



**Mutuga v Co-operative Bank of Kenya Limited (Cause E225 of 2021)
[2025] KEELRC 2875 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2875 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E225 OF 2021
SC RUTTO, J
OCTOBER 21, 2025**

BETWEEN

CHARLES WAWERU MUTUGA CLAIMANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant states that he was an employee of the Respondent until 21st March 2018, when his employment was terminated on allegations of fraudulently inflating account balances. He maintains that his termination was malicious and unfair, asserting that the Respondent lacked a valid and fair reason for the termination of his employment and subjected him to an unfair trial.
2. On account of the foregoing, the Claimant seeks the following reliefs against the Respondent:
 - a. A declaration order that the Respondent's acts and/or omissions are tantamount to unfair and wrongful summary dismissal;
 - b. Compensation for damages for wrongful dismissal and unfair termination equivalent to 5 years;
 - c. Costs of the suit;
 - d. Interest on (b) until payment in full;
 - e. Any other relief that this Honourable court may deem just and fit to grant.
3. In response to the Claim, the Respondent filed a Statement of Response alongside a Counterclaim. In the Response, the Respondent avers that the Claimant defrauded it of Kshs 5,421,500.00, prompting disciplinary action against him. Accordingly, the Respondent prays that the Claim be dismissed with costs.



4. With respect to the Counterclaim, the Respondent avers that during his employment, the Claimant obtained a staff loan facility which became due and payable at the prevailing commercial rates upon his dismissal. The Respondent asserts that the outstanding amount stood at Kshs 4,559,997.00 as at the date of dismissal and continues to attract interest. Consequently, the Respondent seeks the following reliefs against the Claimant:
 - a. Kshs. 4,512,986.00 being the outstanding loan amount due to the Respondent as at 6th July 2021;
 - b. Interest on (a) above at the prevailing commercial rate of 12% until payment in full;
 - c. Kshs. 5,421,500.00 being the amount pilfered by the Claimant's fraudulent conduct;
 - d. Exemplary Damages;
 - e. Charges and expenses incurred on a full indemnity basis;
 - f. Costs of this suit; and
 - g. Interest on (a) and (c) above at court rates from the date of filing this Statement of Response and Counter Claim until payment in full.
5. The matter proceeded for hearing on diverse dates, during which both parties called oral evidence in support of their respective cases.

Claimant's Case

6. The Claimant, who testified in support of his case as CW1, began by adopting his Statement of Claim, witness statement, and verifying affidavit as his evidence in chief. He further produced the list and bundle of documents filed together with the Statement of Claim as exhibits before the Court.
7. The Claimant testified that on Saturday, 4th November 2017, he received a telephone call from one Nicolas Ole Sena of the Criminal Investigation Department (CID), informing him that the Respondent bank had lodged a complaint concerning suspicious activity in his account. He was instructed to report to their office on Monday, 6th November 2017.
8. Upon reporting to the CID office, he was advised to contact Mr Paul Kabura of the bank's Security Department, which he did in the company of his lawyer.
9. Mr. Kabura informed him that the matter was internal and that his lawyer's presence was unnecessary. The Claimant insisted on having his lawyer present and requested that a representative from the bank's legal department attend the meeting.
10. The Claimant further averred that the security team threatened his lawyer to leave the premises and, upon her refusal, declined to engage with them. Shortly thereafter, they agreed to proceed with the meeting on the understanding that the matter was internal and that no formal complaint had been filed with the CID.
11. The Claimant testified that the security team presented certain transactions on a typed Excel sheet and questioned him regarding those entries. He requested to verify the information against his official account statements or other bank records and sought permission to visit the branch to obtain the statements for validation of the Excel data, but his request was denied.
12. It was the Claimant's evidence that four men later entered the meeting, introduced themselves as CID officers, and informed him that he was under arrest. He spent the night in police custody and was



