



**Kitheka & another v Harambee Sacco Society (Cause 669 & 670 of 2019 (Consolidated)) [2024] KEELRC 1290 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1290 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 669 & 670 OF 2019 (CONSOLIDATED)**

**JK GAKERI, J**

**MAY 17, 2024**

**BETWEEN**

**MARY KITHEKA ..... CLAIMANT**

**AND**

**HARAMBEE SACCO SOCIETY ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**CAUSE 670 OF 2019**

**BETWEEN**

**ALICE NJERI WANUTHI ..... CLAIMANT**

**AND**

**HARAMBEE SACCO SOCIETY ..... RESPONDENT**

**JUDGMENT**

1. The Claimants initiated this claims by Memorandum of Claims filed on 2<sup>nd</sup> October, 2019 alleging wrongful and unfair termination of employment by the Respondent and non-payment of terminal benefits.

2. The Claimants allege that they were employed by the Respondent as follows;

Mary Kitheka 10<sup>th</sup> April 1989 and Alice Njeri Wanuthi 1<sup>st</sup> September 1995, both at a monthly salary of Kshs.128,250/= inclusive of leave allowance, commuter allowance and house allowance.



3. The Claimants avers that the Respondent offers Front Office Service Activities (FOSA), a service through which Sacco members can access funds saved in their accounts via mobile services.
4. Mary Kitheka and Alice Njeri state that sometime in November 2018 they were issued with notices to show cause containing allegations of financial malpractices that occurred on the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> August 2018.
5. The notices to show cause stated that the Respondent had received an audit report showing that unknown persons fraudulently accessed and withdrew sums of money amounting to Kshs.197,500/= from the FOSA Savings Account of M/No. 059xxx -Lt General Johnson M.K Ondieki using the mobile phone Number 074173xxxx.
6. It is the Claimants case that they were further issued with a 2<sup>nd</sup> notice to show cause on allegations of other financial malpractices that arose from an Audit Report of November 2018. The letters stated that on diverse dates in August 2018 unknown persons were able to fraudulently access eleven (11) members' savings account and withdraw an amount of Kshs.1,319,800/=.
7. The Claimants were subjected to disciplinary hearing on the 1<sup>st</sup> of February, 2019 and terminated from employment on the 18<sup>th</sup> March, 2019.
8. The Claimants lodged appeals against the summary dismissal to the Disciplinary Appeals Committee and after oral hearing a recommendation was given on the 26<sup>th</sup> April 2019 to summarily dismiss them.
9. The Claimants aver that the termination was irregular as the Respondent failed to supply them with the audit report that formed the basis of the allegations made against them.
10. It is the Claimants' case that they were unfairly and maliciously terminated from employment as there was no evidence to prove that they were directly involved in the fraud.
11. Mary Kitheka prays for;
  - a. A declaration that the act of the Respondent withholding the evidence forming the basis of termination of the claimant is unfair, unlawful and against the rules of natural justice.
  - b. A declaration that the act of discrimination in the place of work on basis on the claimants age is unconstitutional, unlawful and illegal and amounts to breach of contract of employment and deprivation of property.
  - c. A declaration that the Claimant's termination was unfair and unlawful.
  - d. 12 months pay for unfair dismissal at Kshs.1,539,000.
  - e. 3 months' notice pay in accordance to CBA at Kshs.384,750.
  - f. Service pay fifteen (15) days for every year worked for 30 years at Kshs.11,542,500.
  - g. Leave pay 38 unpaid leave days Kshs.221,502.
  - h. Pay of days worked from 1<sup>st</sup> March, 2019 to 18<sup>th</sup> March, 2019 Kshs.104,922/=.
  - i. Medical cover benefits until 31<sup>st</sup> December, 2019.
  - j. 25% discount on outstanding loan balance Kshs.2,266,634/=
  - k. An order for payment of actual pecuniary loss suffered as a result of termination leading to loss of career from the date of termination to date of payment.



