



**Odero v Barclays Bank of Kenya Ltd (Cause 1504 of 2018)
[2024] KEELRC 2113 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1504 OF 2018**

**SC RUTTO, J
JULY 26, 2024**

BETWEEN

BRAIMOH KOTONYA ODERO CLAIMANT

AND

BARCLAYS BANK OF KENYA LTD RESPONDENT

JUDGMENT

1. It is not in dispute that the Claimant herein, Mr. Braimoh Kotonya Odero was an employee of the Respondent Bank. What is disputed is the reasons leading to the termination of the employment contract and the procedure applied in effecting the said termination.
2. According to the Claimant, he carried out his duties professionally and diligently to the satisfaction of the Respondent. He avers that his performance was reviewed in accordance with the Respondent’s Performance Development Policies in force at the time and the Respondent reached a considered view that he deserved a new role in terms of promotion. That subsequently, he was appointed to the position of Contact Centre Agent with effect from 28th September 2015.
3. From the record, the employment relationship started to disintegrate when the Claimant was issued with a letter of suspension on 3rd February 2017. Thereafter, a disciplinary process ensued, culminating in the Claimant’s termination from employment. The Claimant has termed his termination from employment wrongful and unfair and consequently seeks the following reliefs against the Respondent:
 - a. Declarative orders under section 12(3) (iv) of the Industrial Court Act declaring that the said termination letter dated 25th April, 2017 is unlawful, lacks merit and is a violation and infringement of the fundamental freedoms in the Bill of Rights under Articles 50, 35(1)(b), 41(1) and (2) (a) and (b), 27 and 47(1) of *the Constitution*.
 - b. Declarative orders under section 12(3) (iv) of the Industrial Court Act declaring that the Claimants termination should only take effect when the Respondent conforms to all legal



requirements stipulated by the Constitution, Statute and the Employment Contract and therefore declare that the Claimant is entitled to his monthly salary until the Respondent terminates his services within the law.

- c. An order of compensation as directed by Article 23(3) of the Constitution and section 12(3) (v) of the Employment Act by the Respondent to the Claimant for the remainder of the years he has till attaining the retirement age of 60 at the following rate; Monthly salary x 12 months in a year x 32 years of service $77,736.00 \times 12 \times 32 \text{ years} = \text{Kshs.}29,850,624.00$;
 - d. Order the Respondent to pay general damages to the Claimant for unfair termination of employment of the Claimant as contemplated in section 12 (3) (vi) of the Employment Act.
 - e. Order the Respondent to pay the Claimant 12 months' salary on the gross monthly salary at the time of dismissal as stipulated under section 49 of the Employment Act as compensation for unfair termination thus: $77,736.00 \times 12 = \text{Kshs.}932,832.00$
 - f. In the alternative and without prejudice to the foregoing order immediate reinstatement of the claimant to his immediate former position of work.
 - g. A declaration that the Respondent failed to discharge its mandate which it owed the Claimant.
 - h. An order on any other award or benefit that this Honourable Court may deem fit and just to grant in the circumstances of this case.
 - i. Order the Respondent to bear the burden of the costs of this suit.
 - j. Orders the Respondent to pay interest at court rates on all the above prayers.
4. Opposing the Claim, the Respondent avers that genuine reason for termination advanced and leading to the Claimant's termination was valid and fair. It is the Respondent's contention that the termination of the Claimant's employment was both substantively and procedurally fair. In the Respondent's view, the Claimant is not entitled to the prayers sought as there is no cause of action against it.
 5. The Respondent has further filed a Counterclaim against the Claimant for the sum of Kshs 1,734,945.95. According to the Respondent, the Claimant had on his own volition taken various staff loans and which loans he had expressly undertaken to repay. On account of the foregoing, the Respondent has asked the Court to dismiss the Claimant's suit with costs and to enter judgment in its favour for the sum of Kshs 1,734,945.95.
 6. The Claimant filed a Reply to the Respondent's Amended Memorandum of Response and Counterclaim through which he has denied owing the Respondent a loan balance of Kshs 1,734,945.95. The Claimant further disputed this Court's jurisdiction to entertain the Counterclaim.
 7. The matter proceeded for hearing on diverse dates during which both sides called oral evidence.

