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Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Monica Mbaru
Citation:	Justus Wambua Kavyu v Kenya Commercial Bank Limited [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
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Representation By Advocates:	-
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Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 194 OF 2012**

**JUSTUS WAMBUA KAVYU ..... CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

**JUDGEMENT**

This is a claim dated 3<sup>rd</sup> February 2012 filed by the claimant Justus Wambua Kavyu for unfair termination and refusal to pay full terminal dues by the respondent the Kenya Commercial Bank limited. The respondent filed their defence dated 4<sup>th</sup> October 2012 where they admit the claimant was their employee and was terminated due to gross misconduct and therefore his claim should be dismissed as nothing owes from the respondent.

Hearing closed on 30<sup>th</sup> April 2013 and both parties agreed to file their written submissions. On 30<sup>th</sup> May 2013 the matter was mentioned to confirm that parties had put their submissions on record but only the claimant had filed their submissions.

In the claim the claimant stated that he was employed by the respondent on 2<sup>nd</sup> October 1985 as a subordinate staff, he rose through the ranks to a clerk on 1<sup>st</sup> march 2004 which was confirmed to be on terms and conditions subsisting as per the Collective Bargaining Agreement (CBA) that was in force. That on 18<sup>th</sup> February 2011 the claimant employment was terminated on alleged acts of gross misconduct details of which were not disclosed to him in the letter of termination and that the same was cited to be done in terms of Clause 5(d) of the CBAS covering Section head, Check Clerks, Clerical Technical and Subordinate Staff.

The claimant further state that before he received his termination letter he had received a letter dated 25<sup>th</sup> June 2010 from the manager operations stating that on 15<sup>th</sup> June 2010 as a teller he had debited account No. 057165057976 with kshs.35, 000/= and that on 16<sup>th</sup> June 2010 as a teller he had credited the customer with kshs.35, 000/= to which letter he responded to giving an explanation as to what had transpired between him and the customer. That the respondent by an internal memo dated 5<sup>th</sup> July 2010 wrote to the claimant and asked him why he failed to refer the matter to his supervisor for guidance and by a letter dated 7<sup>th</sup> July 2010 the claimant replied to this memo stating that he never made a reverse to his entries because he thought the customer was to come back for his money. According to the claimants observation, the respondent was not satisfied it his response as the respondent wrote to him again on 12<sup>th</sup> July 2010. That the respondent illegally debited the claimant's account a sum of kshs.35, 000/= and credited the customer account.

That in the circumstances there was no valid ground which led to the claimant dismissal and that the respondent never gave him a fair hearing contrary to the principles of natural justice and section 41 of the Employment Act and thus seek reinstatement or payment of his terminal dues and compensation as;

- i. *One month salary in lieu of notice at* 89,616.30

- ii. *Salary for February 2011 at* 98,616.30
- iii. *21 days leave at 21/6x98,616.30 all amounting to* 79,651.38
- iv. *Service gratuity at the rate of 15 days salary for each completed year 15/26x98,616.30x26 years all at* 1,422,346.15
- v. *Twelve (12) month's salary compensation at 12x98,616.30 all at* 1,183,392
- vi. *Certificate of service*

**Total dues being**

**kshs.2, 882,022.13**

That before his termination he was not given a warning and that the decision taken was harsh in the circumstances of the case and that he had performed his duties in an exemplary manner as a result of which his scorecard stated that that he had exceeded his targets. That despite lodging his appeal, the respondent failed to reinstate him or give him his terminal dues. He therefore asked the court to declare that he was unfairly terminated and that he should be paid his dues as outlined.