- l. General, aggravated and exemplary damages for deceit, fraudulent misrepresentation
  - m. Cost of the suit and interest thereon at court rates
  - n. Any other relief the court may deem fair and fit to grant.
12. Alice Njeri Wanuthi prays for;
- a. A declaration that the act of the Respondent withholding the evidence forming the basis of termination of the Claimant is unfair, unlawful and against the rules of natural justice.
  - b. A declaration that the act of discrimination in the place of work on basis on the Claimants age is unconstitutional, unlawful and illegal and amounts to a breach of contract of employment and deprivation of property.
  - c. A declaration that the Claimant's termination was unfair and unlawful.
  - d. 12 months' notice pay for unfair dismissal at Kshs.1,539,000/=.
  - e. 3 months' notice pay in accordance to CBA at Kshs.384,750/=.
  - f. Service pay 3 months for every year worked for 24 years at Kshs.9,234,000/=.
  - g. Leave pay 27 unpaid leave days at Kshs.157,383/=.
  - h. Pay of days worked from 1<sup>st</sup> March, 2019 to 18<sup>th</sup> March, 2019 Kshs.104,922/=.
  - i. Medical cover benefits until 31<sup>st</sup> December 2019
  - j. 25% discount on outstanding loan balance Kshs.2,382,039/=.
  - k. An order for payment of actual pecuniary loss suffered as a result of termination leading to loss of career from the date of termination to the date of payment.
  - l. General aggravated and exemplary damages for deceit, fraudulent misrepresentation and loss of career.
  - m. Cost of the suit and interest thereon at courts rates
  - n. Any other relief the court may deem fair and fit grant.

### **Respondent's case**

- 13. In Response to the Claimants' claims, the Respondent filed memorandum of reply, counter-claim and set off dated 8<sup>th</sup> October, 2020.
- 14. The Respondent avers that the Claimants were negligent in the performance of their duties by linking new numbers provided to the FOSA savings account without validating or verifying the information provided.
- 15. It is the Respondent's case that the Claimants failed to compare the newly captured information with the records available in the society's record.
- 16. The Respondent avers that the correct disciplinary process was followed in accordance with the provisions of the Fair Administrative Action Act and the Employment Act, 2007 and the outcome of the process was summary dismissal of the Claimants.



### **Counter claim**

17. The Respondent avers that prior to the dismissal

#### **a. Mary Kitheka was indebted to the Respondent as follows; Jisaidie 72 Loan Kshs.1,612,902/=**

18. The Respondent further avers that the Claimant declined to clear the loan or otherwise respond as to how she intended to settle the same despite the Respondent's request.

19. The Respondent prays that;

- a. The Claimant's claim be dismissed.
- b. The Respondent's counter claim for Kshs.1,612,902/= be allowed and awarded with interest at court rates.
- c. In the alternative the sum of Kshs.1,612,902/= be set-off from any amounts awarded in favour of the claimant herein.
- d. The Respondent be awarded costs of the claim.

#### **b. Alice Njeri was indebted to the Respondent as follows; Jisaidie 72 Loan Kshs.1,699,371.07/=**

20. The Respondent avers that the Claimant declined to clear the loan or otherwise respond as to how she intended to settle the same despite the Respondent's request.

21. The Respondent prays that;

- a. The Claimant's claim be dismissed
- b. The Respondent's counter claim for Kshs.1,699,371.07 be allowed and awarded with interest at court rates.
- c. In the alternative, the sum of Kshs.1,699,371.07 be set-off from any amounts awarded in favour of the claimant herein
- d. The Respondent be awarded costs of the claim.

### **Claimants' evidence**

22. The Claimants' written statements were identical in most aspects and generally pray for similar reliefs.

23. Mary Kitheka the Claimant adopted her witness statement dated 22<sup>nd</sup> June, 2019 as her evidence in chief.

24. The witness testified that the termination of employment was unfair as she was accused of negligence yet the audit report mentioned by the Respondents was not supplied to her for perusal.

25. The witness further testified that the disciplinary committee was not properly constituted as it consisted of 3 persons and the 4<sup>th</sup> one was not an expert. The Claimant testified that the charges were biased.

26. The witness confirmed that she had an outstanding loan with the Respondent

27. Alice Njeri Wanuthi testified in support of her claim. She adopted her witness statement dated 21<sup>st</sup> June 2019 as her evidence in chief.



28. In her evidence, the witness states that she worked as an Accountant Assistant and her duties included posting salaries of ministries, issuance of ATM cards, bankers cheques and PIN resetting's.
29. The witness testified that she took Mr. Odiiki's transaction through the normal process and compared what was in the MSACCO with the details in the system.
30. The witness told the court that she was taken through a disciplinary hearing whose charges were based on an Audit Report that she had not given before the hearing.
31. The witness stated that the disciplinary hearing was unfair because she was not supplied with the documents relied upon by the Respondent.
32. On cross examination, the witness confirmed that she was a member of the union and was seeking 2 months' notice as ordained by the CBA.
33. The Claimant also that she had an outstanding loan with the Respondent, which she is struggling to repay.