Claimant's Case

8. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement together with his list and bundle of documents to constitute his evidence in chief.
9. The Claimant averred that as per his letter of suspension, the Respondent was conducting investigations regarding BIR fraud cases that occurred between June 2016 to January 2017.
10. The Claimant contended that the letter of suspension failed to inform him of the grounds that informed the Respondent's decision to place him under suspension. Further, it did not give any specific details on how he was involved in the matters under investigation hence necessitating his suspension.



11. His suspension was further extended vide letter dated 27th February 2017 for a period of 30 days.
12. The Claimant averred that on 4th April 2017, the Respondent issued him with a show cause letter requiring him to respond to the incident regarding multiple internet banking frauds that occurred on diverse dates between June 2016 and January 2017.
13. The show cause letter further indicated that following investigations, the Respondent had reasonable grounds to conclude that he was involved in the multiple internet frauds that occurred on diverse dates between June 2016 and January 2017 leading to the actual loss of Ksh.14,9547,323.20 and a potential loss of Ksh.20,720,210.00.
14. The Claimant contended that he was not supplied with the investigation report that had allegedly been conducted nor was he supplied with any other document to corroborate the Respondent's position that he was involved in the multiple internet fraud. That further, the letter did not disclose the specific details of those particular grounds that the Respondent had relied on.
15. It was the Claimant's further contention that the show cause letter was delivered to him on 6th April 2017 at 4. 00p.m and it required him to respond by 5.00 p.m. on 7th April 2017.
16. Despite not having been granted adequate time and facilities to lodge his defense to the allegation of fraud leveled against him, he duly complied and responded by the stipulated time vide a letter dated 7th April 2017.
17. Given that the Respondent only wrote a general letter without specifically pointing out the allegations he was expected to answer to, he could at best only deny the accusations without giving elaborate explanations for the same owing to lack of adequate time and information to respond.
18. The Respondent proceeded to schedule a disciplinary hearing for the 19th of April, 2017 vide a letter dated 12th April, 2017.
19. The Claimant further averred that before the commencement of the disciplinary hearing, the Respondent illegally confiscated his phone without any legal or factual basis or explanations for the same and proceeded to base their questioning on the contents of the illegally confiscated phone.
20. He averred that the disciplinary panel did not ask him any questions directly pertinent to his alleged involvement in the purported acts of internet banking fraud, but instead delved into irrelevant questions which were ostensibly crafted to find the slightest excuse to justify a dismissal.
21. That further, the disciplinary panel neither raised any specifics or particulars of his involvement in the aforesaid fraudulent acts nor adduced any evidence that either directly or remotely linked him to the alleged incidents of the internet banking frauds.
22. He was instead asked about his previous communication with a former employee of the Respondent known as Joash Nyarango Ouso.
23. According to the Claimant, the Respondent irregularly gained access to his cell phone and from it, illegally obtained his private communication with other people, among them, Geoffrey Nyamboga, without seeking his consent.
24. He raised this concern with the disciplinary panel who dismissed it and they proceeded to illegally rely on his private conversations obtained from his phone and used the same to ask him questions relating to a text message sent to him by Geoffrey Nyamboga on 31st December 2016 requesting him to sign him in into the Respondent's CMS log in system with a view to conceal his actual log in time to work.



25. He denied having done as requested by Geoffrey Nyamboga, and further gave an adequate explanation to the effect that he was on leave on the said 31st December 2016 and was thus incapable of having signed Geoffrey Nyamboga into the Respondent's CMS system.
26. He lodged an appeal, in which he specifically sought from the Respondent an explicit explanation of the Respondent's decision regarding his alleged contact with fraudsters with the intention to hatch plans to defraud the Respondent and further, prove the said allegations.
27. The Respondent convened an appeal hearing on 5th May 2017 in which his attempts to get the aforesaid explanations proved futile as no explanation was forthcoming either during the appeal hearing or in the Respondent's letter on 9th May 2017 which conveyed the outcome of the appeal.
28. The Claimant contended that his concerns on the manner in which his phone was seized and personal information retrieved, still went unaddressed. The Appeal panel still upheld the Respondent's initial decision to terminate his employment.
29. In the Claimant's view, the Respondent's decision was not only unreasonable but irrational in the circumstances as none of the allegations against him were adequately backed by actual proof but were simply based on mere suspicions and uncorroborated facts.
30. According to the Claimant, the entire decision of the Respondent to terminate him was, consequently, based on ill-thought-out reasons and a series of unsubstantiated facts much to his prejudice and detriment.