In evidence the claimant gave his sworn evidence and stated that since his employment by the respondent in October 1985 he rose through the ranks and by the time of termination he had served for 25 years and 8 months and was a Teller Clerk and in the termination letter it was stated that the respondent had lost faith in him for committing acts of gross misconduct. That he was not subjected to any disciplinary hearing and when a notice to show cause (NTSC) was issued to him on 25<sup>th</sup> June 2010 by the Manager Operations he replied to it comprehensively. In that NTSC he was accused that a customer had reported a dispute that the claimant had debited this customer account on 15<sup>th</sup> June 2010 with kshs.35, 000.00 and on 16<sup>th</sup> June credited the same customer with kshs.35, 000.00. the claimant stated that on the 15<sup>th</sup> June 2010 a customer came to him as the teller, he wanted kshs.35, 000.00 but had no identity card (ID) which was mandatory as his profile was not on the computer and as the responsible teller, where a customer is known to a staff of the respondent, that staff can guarantee the customer and cash can be issued without this identity card. The claimant could therefore not pay until he saw the customer ID or a staff member known to him to confirm and sign for him.

That at this point the customer told the claimant that there he knew one staff of respondent at Sales department and around 10.30am the same customer came back seeking to withdraw a lesser amount of kshs.6, 000.00 which the claimant could do since he had authority to give a maximum of Kshs.200, 000.00 without the supervisor authority. The claimant therefore decided to pay the less amount of Kshs.6, 000.00 as there was less risk and proceeded to give an explanation.

That at around 4p.m. the staff that was to guarantee the customer had not come and the claimant wanted to close his till for the day and since he still had the kshs.35, 000.00 and another Kshs.4, 600.00 where a customer had come seeking change but failed to come back for it, he indicated that he had Kshs.39, 600.00 that had not been collected and the supervisor signed for him and he closed his till for the day.

The claimant further gave evidence that on the following day the 16<sup>th</sup> June 2010 his first business upon reporting to work was to credit back the money back to the customer account and noted it as an error.

That no money was lost and the respondent did not incur any loss from this transaction. That what the claimant did was proper as according to respondent procedures, he was supposed to indicate what had happened as an error, any shortages are recorded and the checking officer has to confirm and thus what he did was procedural.

That he has served for over 25 years with the respondent and had no disciplinary case and had a clean record and therefore seek reinstatement with benefits. In the alternative payment of terminal dues, service gratuity and compensation for unfair termination as no notice was issued and the salary for February 2011 was not paid or paid in lieu and he had leave days pending.

The claimant noted that he had a conflict with his supervisor David Kimaiyo with regard to operation in his account as he had wanted the claimant to give him cash and he reported this to the head office in an email. This same officer is the one who signed his cash summary on 15<sup>th</sup> June 2010 and by indicating that he did not see the kshs.39,600.00 was in effect giving the wrong information that resulted in the claimant's termination. That according to the practice of the respondent, when a customer made a complaint, the affected staff member was called to answer but in his case he was never called or shown the customer who complained.

In cross-examination by the responded advocate the claimant confirmed that on 15<sup>th</sup> June 2010 a customer came to the bank to withdraw kshs.35, 000.00 but he cannot recall how he looked like and there was no image on the computer system but he was an old man. That he became a teller in October 2009 and this transaction was 8 months from being a teller. That the bank closes at 4pm but he last saw this customer that he had served in the morning at around 4pm who had described the staff member that was known to him as a brown person in Sales Department and that the claimant knew two brown staff members of the respondent. That this identification was required to authenticate the customer as an account holder and the staff member was to act as a guarantee. That the claimant decided not to pay until the brown staff member arrived. That he took it that this customer indeed knew a staff member in this respondent branch. That he however paid this customer Kshs.6, 000.00 without any identification after due diligence and could pay up to kshs.200, 000.00. That this customer remained at the banking hall all day but the claimant could not pay without the required identification procedures.

That though he was unionized, he reported this matter to his union but opted to get his own advocate.

On the other hand the respondent stated that on 25<sup>th</sup> June 2010 they wrote to the claimant regarding a debit and credit of Kshs.35, 000 to account No. 057165057975 belonging to Leonard Kyalo Kituku noting that on 15<sup>th</sup> June 2010 the claimant had debited the account with Kshs.35, 000 as self withdrawal by the customer and on 16<sup>th</sup> June 2010 he credited the customer with kshs.35, 000 with a narration as an error correction. The claimant was further informed that from these events, the customer had disputed these transactions and hence the respondent demanded the the claimant to explain the transaction and also give reasons as to why disciplinary action should not be taken against him for failing to discharge his duties accordingly.

