section was to prove that indeed she was unfairly terminated. Further, Section 43(2) of the *Employment Act* provides that the reasons for the termination must be fair and valid which the employer believed to have existed at the time of termination.
51. The Claimant responded to all allegations against her which responses were not satisfactory. The Court further noted during the trial that the claimant kept disowning some portions of her own witness statement as sign that she was not very candid with the court over what actually transpired.
52. The business of banking is a very sensitive business. It entails handling of customers' funds entrusted to the bank. Therefore rules and procedures put in place in handling customers' affairs must be strictly adhered to. The claimant admitted activating the customer's account in question and accepting mobile banking application without verifying with the customer concerned if the request emanated from him. It was in evidence that the mobile number provided for activation of mobile banking was not in the customer's name. It was also in evidence and the claimant admitted that in such a case the physical attendance of the customer to the domicile branch was required before activation is done. The claimant did not do this. That was gross misconduct and negligence on her part which occasioned the respondent loss.
53. Section 44(4) of the *Employment Act* as well as the Respondent's HR Manual and Policy allowed for summary dismissal of an employee who commits gross misconduct and in this case the negligence to perform official duties or to carelessly and improperly perform the said duties.
54. In conclusion this court finds and holds that the Respondent had fair and valid reasons for terminating the Claimant's service.
55. On procedural fairness section 41 of the *Employment Act* is the guiding law on this where it requires hearing and notification of the employee before termination. The employee needs to be notified, allowed to make their representations and attend disciplinary hearing accompanied by a fellow employee or union official.
56. The respondent admitted not according the claimant a physical hearing but stated that the claimant was given to respond to the allegations against her in writing which she did including response to the show cause letter. The claimant never demanded a physical hearing and only raised the same after she had been terminated. In the case of *Kenya Revenue Authority v Menginya Salim Murgani*, Civil



Appeal No. 108 of 2009 as cited in *Republic v National Police Service Commission Exparte Daniel Chacha Chacha* JR 36 of 2016 (2016) eKLR- Prof. Ojwang' J (as he then was) stated:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed”

57. To this, the Court adds that in this digital age where even Court proceedings are being conducted virtually, physical attendance to meetings or sessions is no longer mandatory. The concern of the Court should be whether the charges against the employee have been clearly communicated to such employee and any additional information sought is provided and further if the employee has been given adequate time to respond to the allegations against him. A physical hearing would not be necessary if it is clearly discernible that the employee was clear in his mind about the charges against him, was furnished with all the necessary information in support of the charges and he has comprehensively responded to the charges without raising any issue about any inadequacy of information provided on any of the charges he is facing. Of paramount concern should be: was reasonable degree of fairness appropriate in the circumstances achieved.
58. In this particular case, the Court is satisfied that the claimant was given adequate opportunity to interact with the charges she was facing and she responded to them on two occasions. That is to say before the internal security investigators and in the show cause letter. In both occasions it emerged that she was clear in her mind about the charges against her and tendered her defence on both occasions. Therefore by not subjecting the claimant to an in-person disciplinary hearing did not vitiate the reasonable degree of fairness appropriate in the circumstances.
59. In conclusion the Court finds and holds that the respondent had reasonable cause and justification in terminating the claimant's service and that the same was carried out through a fair procedure.
60. The claim is therefore found without merit and is hereby dismissed with costs

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