Respondent's Case

31. On its part, the Respondent called oral evidence through three witnesses being Mr. Vaslas Odhiambo, Ms. Linah Khamadi and Mr. Charles Maina. Mr. Odhiambo was the first to go. He testified as RW1 and started by identifying himself as the Respondent's Head of Employee Relations. Mr. Odhiambo proceeded to adopt his witness statement, the initial list and bundle of documents of documents as well as the Supplementary list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
32. It was RW1's evidence that the letter of suspension was issued in accordance with Section 41 of the [Employment Act](#) as it clearly informed the Claimant that the reason for his suspension was to allow for investigations.
33. The suspension was further extended by letters dated 27th February 2017 and 28th March 2017 respectively for a period of 30 days.
34. On or about 4th April 2017 the Claimant was issued with a show cause letter which made reference to the Respondent having reasonable grounds to conclude that he was involved in the multiple internet banking frauds that occurred on diverse dates between June 2016 and January 2017 at the Contact Center following investigations that had been conducted and required him to respond by 7th April 2017.
35. According to RW1, the Respondent acted upon the investigation report by Africa Forensic Investigations which highlighted the Claimant's role in the internet banking fraud that led to the actual loss of Kshs.14,954,323.20 and potential loss of Kshs. 20,720,210.00.
36. The Claimant responded to the show cause letter vide a letter dated 7th April 2017 and denied the allegations. The response was not satisfactory and the Respondent proceeded to invite him to a disciplinary hearing vide a letter dated 12th April 2017.



37. RW1 further averred that the Claimant gave out his phone voluntarily. He contended that there is nothing on record that shows that the Claimant protested giving out his phone or that he wrote a complaint over the alleged confiscation of his phone.
38. RW1 further stated on or about 19th April 2017, a disciplinary hearing was conducted wherein the Claimant was put on his defense. The Claimant denied having reported to work on 31st December 2016 although a call to the Contact Centre management confirmed he accessed the system on 31st December 2016 at 7.00 am and logged out at 1301hrs and that he acted against the Respondent's IRM policy by accessing the system on his colleague's behalf.
39. According to RW1, it is against this background that the panel recommended termination of the Claimant's employment.
40. The Claimant was terminated from employment vide a letter dated 25th April 2017. He appealed against the termination vide a letter dated 27th April 2017 and on or about 5th May 2017, an appeal hearing was conducted where the decision to terminate his employment was upheld.
41. RW1 added that the panel relied on the investigations report that showed the findings that the Claimant had on 31st December 2016, acted on a request from his colleague Geoffrey Nyamboga and logged him in as having reported to work at 0810 hours.
42. The Claimant's explanation to the effect that he was on leave on 31st December 2016 was not adequate as a call to the Contact Centre management confirmed the Claimant actually accessed the system on the said date at 7.00 am and logged out at 1301 hours.
43. RW1 further averred that at the appeal hearing on 5th May 2017, the Claimant was given a second chance to defend himself again where he failed to provide any evidence that he was not involved in the fraud.
44. At the appeal hearing, the Claimant confirmed that he was aware of the Respondent's IRM policy but never took up his personal responsibility to report the anomaly. He further claimed that his phone was taken forcefully and he had not used his phone for a month yet he took no action to report it.
45. In RW1's view, the disciplinary hearing was conducted in accordance with the rules of Natural Justice. He averred that the Claimant was given an opportunity to respond to the charge in writing thus giving him an opportunity to be heard.
46. That further, the preferential rates available to bank staff on loans and cards lapse upon termination as stipulated in the Claimant's employment contract.
47. It was RW1's further evidence that the Claimant has not proven any losses both financially, economically and socially as a result of the alleged termination.
48. In closing, RW1 asked the court to dismiss the Claim and allow the Counterclaim as prayed.
49. Ms. Linah Khamadi, who testified as RW2 stated that she received a request from an investigator at the Respondent Bank to extract the call logs for 31st December 2016 with respect to Geoffrey Nyamboga. According to RW2, the call log report confirms that Mr. Nyamboga was not available to pick up any calls on 31st December 2016, between 8:00 and 9:00 am.
50. Mr. Charles Maina who testified as RW3 told the court that he did an investigation with regards to mobile banking fraud in which various customers were defrauded and the bank lost money in the sum of Kshs. 14 million. To this end, he produced the investigation report filed on behalf of the Respondent to constitute his evidence in chief.