On 29<sup>th</sup> June 2010 the claimant submitted his response whereby he indicated that on 15<sup>th</sup> June 2010 at 9.15 a.m. the customer came with a withdrawal voucher for Kshs.35, 000 but without proper identification and that upon checking the system, his profile was missing and thus requested the customer to identify a staff guarantor but the said staff was out. That the customer requested to withdraw a lesser amount of Ksh.6, 000 and by 4p.m. he debited the customer's account and held the cash awaiting a staff guarantor for the customer. That the customer did not show up and thus he declared an overage. On 16<sup>th</sup> June 2010 he credited the account with Kshs.35, 000 and the customer returned at 3.30p.m. With the correct documents and he debited the account.

The respondent further stated that they caused preliminary investigations to be conducted and requested claimant's supervisor to clarify as to whether the claimant had declared the cash overage of kshs.35, 00 on 15<sup>th</sup> June 2010, to which the supervisor stated that on the 25<sup>th</sup> June 2010 the claimant had not declared any shortage or overage. On 5<sup>th</sup> July 2010 respondent wrote to the claimant seeking further explanations and it was thus noted that there had been a failure of service to the customer and that the claimant was asked to explain why the matter had not been reported to his supervisor for guidance and he was also asked to explain as to why he had held the cash in his till until the following day instead of reversing the entry on the same day and further to show cause as to why severe disciplinary action should not be taken against them for the lapses. The respondent went on to state that upon the claimant receiving their letter dated 5<sup>th</sup> July 2010, he responded on 7<sup>th</sup> July 2010 with an explanation that the debit had not been reversed since he thought that the customer would return shortly and that he was new at the counter and was still learning.

On this the respondent recommended the Forensic Department to undertake urgent investigations to establish if the customer made the withdrawals or not and on 12<sup>th</sup> July 2010 the respondent asked the claimant to give further explanations on various issues particularly his basis on the payment of Kshs.6,000 to a customer without authorization, why he posted the amount of Kshs.35,000 while the staff guarantor had not reported back to sanction the transaction, why the overage had not been brought to the attention of the Branch Manager, why he failed to delete the entry of kshs.35,000 from the day's work and instead posted the same the following day and also to give the name of the staff member who was to guarantee the withdrawal. On the same day the claimant responded noting that he paid the Kshs.6, 000 on humanitarian grounds and that he had been a teller for a short time.

The respondent suspended the claimant on 29<sup>th</sup> September 2010 on half pay pending further investigations and on 2<sup>nd</sup> October 2010 the claimant protested again this suspension on the grounds that the customer should have been interviewed in his presence.

On 15<sup>th</sup> February 2011, the respondent received the investigation report from the Forensic Department with finding that on 15<sup>th</sup> June 2010 the customer had made a withdrawal of Kshs.6, 000 from his account at 11.24a.m. Having dully completed and signed a customer transaction voucher and was paid by the claimant. That at 16.04 on 15<sup>th</sup> June 2010 the claimant debited the cashier's account with Kshs.35, 000 and an examination of the CTV and debit advice revealed that the authorizing signature was completely different from the customer's signature in the system. That it was further noted that the signature purported to be that of the customer was substantially similar to the claimant's signature on the voucher meaning that the customer did not make the withdrawal and the same customer denied knowledge of the said withdrawal.