### **Respondent's evidence**

34. Mr. Willy Tanui, the Respondent's Human Resource Officer testified in defence of the Respondent's case.
35. In his testimony, the witness stated that in November 2018, an internal audit was conducted on the Respondent and the audit raised issues of fraudulent withdrawals through the Respondent's Msacco platform.
36. The witness stated that the Claimants were implicated for failing to verify information provided to them in relation to the affected member accounts.
37. The witness testified that the Claimants were issued notices to show cause, which they responded to and were subjected to a disciplinary hearing. That the disciplinary committee recommended that the claimants be summarily dismissed.
38. It is the witness's evidence that the Claimants were given a chance to appeal the dismissal and the Disciplinary Appeal Committee upheld the summary dismissal as no new facts had been raised to warrant a review of the dismissal.
39. Finally, the witness testified that the Collective Bargaining Agreement covered members working in January 2019 to December 2022.

### **Claimants' submissions**

40. The Claimants distilled the following issues for determination, whethr;
  - i. The Claimants dismissal by the Respondent was not premised on a valid reason.
  - ii. The disciplinary process by the Respondent was procedurally unfair.
  - iii. The Claimants are entitled to the reliefs sought.
41. On the first issue, counsel submits that the Claimants termination from employment was not premised on a valid reason. Counsel urges that it is trite law in employment and labour relations in Kenya that termination of employment should be based on genuine, valid and fair grounds as provided under Section 43(1) of the Employment Act, 2007.



42. Counsel relies on the holding in *National Bank of Kenya v Attorney Njue John* (2019) eKLR where the court affirmed the finding that termination of the Claimant's employment was not premised on a valid reason and stated as follows;

“Section 45 of the Act.....in terms of the said section a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employees conduct, capacity, compatibility”.

43. Counsel submits that the Respondent accused the Claimants of negligence of duty which led to fraudulent transactions yet the investigations report did not show that there was a direct link between the alleged fraud and negligence on the part of the Claimants.

44. It is the Claimants submission that acts of alleged fraud must not only be set out but also be distinctly proved as was held in *Stanely Mwangi Gachungu & Another Vs Barclays Bank of Kenya ltd* (2019) eKLR where the court dismissed the Respondents fraud allegations and affirmed the legal requirement that fraud is to be distinctly proved;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly proved and it is not allowable to leave fraud to be inferred from the facts”.

45. The Claimants submit that their conduct did not illustrate reckless or unreasonable discharge of duty nor elicit elements of fraud.

46. On the second issue, counsel submits that the Claimants were taken through a procedurally unfair process that did not meet the threshold provided under Section 45 of the Employment Act, 2007 for the following reasons;

- i. The Claimants were not supplied with the investigation report before the disciplinary hearing and therefore their right to challenge the evidence was put in jeopardy.
- ii. Failure to provide the Claimants with minutes of the disciplinary hearing together with the recommendations which were required in the preparation of the appeal.
- iii. The disciplinary committee was not constituted as per the requirements of the Human Resource Manual.
- iv. The investigations report was the basis of the charges yet the Claimants was not supplied with it.
- v. The Claimants were not provided with the minutes of the disciplinary hearing together with the panellists' recommendations and comments despite requesting for the same.

47. Reliance was made on the holding in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR where the court found that the Respondent had subjected the Claimants to an unfair disciplinary hearing and declared the termination unlawful.

48. Counsel further submits that failure to supply the Claimants with the very document that is the basis of the charges levelled against them denied them a reasonable opportunity to prepare and submit their defence.



49. Counsel submits that having established that the Claimants were unfairly terminated they were entitled to the reliefs sought as set out in Section 49 of the Employment Act, 2007.