51. He further testified that he did an investigation with respect to communication between the Claimant and Mr. Geoffrey Nyamboga. That in the course of their investigations, they relied on extraction reports retrieved from Mr. Geoffrey Nyamboga's mobile phone. In this case, they looked at communication between various persons involved in the fraud. That there were various text messages between the Claimant and the said Geoffrey Nyamboga.
52. RW3 further stated that they obtained the mobile phones of the staff concerned by consent. He maintained that the said staff gave them their phones voluntarily.

Submissions

53. It was the Claimant's submission that he was sent on suspension to enable the Respondent conduct investigations regarding BIR fraud cases that occurred between June 2016 and January 2017 and that the Respondent neither amended nor added on those charges.
54. It was the Claimant's further evidence that the show cause letter was not accompanied by any documentary evidence such as the Investigation Report arising from the Investigations that had allegedly been carried out by the Respondent and upon which it relied on, in determining that he needed to show cause.
55. The Claimant further posited that he was terminated for reasons that were at variance with those hitherto disclosed to him both through the letter of suspension and the show cause letter.
56. According to the Claimant, the decision to terminate him was not substantively fair.
57. The Claimant maintained that from the Respondent's own evidence, they did not have any reason whatsoever to suspect him for having been involved in the BIR fraud. In support of the Claimant's submission, the case of Jane Wanja Muthara v EACC ELRC Cause No. 722 of 2015 was cited.
58. The Claimant further submitted that the Respondent's entire investigations were anchored on illegally obtained evidence from his personal phone and that of Geoffrey Nyamboga. He argued that the Respondent must not be allowed to rely on and benefit from that illegality. In support of this position, the Claimant cited the case of GJK v KPMG Advisory Services (2017) eKLR.
59. Citing the case of *Oyatsi v Judicial Service Commission (Petition E111 of 2021)* (2022) KEELRC 3 (KLR) (10 March 2022), the Claimant submitted that the Respondent was thus in breach of its own rules and procedures relating to the show cause letter.
60. The Claimant further submitted that the Respondent did not bother to prove the allegations against him but instead orchestrated a sham investigation report based on illegally obtained evidence. According to the Claimant, the evidence against him was therefore not obvious to warrant a summary dismissal.
61. It was the Claimant's further submission that the Respondent deliberately withheld the investigation Report from him during the disciplinary process so as to prejudice and disadvantage him by incapacitating his ability to defend himself. In this regard, he made reference to the case of Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited (2019) eKLR.
62. With respect to the Counterclaim, the Claimant submitted that the Court cannot adjudicate over the terms and conditions of a loan agreement that is not before it. According to him, the Respondent is inviting the Court to speculate over the terms and proof as to the existence of the loan.
63. The Claimant further submitted that the Court cannot be asked to read into the nil balance as indicated in the bank statement and interpret the same as representing other figures on account of the