The investigation also released that the claimant misrepresented the debit of kshs.35, 00 as an error connection on 16<sup>th</sup> June 2010 when he credited the customer's account with the said sum. The claimant's supervisor had explained that he checked the claimant's work on 15<sup>th</sup> June 2010 and there was no overage declared which would have been the basis for purported error correction. That notwithstanding the claimant's explanation that he had declared an overage, it was clear that he had ultimately stolen the sum of kshs.35, 000 in the afternoon of 16<sup>th</sup> June 2010 when he debited the customer's account with the said sum. That the claimant's explanation were unmeritorious for a number of reasons that if the customer did not have any documents on him, then he should not have been paid the kshs.6,000 and the authorizing signature in the CTV and credit advice for Kshs.35,000 is completely different from the customer's signature but resembles that of the claimant.

The respondent forensic investigation thus revealed that the claimant had dishonestly obtained the sum from the customer's account on 15<sup>th</sup> June 2010 but credited the account with the sum on 16<sup>th</sup> June 2010

and at 15.48p.m. He posted a fraudulent debit of Kshs.35, 000 from the customer's account. This caused a loss of kshs.35, 000 to the respondent and it was thus recommended that the claimant be summarily dismissed from the respondent employment for engaging in fraud and for performing his duties in utter violation of the cashier's guide by making unauthorized debits into the customer's account.

Following this report, the respondent human Resource manger on 16<sup>th</sup> February 2011 recommended that the claimant be terminated for misappropriating funds belonging to a bank customer and on 18<sup>th</sup> February 2011 the claimant was terminated for committing acts of gross misconduct and he was informed that the respondent had lost confidence in him and the termination was based on clause 5(d) of the CBA. The claimant appealed this decision of termination on 28<sup>th</sup> February 2011 on the grounds that the branch management was out to set him up, this appeal was considered with a hearing on 24<sup>th</sup> March 2011 and the Appeals Committee deliberated and found no merit to change the action taken against the claimant. The claimant re-appealed on 8<sup>th</sup> July 2011 on the grounds that the grounds for his termination were due to ill intentions of colleagues. On 31<sup>st</sup> October 2011 the claimant applied to for the transfer of his pension benefits to be transferred to his individual pension plan and this was approved.

In evidence the respondent witness was Nahashon Karumba who in his sworn evidence stated that he is currently the respondent Othaya branch manager and in 2010 he was the Manager Operations at the respondent branch in Tala where he worked with the claimant. That Manager of the Tala branch was Ben Musau. That in June 2010 the claimant's supervisor informed him that there were debits to a customer account that were recorded as error correction and credits. That the witness wrote a memo to the staff claimant requesting an explanation as to the circumstances of these transactions. That there were responses and the Manager as the overall responsible person told the claimant to give a further explanation. The witness wrote to the claimant requesting for a further explanation on the debits and credits to the account which he did on 29<sup>th</sup> June 2010. That as the persons in charge of operations, the witness was not satisfied with the reply and explanations of the claimant because the cashiers once they debt on an account any reversal should be on the same account within the same transaction reference number which was not done in this case. That a reversal must reflect on the account as there are charges to the account the debit amount and the withdrawal amount. In this case the debit amount was Kshs.35, 000/= plus 100/= withdrawal charge and the credit must be Kshs.35, 000/= and the charge of kshs.100/=. That this should be done on the same day the transaction took place.

That another memo dated 5<sup>th</sup> July 2010 was done where the Manager asked to have an explanation as to why the transaction was not done properly. There was also a NTSC to the claimant.

The policy and procedure is that where there is not customer identification the cashier should refer to the supervisor to approve to pay or not to pay. The manager operations or the branch manger should approve.

That in the claimant's explanation, he stated that somebody from Sales was to guarantee the customer. That the circumstances where a staff acts as a guarantor required that that staff member to sign on the voucher that they knew the customer. This was not done to the Kshs.35, 000/= or the kshs.6, 000/= that was paid. That for a cashier to depend on a staff, that staff member must know the customer and sign on the voucher in evidence. That that staff member need not know the customer.

That by the claimant saying that the said staff member was absent all day does not have evidence as no effort is shown to have been made in this regard. That all Sales representatives of the respondent report on a daily basis in the morning or in the venin as their guarantees were being waited for the transactions of the day on account of due diligence.