- arraigned on 7th November 2017, charged with the offence of stealing by servant, before being released on cash bail.
13. On 8th November 2017, he received a call from the Respondent's Chief Information Officer, Mr. Charles Washika, instructing him to collect a suspension letter and to report daily to the security office to sign the attendance register.
 14. The Claimant further averred that on 14th November 2017, he met with Mr. Kabura at the security office and was asked to provide a written statement, which he declined to sign as he was uncertain of its contents. The following day, after signing the attendance register, he informed Mr. Kabura that he would not attend further informal meetings or provide any information that could be used against him in the pending criminal proceedings unless formally instructed by the bank.
 15. On 16th November 2017, he wrote to the Human Resource Director requesting a formal disciplinary hearing and a copy of the Staff Disciplinary Manual, noting that he could not access it through the intranet since his laptop was in police custody.
 16. The Claimant averred that despite following up with Mr. Simon Maina from the Human Resources office, he never received a response to his letter.
 17. He continued signing the attendance register until 30th November 2017, when Mr. Kabura informed him that a show cause letter dated 23rd November 2017 had been dropped at the security office for his collection. He requested an extension of time to respond to the letter, which was granted.
 18. It was the Claimant's further evidence that on 6th December 2017, he responded to the show cause letter, providing a detailed account of events and seeking clarification on several issues, including.
 19. On 15th December 2017, he received an invitation to attend a disciplinary hearing scheduled for 20th December 2017.
 20. According to the Claimant, the hearing was biased, as most panel members appeared predisposed against him. He added that he was not furnished with any evidence before or during the hearing to enable him to respond to the allegations of account inflation.
 21. The Claimant further stated that he lodged a formal complaint with the Managing Director regarding the unfair and unlawful manner in which the disciplinary hearing had been conducted.
 22. On 30th January 2018, he was invited to appear before the Staff Disciplinary Committee for a further hearing scheduled for 6th February 2018, primarily on allegations that he had inflated his account balance by amending old entries, transferring credits from closed customer accounts, and deleting debit transactions.
 23. The second disciplinary hearing was rescheduled to 12th February 2018 after he requested, by a letter dated 2nd February 2018, additional time to prepare and to review the available evidence from the Human Resources office. However, the hearing did not proceed as planned.
 24. On 6th February 2018, he received a letter instructing him to appear at the Security Services Department on 12th February 2018 for an investigative interview and review of the evidence. He was informed that the evidence would not be provided to him as it existed only in soft copy form.
 25. The Claimant averred that on 20th February 2018, he appeared before the Staff Disciplinary Committee for the second hearing.



26. According to him, the proceedings were unfair as the panel once again failed to provide him with authentic, computer-generated printouts of the alleged illegal transactions, nor did they supply the soft or hard copy Excel evidence that had been shared with the police.
27. It was the Claimant's case that he presented substantial evidence in his defence, including hard copies of his bank statements and email notifications of online banking transactions, which were deliberately omitted from the minutes of the hearing.
28. It was his testimony that, faced with a biased process based on fabricated evidence and no prospect of a fair outcome, he tendered his resignation by a letter dated 21st February 2018. The Respondent swiftly rejected his resignation and, by a letter dated 27th February 2018, summarily dismissed him from employment, granting him a right of appeal within 21 days.
29. The Claimant averred that following his dismissal, the Respondent revoked his preferential staff interest rates and directed that his loan would thereafter attract interest at the prevailing commercial rates after 30 days.
30. On 16th March 2018, he appealed against the summary dismissal, citing, among other grounds, failure to provide the Staff Disciplinary and Procedures Manual, harassment during the hearing, and reliance on manipulated Microsoft Excel evidence instead of genuine computer printouts.
31. On 21st March 2018, his appeal was dismissed and the Respondent upheld the summary dismissal.
32. The Claimant contends that his dismissal was wrongful, unfair, and irregular, in total contravention of the rules of natural justice, fair labour practices, and the provisions of the *Employment Act*.