- Respondent's administrative procedures. He argued that the only evidence brought to Court is the existence of a nil balance and all other evidence is extrinsic and cannot be relied on account of the parol evidence rule.
64. On the other hand, the Respondent submitted that the Claimant's employment was terminated for a valid reason which was his involvement in multiple internet fraud particularly his actions of being in contact with the fraudsters and acting contrary to the Respondent's procedures and policies by sharing log in credentials of his colleague.
 65. The Respondent further submitted that suspension is a preliminary stage in the disciplinary process and that it reserved the right to alter the charges against the Claimant as may have been appropriate following conclusion of the investigations.
 66. The Respondent further argued that the reasons preferred in the termination letter and the grounds stated in the show cause letter were similar and were not at variance as purported by the Claimant. In support of this position, the Respondent cited the case of Charles Oyieko Okumu v United Millers Limited (2021) eKLR. In the same vein, the Respondent submitted that both the show cause letter and the termination letter speak the same language, which is the Claimant's involvement in the multiple internet banking fraud that occurred between June 2016 and January 2017.
 67. It was further submitted that the Claimant was aware of the terms of his employment contract and he had consented to the Respondent monitoring the communication in his electronic equipment including his mobile phone. That the Claimant cannot therefore be heard to claim that the Respondent illegally obtained the evidence contained in his mobile phone.
 68. It was the Respondent's view that the right to privacy is a limited right under *the Constitution* and the Claimant having willfully handed over his mobile phone to the Respondent for purposes of investigation, is estopped by his conduct from claiming that the evidence extracted from the said mobile phone was obtained illegally.
 69. The Respondent maintained that there was a substantive and justifiable reason as to why the Claimant was terminated from the Respondent's employment.
 70. Referencing the case of Benedict Mtoto Mwabili v County Public Service Board Taita Taveta County (2018) eKLR and Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited (2013) eKLR, the Respondent submitted that it accorded the Claimant a fair hearing before proceeding to embark on terminating his employment. That it cannot therefore be said to have failed to comply with the provisions of Section 41 of the Act.
 71. Citing the case of Anarita Karimi Njeru v Republic (1976-1980) KLR 1272, the Respondent further submitted that no particulars of violations of Articles 41, 47 and 50 have been provided by the Claimant.
 72. The Respondent further submitted that the role of the Court is to enforce the terms and conditions of the contract between the parties and not to re-write the contract between them. That the parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved as was held in the case of National Bank of Kenya Limited v Pipe Plastics Sumkolit (K) Ltd & Another (2001) KLR 112. In the Respondent's view, the Court should not therefore import into the agreement clauses that were not intended by the parties themselves. In support of this position, further reliance was placed on the case of Amatsi Water Services Company Limited v Francis Shire Chachi (2018) eKLR.



73. The Respondent further submitted that the letter of offer provided in unequivocal terms that the Claimant agreed to the undertaking to pay the outstanding loan amount in full on termination of his employment contract. That upon termination of the Claimant's employment, he was duly informed of his outstanding loan balance and the conversion of the interest rates from staff rates to commercial rates in terms of the Respondent's policies.
74. It was the Respondent's position that the Claimant had an obligation to repay the loan, which obligation he was well aware of at the point of obtaining the credit facilities from the Respondent.

Analysis and Determination

75. Having considered the pleadings filed by both parties, the evidentiary material before on record and the rival submissions, the issues falling for the Court's determination can be distilled as follows;
- a. Whether the Respondent has proved that it was justified in terminating the employment of the Claimant;
 - b. Whether the Respondent accorded the Claimant procedural fairness prior to termination;
 - c. Whether the Respondent has proved its Counterclaim;
 - d. Is the Claimant entitled to the reliefs sought?

Whether the Respondent has proved that it was justified in terminating the employment of the Claimant

76. As can be discerned from the record, the Claimant herein was terminated from employment on grounds of gross misconduct in that he was involved in multiple internet banking frauds that occurred on diverse dates between June 2016 and January 2017 at the Contact Centre that led to the actual loss of Kshs. 14,954,323.20 and potential loss of Kshs. 20,720,210.00.
77. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
78. Applying the aforementioned statutory provisions to the case herein, the Respondent was required to prove that the Claimant's termination from employment was fair and valid and related to his conduct. Specifically, that the Claimant was involved in multiple internet banking frauds that occurred on diverse dates between June 2016 and January 2017 at the Contact Centre that led to the actual loss of Kshs. 14,954,323.20 and a potential loss of Kshs. 20,720,210.00.
79. According to the Respondent, the Claimant was in contact with fraudsters on several occasions with the sole aim of hatching a plan to defraud the Bank.
80. In this regard, the Respondent averred that on 31st December 2016, the Claimant received CMS system log-in credentials belonging to Geoffrey Nyamboga and logged into the system with the said credentials so as to conceal his reporting time to be seen as having reported at 0810 hrs while Geoffrey actually started picking calls at 0920 hrs.
81. In support of its case, the Respondent exhibited an extraction report containing messages retrieved from Mr. Nyamboga's cellular phone.