That the claimant was a teller for over 8 months having at the Tala Branch for a long time and he knew that if a customer came to the bank without an ID, a teller was not supposed to release cash to the customer in good faith. That the memos that were issued, an investigation followed where the claimant was suspended and eventually terminated.

That respondent investigations revealed that on 15<sup>th</sup> June 2010 the claimant paid the customer kshs.6,000/= on condition that he remained at the banking hall and that this amount was paid without any identification. That at the same time another customer came seeking for change and the respondent procedure was that anybody who needed change for example an amount of kshs.5000/= be issued in 200/= notes; the cashier was supposed to give the total value and at no time was the cashier to be left with a customer's money. Therefore the balance of any cash at hand was due to the customer and not to the claimant. This was not procedural in the policy of the respondent.

The witness also stated that according to the policy of the respondent that before any deployment was done a cashier was taken through a weeklong training and once back to their station, the deployment was to take place. That in October 2009 the claimant became a teller and the errors he made were in June 2010 and by then he had been a cashier for over 8 months. That he was suspended and investigations commenced. The Branch manager was informed of these investigations and the Human Resource manager gave recommendations on what was to be done.

That in all bank withdrawals, a customer must file a customer transaction voucher (CTV) which is presented to the cashier. The customer must sign the CTV and where a teller doubts the customer signature, a customer can be asked to repeat again on a second space provided in the CTV. If there was an error, another CTV must be raised. In this case the teller himself did the CTV and where that was done, administratively the cashier/teller had to seek the approval and or authorization of the branch manager or Operations Manager.

In a case where a customer is not present at the bank, the teller can raise the CTV but must be authenticated by two signatures, that of the Manager and Manager Operations. In this case, by the teller debiting "in error" he knew what he had done and this was not the proper way to record that transaction. That it was supposed to be corrected the same date and indicate the cash summary as the amount the teller was holding. The respondent system generated summary at the end of the day to confirm the cash at hand and the physical cash.

Mr. Karumba further stated that the handwriting on total overage of kshs39,000/= was done by the claimant. That kshs.97,000/= was the actual cash the teller had in the till broken down in various denominations. In circumstances where a cashier has more cash, he should involve the supervisor to balance or the cash shortage or overage noted and posted to the cash overage account but this was not done in this case where the claimant was responsible.

That to enable the cashier balance where there was an overage; upon checking by the Manager, this was to be posted in the overage account. In the entries of the claimant there was no record that the overage or loss was recorded in the appropriate account. According to the policy procedures the checking official upon realization of shortage or overage must take note and in their handwriting note the denominations, the numbers and the total sum and the cashier must proceed to get these recorded in the appropriate account. In this case, the records were in the handwriting of the claimant and this was not procedural. The supervisor signed but the stamp was that of the cashier.

The CTV of 15th June 2010 related to the account of Leonard Kyalo Kituku and his sample signature was on the system and the teller was supposed to confirm the signature into the system and what was

on the CTV an ounce this was verified the teller was supposed to sign at the back but this was not done. On the overleaf, the signature on the stamp is that of the claimant and this should have been the same as on the CTV. On the cash summary, the signature is that of the teller with initials. The cashier had initials similar to CTV signature and in his own handwriting.

The respondent therefore noted that the customer signature and what was the in the system as his signature were different. Investigations were called for as the customer CTV signature seems to have been forged. In the explanation of the claimant he had replied that the customer had all the necessary documents that were provided before payment was done. This was in his own statement noting that he had paid cash on the strength of documents issued yet he had said the customer had no ID and was waiting for a staff to authenticate the customer before payments were made.

From the documents assessment the respondent noted that the alleged cash withdrawal by the customer where he was said to have received cash was false since if he had picked the withdrawal slip he should have signed for any receipt of cash and in this case, no customer came back to collect cash. The account number was the same as that of Leonard Kyalo and according to the cash withdrawal, the teller issued the kshs.35, 000/= and the withdrawal slip was supposed to tally with the customer signature as on the CTV signature as these are the two signatures of the customer. The second signature was that of the teller as indicated below in this document. The signatures in this case do not tally as regards the teller and the customer.