### **Respondent's submissions**

50. Counsel for the Respondent highlighted the following issues for determination, whether;
- a. The Claimants dismissal from employment was not premised on a valid reason.
  - b. The disciplinary process by the Respondent was procedurally unfair.
  - c. Whether the Claimants are entitled to the reliefs sought.
51. On the first issue, counsel submits that the Claimants termination by the Respondent was premised on a valid reason, namely; failure to conduct basic verification of documents submitted to them.
52. It is the Respondent's submission that the Claimants had a role to play in the verification process which is the first port of call in the entire transaction.
53. Counsel cites the holding in *Galgalo Jasro Jillo v Agricultural Finance Corporation (2021) eKLR* to reinforce the submission.
54. Counsel further submits that the Respondent had a fair and valid reason to warrant the Claimants dismissal. Counsel urges that the Claimants were issued with a 1<sup>st</sup> warning relating to a fraudulent transaction and soon thereafter they were issued with notice to show cause based on financial malpractices.
55. On the second issue counsel submits, that the Claimants were accorded every opportunity to defend themselves against the allegations levelled upon them. It is submitted that the Claimants appealed against the dismissal to the Disciplinary Appeal Committee.
56. Counsel submits that the Respondent followed its Human Resource Manual to the letter and the Claimants' dismissal from service was procedurally fair.
57. Reliance was made on the holding in *Simon Karuga Waweru v Twiga Stationeries Limited (2019)* where the court held as follows;
- “In this cause, the Claimant was served with internal memo charging him with absenting from work without permission, which he responded admitting that he absented himself from work on 9.6.2014 after lunch and reported back 10.6.2014. In a number of previous decisions, I have held that whenever an employee admits misconduct in a response to a show cause letter, the employer is not bound to conduct any further disciplinary hearing. In this case I dare repeat that any demand for an oral hearing under section 41 of the Employment Act was superfluous in the face of the said unequivocal admission by the Claimant that absconded duty on 9.6.2014”.
58. On the 3<sup>rd</sup> issue, counsel submits that the Claimants are not entitled to the reliefs sought as the dismissal was substantially and procedurally fair.
59. As regards the counter claim, the Respondent's counsel submits that the Claimants have outstanding loans with the Respondent and urges the court to set off the loans with any award made in their favour.
60. Finally, it is the Respondent's submission that the Claimants were lawfully dismissed on account of negligence of duty which occasioned the loss of society's funds.



## Findings and determination

61. It is common ground that the Claimants were employees of the Respondent serving in various capacities until 18<sup>th</sup> March 2019 when Mary Kitheka and Alice Njeri were terminated from employment.
62. It is also not contested that the Respondent received an internal audit report dated 26<sup>th</sup> November 2018 that revealed fraudulent transactions had taken place in the Respondents Msacco platform where mobile numbers relating to 5 non-members were updated in existing member bio data and linked to their FOSA savings accounts and withdrawals made from those accounts.
63. From the foregoing, the issues for determination are;
  - a. Whether termination of Claimants employment by the Respondent was unfair.
  - b. Whether the Claimants are entitled to the reliefs sought.
  - c. Whether the Respondent is entitled to the counter claim.
64. As correctly submitted by counsel, the provisions of the Employment Act, 2007 and case law are consistent that for a termination of employment to pass muster, the employer is required to prove that it had a valid and fair reason to terminate the employee's employment and conducted the same in accordance with a fair procedure.
65. The provisions of Sections 41, 43, 44 and 45(2) and 47(5) of the Act set out the essentials of a fair termination of employment as underscored in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR.
66. In Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR, the Court of Appeal stated as follows;

“. . . From the foregoing, termination of employment may be substantively and/or procedurally fair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
67. Finally, in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, Ndolo J. underscored the need to establish a substantive justification and procedural fairness for a termination to pass the fairness test.

## Reason for termination

68. It is not in contest that Mary Kitheka and Alice Njeri's employment was terminated on the 18<sup>th</sup> March, 2018. Their termination letters read in part;

“as an employee of the sacco you are well aware that due diligence is an important measure in mitigating against fraud and theft through the Msacco platform. However, it is noted that you choose to ignore that crucial process, thus abetting fraudulent access to members FOSA savings account and exposing your employer to loss of funds”.
- 69.



- (i) Alice Njeri Wanuthi responded to the notice to show cause by letter dated 21<sup>st</sup> November, 2018 stating that the request to reset Pin No. 59977 was placed on her desk and the cell phone number had already been updated in the system and after checking, she reset the pin.
70. That the member's signature on the form resembled the one in the system and the names were similar and could not differentiate them.
71. It was her testimony that DOD service numbers changed. The Claimant was remorseful that her actions led to loss and asked for leniency.
- 72.
- (ii) Mary M. Kitheka responded to the notice to show cause vide letter dated 5<sup>th</sup> December, 2018.
73. The Claimant admits that during the month of August 2018, it appeared to her that there was a well-organized cartel which was using an insider.
74. That before October 2018, there were no controls or order as update forms could be forwarded by anyone including members, branch officials, staff, by mail or via email and it would not have been difficult for any malicious person to impersonate members and change member's details.
75. The Claimant makes proposals on how to tighten the system, apologises for any inconvenience, is expressly remorseful and prays for leniency.
76. Section 43 of the Employment Act, 2007 provides;
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.
  2. The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
77. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal held that;
- “The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist”, causing it to terminate the employee's services. That is a partly subjective test.”
78. The provisions of Section 43(2) of the Act require the employer to establish that it had reasonable and sufficient grounds for its belief.
79. The foregoing is constituent with the sentiments of B.O. Manani J. in *Galgalo Jarso Jillo V Agriculture Finance Corporation* (Supra), where the judge stated as follows;
- “In terms of Section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for



the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that in fact it did not”.