82. The Court has reviewed the text messages exchanged between the Claimant and the said Mr. Nyamboga on 31st December 2016. Notably, the said text messages do not reveal any acts of fraud or plans to commit fraudulent acts on the part of the Claimant in conjunction with Mr. Nyamboga.
83. To further support its case, the Respondent exhibited a copy of its investigation report in which it was noted that a text message originated from Mr. Geoffrey Nyamboga requesting the Claimant to log him into the CRM system as he would be late.
84. Once again, it is notable that the investigation report does not link the Claimant to the internet banking fraud as alleged. If anything, the report confirms that the Claimant was being requested by Mr. Nyamboga to log him into the system as he was running late.
85. Granted, the Claimant may have breached the Respondent's IRM Policy by irregularly logging Mr. Nyamboga into the system. However, this was not proof that he had committed internet banking fraud.
86. As a matter of fact, there is no evidence of further communication between the Claimant and Mr. Nyamboga after 31st December 2016.
87. One therefore wonders why the Respondent would conclude that the communication between the Claimant and Mr. Nyamboga was geared towards committing acts of fraud against the Bank.
88. The investigations report exhibited by the Respondent further noted that the Claimant had communicated with Joash Ouso a suspected fraudster. The record bears that during the disciplinary hearing, the Claimant informed the panel that he contacted Mr. Ouso since he was his loan guarantor and he risked losing his shares with the Kenya Bankers Association. He maintained that that was the reason for his numerous attempts to contact Mr. Ouso.
89. In support of his case, the Claimant exhibited a copy of a letter dated 5th August 2016 from the Kenya Bankers Association addressed to Mr. Ouso and copied to him, among others. In the said letter, the Kenya Bankers Association notified Mr. Ouso that his Express Loan was in arrears and informed him that they would be forced to revert to his guarantors' shares for the entire debt settlement in the event he failed to make monthly repayments as and when they fell due.
90. In another letter dated 5th August 2016, addressed to Mr. Ouso and copied to the Claimant, among others, he was once again notified by the Kenya Bankers Association that his Mirco-loan was in arrears and that they would be forced to revert to his guarantors' shares for the entire debt settlement in the event he failed to make monthly repayments as and when they fell due.
91. Further to the foregoing, the Claimant exhibited emails dated 8th August 2016 from the Kenya Bankers Association bearing the same message to Mr. Ouso regarding his outstanding loans. The Claimant was copied in the said emails.
92. The foregoing communication from the Kenya Bankers Association lends credence to the Claimant's assertions that his communication with Mr. Ouso was with respect to the loans he had guaranteed him.
93. Needless to say, there was no proof from the Respondent's end to discount the Claimant's assertions that his communication or attempted communication with Mr. Ouso was with respect to the loans he had guaranteed him.
94. In any event, it is common ground that the said Mr. Ouso and Mr. Nyamboga were the Claimant's colleagues. Therefore, communication between the Claimant and either of them cannot be reasonably construed as a scheme to commit acts of fraud except where there is cogent evidence to that effect.



In this case, the Respondent has failed to adduce evidence in whatever form or manner to link the Claimant to any alleged acts of fraud.

95. The net effect of my consideration is that the Respondent has failed to prove to the requisite standard that the Claimant was involved in multiple internet banking frauds that led to the loss of Kshs 14,954,323.20 and a potential loss of Kshs 20,720,210.00.
96. To this end, this Court arrives at the inescapable conclusion that the Respondent has failed to satisfy the requirements of Section 43(1) read together with Section 45(2) (a) (b) of the Act and as such, it has not proved that it was justified to terminate the Claimant from its employment on the grounds advanced.

Procedural fairness?