For the kshs.35, 000/= for CTV and the signatures on them are different and the investigations by forensic department show they were forgeries. That the CTV was forged and the withdrawal was also forged and the signatures do not tally. The claimant explained that he paid the Kshs.6, 000/= in good faith but a CTV should have been raised. That bank does not allow that to happen in good faith.

Mr. Karumba further stated that the claimant was terminated on the basis of these transactions and as the Manager Operations; the process of appeals did not involve him or the decision to terminate the claimant. In the NTSC there were two offences listed that the ones that he dealt with and based on the investigations, the findings established the gross mistakes committed by the claimant. That at no time did the complaint regarding the claimant and Mr. Kimaiyo arises.

That the termination of the claimant was procedural and the correct action taken against the claimant which should be upheld.

In cross-examination the witness confirmed that he was not the direct supervisor of the claimant this was David Kimaiyo but he was the overall supervisor of staff that ensured effective transactions and the reasons for the termination of the claimant were debiting a customer illegally that was Mr. Leonard Kyalo. That this customer had no withdrawal transaction. There was no complaint from the customer and what were applied were the respondent systems controls which do not require a complaint by a customer. That the customer did not loss any money but there was potential for loss of kshs.35, 000/= which had been debited by the claimant and the investigation conducted by the respondent forensic department revealed that the claimant had withdrawn the cash from this account. That this was an illegal transaction done by the claimant. The basis was that where a cashier transactions noted are done they should be verified and if something is noted as missing it must be raised. In this case, it was only noted on the following day. The claimant credited the money back to the customer account the following day with a debit of kshs.35,000/= and despite the fact that the customer did not complain, based on the history of his account, there was a reversal and based on the controls this was discovered and hence the gross misconduct sanction on the claimant.



That following the forensic investigations the customer did a statement but the claimant did not question the customer. This was part of the investigations team role. They recommended that the claimant be terminated due to fraud as he had converted the cash withdrawn into his own use. That the overage of Kshs.39, 600/= was declared but was not credited to the proper account. The claimant on his own removed the funds and the bank charge was not credited at kshs.100/= which ought to be a revenue to the bank. That if this had been a genuine transaction, the customer should have been fully refunded plus the Kshs.100/= transaction costs. The manner of the error correction which required two signatures of the Bank Manager and a supervisor, this was suspicious and what the claimant did was unprocedural.

The witness also confirmed that any fraud cases go to the head office and the witness did not know if the fraud was reported to the police. What was recommended by the Human Resource Manager was that the claimant had misappropriated customer cash by a withdrawal on 15<sup>th</sup> of June 2010 and deposited on 16<sup>th</sup> June 2010 and another withdrawal done on the same day the 16<sup>th</sup> June 2010. That where a till is closed and an error is noted, the Manager must approve and allow a proper posting. That once the Bank closes at 4p.m. there is time allowed to have cashiers balance their work and record.

That the supervisor was the one to note the overage but in this case it was done by the claimant. The debit in error was kshs.35, 000/= and any erroneous reversal would have been to the customer and it needed two signatures for this to be approved as to how the reversal was done. The CTV of Kshs.6, 000/= was properly raised by the one for kshs.35, 000/= was irregular. The signatures in both differ in a material way and cannot have been from the same person as that of the account holder. The signature specimen on the kshs.6, 000/- withdrawal is not as the one on the Kshs.35, 000/= withdrawal.

That the bank statement from Leonard Kyalo indicate that the highest amount of withdrawal from his account was that of kshs.6, 000/=

Under subsection 43 (2) of the Employment Act, 2007, the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. By the employer stating this reason or reasons of termination it becomes very important as where there is a dispute and the employee wishes to challenge such termination, the basis of that challenge must arise from the stated reason or reasons as in the letter of termination. It does not matter how many hearings or procedures have been complied with by the employer to arrive at the termination as that final reason that causes the employer to stop their employment relationship with the employee must be stated. By Parliament putting this requirement as a mandatory provision, this Court then must be satisfied that indeed this is complied with.