Respondent's Case

33. The Respondent presented oral evidence through Wycliffe Tongi and Leah Kerich, who testified as RW1 and RW2, respectively. Mr. Tongi, who testified first, identified himself as a Fraud Analyst at the Respondent bank.
34. Similarly, RW1 adopted his witness statement to constitute his evidence in chief. He further produced all the documents filed on behalf of the Respondent as exhibits before the Court.
35. RW1 testified that under his role profile, the Claimant's duties included, among others, receiving internal data requests and converting them into specific reporting requirements for analysis and use by the Respondent's Business Development Unit. That in executing his duties, the Claimant interacted with the Respondent's data sources under authorized access to fulfil his role objectives.
36. RW1 added that the Claimant's interaction with these data sources was strictly limited to acquiring and interpreting business data to support the Business Development Unit in generating insights and strategies.
37. It was RW1's evidence that on 31st August 2017, the Respondent's Data Centre detected an irregular system imbalance of Kshs. 571,500.00 within its Bank Fusion Universal Banking (BFUB) production database. This prompted the Data Centre to initiate a review of the BFUB production database to determine the cause of the imbalance.
38. RW1 averred that before the cause could be established, a similar imbalance of Kshs. 570,000.00 was detected on 8th September 2017, and such irregularities continued to occur weekly thereafter. To trace the source, on 1st November 2017, the Respondent's Database Administrators implemented a trigger imbalance alert system within the BFUB database to audit and track the cause of the anomalies.



39. On 3rd November 2017, following another imbalance of Kshs. 570,000.00, the trigger alert system was disabled to allow for analysis of the collected data.
40. Upon reviewing the data logs, the Security Department discovered that the recurring system imbalances between 31st August and 3rd November 2017 were all linked to inflated balances in the Claimant's bank account, number 01109009387600.
41. RW1 averred that preliminary investigations revealed that the Claimant had used a Structured Query Language (SQL) procedure from his assigned bank laptop (IP address 172.16.159.126), logged in under the user ID "cmutuga."
42. According to RW1, the Claimant's connection to the BFUB production database through the test DB server was irregular, as only two authorised server IP addresses 172.16.201.2 and 172.16.201.11, had legitimate access to that database.
43. RW1 further testified that the Claimant's access exceeded his scope of duties since he was neither an ICT Networks and Infrastructure Administrator, who held the root password, nor a Database Administrator.
44. RW1 further testified that additional investigations revealed that between 31st August and 3rd November 2017, the Claimant had amended old entries in his account by inflating existing amounts, transferred credit transactions from closed customer accounts into his own, and used SQL procedures to update and justify the irregular amendments. The inflated sums, totalling Kshs. 5,421,500.00, were then transferred between his CIC Investment Account and his M-Pesa account.
45. Upon completion of investigations, the Respondent suspended the Claimant on 7th November 2017 and reported the findings to the Office of the Director of Public Prosecutions, leading to his criminal charge for stealing by servant in the sum of Kshs. 5,421,500.00.
46. RW1 added that the suspension was necessary to prevent further loss, manipulation of data, and to allow comprehensive investigations into the Claimant's conduct.
47. On 23rd November 2017, after establishing grounds for misconduct, the Respondent charged the Claimant with violating its Computer User Policy, Business Code of Conduct and Ethics, and with fraudulently misappropriating Kshs. 5,421,500.00.
48. The Claimant was thereafter required to appear before the disciplinary panel on 20th December 2017 and again on 20th February 2018 to answer to the charges.
49. RW1 stated that during these hearings, the Claimant attempted to frustrate the disciplinary process by alleging lack of evidence against him.
50. It was RW1's further evidence that the Claimant had persistently refused to cooperate with the Security Department or attend investigative interviews to review the BFUB database evidence during his suspension.
51. RW1 further averred that during the hearings, the Claimant failed to provide a satisfactory explanation for the unsupported entries, which were not backed by any cheques or cash deposits.
52. Similarly, when questioned about the "hanging transactions" in his account, non-sequential counters similar to those found in closed customer accounts, the Claimant failed to give a reasonable explanation.