97. Beyond proving that it had reasons to terminate the services of an employee, an employer is required under the Act to further prove that it accorded an employee procedural fairness prior to terminating his or her employment.
98. This is the position under Section 45(2) (c) of the Act which stipulates that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the Act provides for notification and hearing. In this regard, the employer is required to notify the employee of the reasons for which it is considering terminating the employment contract and to also grant the employer an opportunity to make representations in response to allegations levelled against him.
99. In the instant case, the Claimant's disciplinary process was commenced on 3rd February 2017 when he was sent on suspension for a period of 30 days pending investigations.
100. The suspension was subsequently extended for a further period and on 4th April 2017, the Claimant was issued with a notice to show cause. He was asked to tender his explanation by 7th April 2017. From the record, the Claimant received the notice to show cause on 6th April 2017 whereas he was required to submit his explanation the following day by 5:00 pm.
101. Clause 5.3.1.1 of the Respondent's Disciplinary Capability and Grievance Policy and Procedure which addresses issuance of notices to show cause, provides for a period of three (3) working days within which an employee is required to respond to the show cause letter.
102. In this case, it is evident that the Claimant was given less than the stipulated period to respond to the notice to show cause. Needless to say, this was contrary to the Respondent's Disciplinary Capability and Grievance Policy and Procedure.
103. In its submissions, the Respondent has stated that the Claimant never raised the issue in his response to the notice to show cause. Be that as it may, that does not negate the fact that the Respondent acted contrary to its own Disciplinary Capability and Grievance Policy and Procedure.
104. The Claimant has further submitted that the Respondent withheld the investigation report from him.
105. With respect to investigation reports, Clause 5.3.1.2 of the Disciplinary Capability and Grievance Policy and Procedure provides as follows:

“ Ordinarily and except where it is inappropriate for any reason, the colleague will be provided with the relevant extracts of the investigation report.”
106. The Respondent did not advance any plausible reason why it failed to avail the investigation report to the Claimant yet the said investigations formed the basis under which he was sent on suspension.



Further to that, the said investigations formed a basis for the subsequent disciplinary action that was taken against the Claimant. This being the case, it would be expected the Respondent would share the investigation report with the Claimant once the investigations were concluded.

107. On this issue, I will follow the determination by the Court in the case of *Rebecca Ann Maina & 2 others vs Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, thus:

“34. I agree with Counsel for the Respondent that internal disciplinary proceedings are non judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence...”

108. In view of the foregoing observations, I am led to conclude that the Respondent failed to comply with the requirements of procedural fairness in effecting the Claimant’s termination. In the end, the Claimant’s termination was not procedurally fair.

Counterclaim?

109. As stated herein, the Respondent has lodged a counterclaim in the sum of Kshs 1,734,945.95 being loans taken by the Claimant in the course of his employment. According to the Respondent, the said loans were outstanding at the time the Claimant was terminated from employment.
110. The Claimant has disputed the Counterclaim and averred that there is no evidence of any existence of the loan. The Claimant has further argued that the bank statement produced in Court by the Respondent indicates that his loan balance is “0”.
111. It is notable that the Bank Statement exhibited by the Respondent indicates that the loan balance with respect to the principal, the interest and the penalty amounts as of 31st August 2017 was “0”. Explaining the “0” balance in the bank statement exhibited, RW1 stated in his oral testimony before Court, that once a customer defaults on a loan, the loan is written off from the books.
112. In view of the balances on all the foregoing items reading “0”, I am led to question what then is the Court being asked to award as Counterclaim?
113. In the premises, the Court finds that the Counterclaim has not been proved to the requisite standard.

Reliefs?

114. As the Court has found that the Claimant’s termination was unjustified, the Court being guided by the principles set out under Section 49(4) of the Act, awards him compensatory damages equivalent to eight (8) months of his gross salary. In arriving at this determination, the Court has considered the length of the employment relationship as well as the circumstances attendant to the Claimant’s termination and his reasonable expectation as to the length of time for which his employment with the Respondent might have continued but for the termination.
115. The claim for general damages is declined as the Claimant has been awarded compensatory damages. That should make good his loss. In so holding, I will follow the persuasive South African decision of *Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G. Dun and others*, Appeal Case No. JA 65/205, where it was determined that the purpose of compensation is to make good the employee’s loss and not to punish the employer.



Orders

116. It is against this background that I enter Judgment in favour of the Claimant against the Respondent in the following manner:

- a. The Claimant is awarded compensatory damages in the sum of Kshs 621,888.00 being equivalent to eight (8) months of his gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
- c. The Counterclaim is dismissed with no orders as to costs.
- d. The Claimant shall also have the costs of the Claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024.

.....

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Wakwaya instructed by Mr. Ongoro

For the Respondent Mr. Oduo

Court Assistant Millicent Kibet

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