This court must therefore apply the test as under section 45(2) of the Employment Act to ensure that the stated reasons for termination is valid and fair;

***(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***

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

Failure to state the termination reason or reasons denies the employee and this court the opportunity to apply the soundness or the legitimacy and justification of the termination and therefore a fundamental flaw in the procedure applied by the employer. The claimant was taken through the various levels of hearing, he was allowed to lodge his appeal and even a second appeal, nothing prevented the respondent from stating the reason or the reasons of his termination in their letter of termination dated 18<sup>th</sup> February 2010. Looking at the letter of termination one cannot tell why the claimant is no longer in the employ of the respondent. This offends section 45(2) (c) of the Employment Act by making the termination of the claimant procedurally unfair.

In the letter dated 18<sup>th</sup> February 2011, the respondent wrote to the claimant;

*...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, the Bank has lost confidence in you and your services with the Bank is hereby accordingly terminated with effect from today's date in terms of clause 5(d) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical, Technical and Subordinate Staff...*

The 'gross misconduct' or the 'loss of confidence' are not reasons as outlined under section 45 cited above. The respondent as of 18<sup>th</sup> February 2011 knew the reasons as to why the claimant was being terminated and ought to have included them clearly in this notification.

That said, every employee is expected to give his best service to their employer and where in doubt or unable to understand any instructions, the employer has a right to seek guidance or proper communication of any instruction in a language he understands best. It is a reasonable expectation that an employee who has been on a job for a good duration of time, the case of the claimant being a clerk for over 25 years, that he had understood the basic requirements of his job and required minimum supervisor, and that he was to carry his duties effectively but still seek assistance of his supervisor or any other senior officer where in doubt.

For these reasons I find the termination of the claimant was substantively fair but the omission in the termination notification procedurally unfair. I will make an award of one month pay in this regard.

Notice pay was already admitted by the respondent. If this has not already been received by the claimant, the same should be paid within 14 days.

The claimant was terminated while on suspension. The claim for work in February 2011 does not arise. I will decline this claim. However I will grant half pay for the retained during the suspension as for the duration of 29<sup>th</sup> September 2010 to 18<sup>th</sup> February 2011 the claimant was not yet dismissed and remained an employee of the respondent for the 4 ½ months at Kshs.246,540.75

Leave days where earned were not particularized as to how they arise in this claim. I will decline this claim.

Gratuity is due to an employee as under the terms of their agreement and where there is no such agreement as in accordance with section 35(6) of the Employment Act. I noted that the claimant relied on the CBA terms, he however did not state whether he was unionized or not save that he decided to hire his own advocate instead of going to the Union. A look at the claimant's pay slip indicates that his

dues to NSSF and NHIF were remitted. Where there is no proof of unionization to benefit from the CBA as between union members and the employer, it is deemed that the claimant was covered as under the law and being covered as under NSSF and NHIF, service gratuity does not arise. I will therefore not make orders herein.

A Certificate of Service is a right due to any employee who is terminated by a particular employer the reason or reasons for the termination notwithstanding. I will direct that this certificate be issued to the claimant by the respondent.

For the loan due from the claimant, there was no counter-claim from the respondent. I will therefore take it the claim before me only arises as against the respondent. Any monies due from the claimant with regard to his employment by the respondent can still be recovered upon following due process.

**For the above reason, judgment is hereby entered for the claimant against the respondent in the following terms;**

1. **The termination of the claimant was procedurally unfair**
  - a. **Compensation at one month salary amounting to Kshs.89,616.30**
  - b. **Pay for the duration of suspension at kshs.246,540.75**

**Total 345,157**

2. **Certificate of Service be issued within 14 days.**
3. **Each pay to bear their own costs.**

**Delivered and dated this 17<sup>th</sup> day of June 2013.**

M. Mbaru

Judge

In the presence of

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