53. Upon being shown irregular IP logs from his assigned laptop, captured from the BFUB database and evidencing the fraudulent transactions, the Claimant admitted that, as an expert, he knew such logs could be manipulated.
54. Following the Claimant's unsatisfactory responses, the Respondent summarily dismissed him on 27th February 2018.
55. RW1 further stated that as a Demand Manager, the Claimant held a position of trust and responsibility, yet he breached that trust by defrauding the bank of Kshs. 5,421,500.00, thereby compromising his integrity.
56. Ms. Leah Kerich, who testified as RW2, identified herself as the Employee Relations Advisor at the Respondent bank. Similarly, she adopted her witness statement to constitute her evidence in chief. She further produced all the documents filed on behalf of the Respondent as exhibits before the Court.
57. Worthy to note is that RW2's evidence largely mirrored that of RW1.
58. RW2 testified that although the Claimant initially declined to accept his suspension, he later wrote to the Respondent on 9th November 2017, accepting it.
59. After confirming the grounds of misconduct, the Respondent issued the Claimant with a show cause letter on 23rd November 2017, requiring him to explain why disciplinary action should not be taken against him.
60. On 1st December 2017, the Claimant requested more time to respond, which was granted on condition that he submit his response by 14th December 2017. On 7th December 2017, the Claimant responded to the show cause letter, denying all charges. Finding his response unsatisfactory, the Respondent invited him to a disciplinary hearing scheduled for 15th December 2017.
61. On 20th December 2017, the Claimant appeared before the panel, where the charges were read and explained to him.
62. RW2 averred that instead of addressing the allegations, the Claimant alleged that no evidence had been presented against him, despite having ignored earlier invitations to review the database evidence.
63. She added that although the Claimant acknowledged ownership of the implicated bank account, he failed to produce any supporting evidence for the inflated balances or to explain the non-sequential transactions.
64. On 29th January 2018, the Respondent provided the Claimant with typed disciplinary proceedings, which he contested without identifying any specific inaccuracies.
65. RW2 further told the Court that to ensure fairness, the Claimant was invited to a second disciplinary hearing on 2nd February 2018. On the same day, the Claimant made several requests, including access to evidence, permission for his lawyer's presence, and for the hearing to be audio-recorded.
66. The Respondent informed him that the disciplinary process was an internal matter, not a court proceeding, but that he was entitled to have a fellow employee present. It also clarified that some evidence was stored electronically and could not be reproduced in hard copy, though the hearing minutes would be recorded and shared thereafter.
67. On 5th February 2018, the Claimant sought additional time to prepare, leading to the rescheduling of the hearing to 20th February 2018.



68. By a letter dated 6th February 2018, the Respondent invited the Claimant to the Security Services Department on 12th February 2018 to review the electronic evidence.
69. On 20th February 2018, the Claimant appeared before the Disciplinary Committee for the second hearing, where the earlier charges were restated.
70. RW2 averred that despite being given ample opportunity to review and respond to the evidence, the Claimant continued to dispute the charges without offering any credible explanation.
71. After the second hearing, on 22nd February 2018, the Claimant was provided with typed minutes, which he again disputed without specifying any inaccuracies.
72. RW2 averred that on 21st February 2018, before the process concluded, the Claimant tendered his resignation, which the Respondent rejected due to the pending disciplinary proceedings.
73. On 27th February 2018, following the Claimant's failure to satisfactorily respond to the charges, the Respondent summarily dismissed him for gross misconduct.
74. The Respondent issued a Certificate of Service and paid his terminal dues amounting to Kshs. 403,635.45, which were credited to his internal settlement account.
75. Dissatisfied with the outcome, the Claimant appealed on 16th March 2018 seeking reinstatement, but the Respondent dismissed the appeal on 21st March 2018.
76. Following the dismissal, the Respondent required the Claimant to settle his outstanding staff loan, and was invited to liaise with the Head of Remedial Management within 30 days to agree on a payment plan, but he failed to comply.
77. According to RW2, the Claimant had neglected to honour his financial obligations to the Respondent.