80. Similarly, in *British Leyland (UK) Ltd V Swift* (1981) I.R.L.R 91, Lord Denning MR stated as follows;

“ . . . The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair. It must be remembered that in all these cases there was a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably keep him on. Both views may be quite reasonable.

If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employers may not have dismissed him.”

81. In the instant case, the Respondent based the charges and dismissal of the Claimants on the Internal Audit Report dated November 2018. The report reveals that 24 transactions relating to withdrawals via the Msacco platform were fraudulent. That mobile phone numbers belonging to five non-members of the sacco were updated to existing members bio data and linked to FOSA savings accounts and withdrawals effected 1 – 3 days later.

82. The audit also found that the change of mobile phone numbers in the bio data of members was effected by Mary Kitheka and Alice Njeri linked the mobile numbers to FOSA Savings Account.

83. The audit found that the fraudsters were targeting dormant accounts and update forms were not attached to members’ files for verification which would appear to confirm the observations by Mary Kitheka in her response to the notice to show cause.

84. Finally, the audit found the Claimants culpable for failure to verify and validate the information provided.

85. The Audit Report recommended that the record assistants must validate physical forms before creation or updating any record in the member personal account.

86. Having pleaded and testified that the Claimants’ duties included updating of members details and interacted with the Msacco platforms, the findings exposed shortcomings in their dockets, an indictment they could not run away from.

87. From the evidence, it is discernible that the Claimant’s failure to verify account details of members before updating their bio data’s indirectly facilitated fraudulent transactions.

88. For the foregoing reasons, it is the finding of the court that the Respondent has demonstrated on the balance of probabilities that it had a valid and fair reason to dismiss Mary Kitheka and Alice Njeri from employment.

89. Put in the alternative, termination of the Claimant’s employment was substantively justifiable.

### **Procedure**

90. Section 41 of the Employment Act, 2007 prescribes the procedural precepts of termination of employment.

91. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal expressed itself as follows;

“ Four elements must be discernible for the procedure to pass muster:-



- i. an explanation of the grounds of termination in a language understood by the employee;
  - ii. the reasons for which the employer is considering termination;
  - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
  - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
92. Needless to belabour, Section 41 of the Act prescribes the minimum requirements an employer must abide by in termination of employment.
93. Similarly, in the words of Mbaru J. in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (Supra)*;
- “ . . . Where an employer fails to follow these mandatory provisions whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair . . . ”
94. As regards the procedure employed by the Respondent, the Claimants fault the Respondent for failure to furnish them with the Internal Audit Report dated November 2018 from which the charges of negligence or want of care were drawn and the dismissal justified.
95. The Respondent’s witness, Mr. Willy Tanui testified that he was at Mombasa when the audit was conducted and could not confirm whether the documents were availed prior to the disciplinary hearing. In his view, the documents ought to have been supplied to the Claimants.
96. It is a tenet of fair hearing that the accused party be supplied with evidence and documents the accusing party intends to rely on in the prosecution of the accused party to enable the accused party prepare his defence.
97. In this case, the Respondent’s refusal to provide the Claimants with the evidence it relied on at the hearing adversely affected the Claimants’ right of fair hearing as it impaired their ability to mount an effective defence against the charges levelled against them which rendered the termination of employment procedurally flawed and unfair.
98. The need for the accuser to avail the evidence it will rely on to the accused before the hearing was underscored by the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui (Supra)*.
- On the reliefs sought, the court proceeds as follows;

**i. Declaration**

99. Having found that the Respondent’s refusal to supply the Claimants with the Internal Audit Report impeded their ability to mount an effective defence, a declaration that the termination was unfair and contrary to the principles of natural justice is merited and is decreed.

**ii. Discrimination**

100. Neither the Claimants’ written witness statement nor the oral evidence they adduced in court mentioned or alleged or insinuated that they were discriminated on account of age or any other aspect.