Submissions

78. The Claimant submitted that his termination from employment was both unfair and unlawful, as the Respondent failed to observe the mandatory provisions of the law.
79. He further contended that none of the witnesses called produced evidence linking him to the alleged theft, adding that he did not have access to the core banking system as implied by the Respondent.
80. The Claimant further argued that his termination was unlawful and procedurally unfair, as no reasons were provided for the failure to provide evidence. He contends that, consequently, there was no evidence to substantiate the Respondent's allegations that purportedly justified his dismissal. He also asserted that he was denied a fair hearing, resulting in an infringement of his constitutional rights.
81. The Claimant additionally submitted that the Respondent failed to provide sufficient reasons for denying him access to evidence against him, the right to representation, and the disciplinary manual. In his view, the disciplinary process was entirely opaque and confusing, with no clarification or confirmation of the allegations.
82. On the other hand, the Respondent submitted that the Claimant's failure to justify the transactions provided reasonable grounds for the Bank to conclude that he had illegally accessed the Bank's test DB server and BFUB core banking database without authorization and had amended his own bank account statement to defraud the Bank. In support of this submission, reliance was placed on *Mule v Credit Bank Limited (Cause E516 of 2023) [2024] KEELRC 2392 (KLR)*.



83. The Respondent further contended that the evidence obtained from the Bank's core BFUB banking database through the data imbalance trigger, the Claimant's account details, IP address, and username, provided sufficient grounds to initiate disciplinary action against him.
84. To this end, the Respondent argued that it not only had reasonable suspicion but also a fair and valid reason to subject the Claimant to disciplinary proceedings. To support this position, reliance was placed on *Diamond Industries Limited v Mwale* (Appeal E028 of 2022) [2023] KEELRC 1235 (KLR) (25 May 2023).
85. Citing *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* [2017] eKLR, the Respondent submitted that it duly complied with its obligations under Section 41 of the *Employment Act*.
86. The Respondent further argued that the Claimant's assertion that he was not provided with evidence prior to or during his disciplinary hearings is unfounded and represents an attempt to discredit a valid and procedurally fair dismissal. In support of this contention, the Respondent relied on *Olute v County Government of Siaya & Another* (Cause E059 of 2021) [2022] KEELRC 13206 (KLR).
87. Referencing *Khamasi v Paramount Bank Limited* (Appeal E033 of 2021) [2023] KEELRC 910 (KLR) (20 April 2023), the Respondent submitted that a disciplinary hearing is not a quasi-judicial proceeding, and the Bank had no legal or contractual obligation to ensure the presence of the Claimant's legal representatives.
88. In the Respondent's view, it fulfilled its obligations by providing the Claimant with all evidence held against him and by conducting a valid disciplinary hearing to hear his explanations.

Analysis and Determination

89. Flowing from the pleadings by both parties, the evidentiary material on record, as well as the rival submissions, the following issues emerge for determination: -
 - i. Whether the Respondent has established that there existed a valid and fair reason for terminating the Claimant's employment;
 - ii. Whether the Claimant was subjected to a fair process prior to termination from employment;
 - iii. Whether the Claimant is entitled to the reliefs sought; and
 - iv. Whether the Respondent's Counterclaim is merited.

Valid and fair reason for termination?

90. The record bears that the Claimant's employment was terminated on allegations that between 31st August 2017 and 3rd November 2017, he made unauthorized entries into his bank account No. 01109009387600 which were unsupported by any corresponding cash or cheque deposits or transfers. In this regard, it was alleged that the Claimant irregularly inflated his account balances through fictitious credits and subsequently transferred or utilized the funds through his CIC Investment and M-Pesa accounts.
91. Faced with the allegations, the Claimant denied accessing or altering any data within the Respondent's BFUB production or test databases.
92. In support of its case, the Respondent exhibited the Claimant's bank statement with respect to account number 01109009387600. A review of the bank statement reveals an irregular pattern in the credit transactions, as the sequence of dates and times is not chronological. In this regard, the transaction



appearing immediately after that of 3rd November 2017 is dated 26th June 2015, almost two years earlier, followed by entries dated 21st July 2015, 28th August 2015, 22nd September 2015 and 14th October 2015.