101. More significantly, neither of the Claimants catalogued the particulars of the alleged discrimination.
102. The prayer lacks particulars and it is dismissed.

### **iii. Declaration that termination was unfair**

103. Having found that termination of the Claimants' employment was procedurally unfair, a declaration to that effect is merited and is decreed.

### **iv. 12 months' pay for unfair dismissal**

104. Having found that the termination of the Claimant's employment was substantively justifiable but procedurally unfair, the Claimants are entitled to the relief under Section 49(1)(c) of the Employment Act, 2007.
105. The Court has considered the fact that the Claimants were employees of the Respondent for a duration of about 29 and 23 years respectively, which is long. The Claimants expressed their wish to remain in the Respondent's employment when they appealed the decision to terminate their employment. Mary Kitheka had a 1<sup>st</sup> warning and both Claimant substantively contributed to the termination of employment.
106. In the circumstances, the court is satisfied that the equivalent of three (3) months gross salary is fair compensation for unlawful termination.

### **v. Three months' salary in lieu of notice**

107. Having found that the termination of the Claimants' employment was substantively justifiable, though procedurally unfair and having further found that the Claimants were summarily dismissed from employment, the claim for salary in lieu of notice is unsustainable and is declined.

### **vi. Service pay**

108. Although the Claimants sought service pay at 3 months and 15 days respectively for every year worked, they did not adduce any evidence to justify the claim.
109. The CBA for the period January 2019 to December 2022 produced in court does not have a provision for service pay in the event of termination of employment. The prayer is declined.

### **vii. 25% discount on the outstanding loan balance**

110. The Claimants are seeking a 25% discount on the outstanding loan balances but did not adduce evidence to justify discount sought. As no basis has been laid for the claim or any material presented, the prayer is declined.

### **viii. Leave days**

111. Mary Kitheka prays for 38 unpaid leave days at Kshs.221,502/= and Alice Njeri prays for 27 unpaid leave days at Kshs.157,383/=.
112. However, neither the written witness statements nor the oral evidence adduced in court make reference to number of outstanding leave days and when they accrued and perhaps why leave was not taken as the termination took place early in the year.
113. The prayer lacks particulars and is declined.



**ix. Days worked from 1<sup>st</sup> March, 2019 to 18<sup>th</sup> March, 2019 at Kshs.104,922.00**

114. Having found that termination of the Claimants employment was substantively justifiable, the Claimants are not entitled to the salary for the days claimed.

The prayer is declined.

**x. Medical Cover benefits**

115. The Claimants seeks medical cover benefits until 31<sup>st</sup> December, 2019 but did not adduce evidence why the same should be extended at this stage. The prayer has been overtaken by events and is declined.

**xi. General, aggravated and exemplary damages.**

116. The Claimants have not proved entitlement to general or aggravated damages.

117. As explained in *Rookes v Banard & others* (1964) AC 1129 and succinctly captured in *Obonyo & another V Municipal Council of Kisumu* (1971) EA 91, exemplary damages are awarded in defined circumstances namely;

- i. if authorised by statute,
- ii. oppressive, arbitrary or unconstitutional action by servants of the government and
- iii. where the defendant's conduct was calculated to procure him some benefit at the expense of the Claimant.

118. Exemplary damages are not consolatory in nature and are seldom awarded in termination of employment contracts.

119. The Claimants tendered no evidence to demonstrate entitlement to exemplary or aggravated damages.

120. The prayer is declined.

**xii. Counter claim**

121. The Respondent counter-claims against the Claimants for

- a. Mary Kitheka Kshs.1,612,902/=
- b. Alice Njeri Kshs.1,699,371.07/=

Being an outstanding loan balances with the Respondent.

122. In their evidences, the Claimants acknowledged that they had outstanding loans with the Respondent.

123. In the circumstances, the Claimants shall continue servicing the outstanding loans as they were doing during their employment.

124. The prayer for set-off is declined.

125. In the upshot, judgment is entered for the Claimants against the Respondent as follows;

- a. Declaration that the act of the Respondent of withholding evidence which formed the basis of termination of the Claimants' employment was unfair, unlawful and in breach of the rules of natural justice.
- b. Declaration that termination of the Claimants employment by the Respondent was unfair.



- c. Equivalent of 3 months' gross salary for each of the Claimants.
- d. Claimants to continue servicing the outstanding loan with the Respondent
- e. 50% costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF MAY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