93. Ordinarily, transactions in a bank statement are arranged in chronological order, with earlier transactions appearing first. It is therefore evident that the Claimant's bank statement was irregular, as it is illogical for transactions from mid-2015 to appear after those from 2017. During cross-examination, the Claimant himself acknowledged this anomaly.
94. In addition to the foregoing, a closer examination of the Claimant's bank statements reveals that the credit transactions dated 26th June 2015, 21st July 2015, 28th August 2015 and 22nd September 2015 corresponded exactly with transactions in the closed account of a customer, one Muhiyadin Shukri Elmi, matching precisely in date, RTGS reference number, and transaction amount.
95. It is thus evident that these transactions were replicated from the closed customer's account and posted into the Claimant's account, thereby inflating his credit balances.
96. Cross-examined, the Claimant admitted that he could not explain how the credit transactions appeared in his account. Cross-examined further, the Claimant conceded that he did not possess any supporting documentation to account for the inflated credit balances.
97. Given that the transactions appeared as RTGS transfers, the Claimant was reasonably expected to provide supporting documentation to verify their authenticity. Regrettably, he failed to do so.
98. Consequently, the Claimant was unable to justify or demonstrate the source of the credited amounts in his account, whether they originated from cash deposits, bank transfers, or cheque payments.
99. Coupled with the foregoing, the imbalance trigger activated in the Respondent's BFUB core banking system detected unauthorized access, with the access logs identifying the Claimant's username "cmutuga" and his assigned IP address 172.16.159.126 as having irregularly accessed the Bank's test DB server and, subsequently, the BFUB production database.
100. Under cross-examination, the Claimant confirmed that "cmutuga" was indeed his username. However, he could not explain why his credentials and IP address appeared in the unauthorized access logs.
101. It is evident that the Claimant's job description as Demand Manager only permitted limited data access for business intelligence purposes, not access to the test DB server or authority to manipulate core banking data. As such, it is apparent that the Claimant exceeded his authorized access.
102. In view of the unauthorized access, sequential transaction anomalies, and inflated balances, the Court is persuaded that the Claimant fraudulently manipulated the Respondent Bank's internal systems, thereby inflating his credit balances.
103. No doubt, the Claimant's conduct amounted to dishonesty and a fundamental breach of trust.
104. Given the Claimant's role within the Respondent Bank, which permitted him access to the Bank's system, it goes without saying that integrity and honesty were fundamental to the employment relationship.
105. Accordingly, the Claimant's fraudulent activities in the Respondent Bank's internal system fundamentally undermined the trust and confidence reposed in him by the Respondent. This went to the root of the employment relationship and posed serious reputational and operational risks to the Respondent Bank as custodian of its customers' funds.



106. In *McKinley v BC Tel* [2001] 2 S.C.R. 161, the Supreme Court of Canada held as follows:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship... Just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent in the work relationship, or is fundamentally inconsistent with the employee’s obligations to the employer.” Underlined for emphasis

107. Applying the foregoing holding to the case herein, I am persuaded that the Respondent’s confidence in the Claimant had been irreparably eroded. In light of the incident, continued employment would have been untenable.

108. Considering the Claimant’s conduct, a reasonable employer in the Respondent’s position would have been justified in dismissing him. Accordingly, termination of his employment was the most reasonable course of action in the circumstances.

109. This reasoning aligns with the principle stated by Lord Denning in *British Leyland UK Ltd v Swift* [1981] IRLR 91, thus:

“The correct test is whether it was reasonable for the employer to dismiss the employee. If no reasonable employer would have dismissed him, the dismissal is unfair. But if a reasonable employer might reasonably have dismissed him, the dismissal is fair... If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers might not have done so.”

110. In sum, the Court finds that the Respondent has proved, on a balance of probabilities, that there existed a valid and fair reason for terminating the Claimant’s employment within the meaning of Sections 43 and 45(2)(a) & (b) of the *Employment Act*.

Fair process?

111. Regarding procedural fairness, Section 45(2)(c) of the *Employment Act* places the obligation on the employer to demonstrate that the termination was carried out in accordance with a fair process. In this regard, Section 41 prescribes the specific procedure to be followed, which requires the employer to notify the employee of the allegations against them and to afford the employee an opportunity to respond to those allegations, in the presence of a fellow employee or a shop-floor union representative of their choice.

112. In the present case, the record shows that the Claimant was issued with a Notice to Show Cause dated 23rd November 2017, which outlined in detail the allegations against him and required him to respond. Upon his request for more time to respond, the Respondent extended the deadline to 14th December 2017. The Claimant subsequently submitted his written response on 6th December 2017.

113. Thereafter, the Claimant was invited to attend two disciplinary hearings held on 20th December 2017 and 20th February 2018. It is worth pointing out that the second hearing was convened following objections raised by the Claimant in his letter dated 2nd January 2018. In a letter dated 2nd February 2018, the Claimant requested access to the evidence intended to be relied upon during the disciplinary hearing.



114. In response, the Respondent advised the Claimant to visit the Security Department to review the evidence at his convenience on or before 5th February 2018. Through a subsequent letter dated 6th February 2018, the Respondent clarified that some of the evidence existed only in soft copy within its internal system and therefore could not be physically issued to the Claimant. The Respondent further informed the Claimant that he would be given an opportunity to make a statement, noting that he had declined to be interviewed during the investigations.
115. There is, however, no evidence that the Claimant took steps to review the evidence as advised. It follows, therefore, that he had a fair opportunity to access the evidentiary material in question but failed to do so. What's more, there is no evidence that the Claimant communicated to the Respondent any difficulties he may have encountered in attempting to access the evidence.
116. In the circumstances, the Court finds no fault on the part of the Respondent for allegedly failing to provide the Claimant with evidence.
117. The Claimant also contended that he was denied the right to representation during the disciplinary hearings. However, the invitation letters clearly informed the Claimant of his right to be accompanied by a member of staff of his choice during the proceedings.
118. It should be appreciated that in terms of Section 41 of the *Employment Act*, the right to representation extends only to a fellow employee or a shop-floor union representative, not to legal counsel. Consequently, the Respondent's refusal to allow the Claimant to be accompanied by his advocate cannot be said to have been unreasonable or unlawful.
119. Having considered the requirements of Section 41 of the *Employment Act* in light of the facts presented, the Court is satisfied that the Respondent adhered to the principles of procedural fairness in that the Claimant was duly informed of the charges against him, given adequate opportunities to respond, subjected to two disciplinary hearings, accorded access to the relevant evidence, and granted a right of appeal.
120. Accordingly, the Court finds that the Respondent has proved, to the requisite standard, that the process applied in terminating the Claimant's employment was procedurally fair.

Reliefs?

121. In view of the Court's finding that the Respondent has demonstrated, to the requisite standard, that the Claimant's termination from employment was for a valid and fair reason and that a fair process was applied, the claim for compensatory damages collapses.

Merit in the Counterclaim?

122. The Respondent filed a Counterclaim against the Claimant seeking Kshs. 4,512,986.00, being the outstanding balance on a staff loan advanced to him during his employment, and a further Kshs. 5,421,500.00 allegedly pilfered by the Claimant through fraudulent activities.
123. It is notable that the Claimant did not file any response to the Counterclaim, and it therefore remains unopposed.
124. In support of its case, the Respondent produced a copy of the Staff Loan Application Form showing that the Claimant obtained a facility of Kshs. 4,800,000.00 from the Respondent bank. A copy of the Claimant's loan statement was also exhibited, reflecting an outstanding balance of Kshs. 4,457,742.00 as at July 2021.



125. The Claimant did not adduce any evidence to show that he had repaid the outstanding loan.
126. In the circumstances, the Court finds in favour of the Respondent on this issue, and the Counterclaim in respect of the staff loan succeeds.
127. Regarding the funds lost by the Bank as a result of the Claimant's fraudulent activities, the unexplained credit transactions in the Claimant's account total Kshs. 3,732,000.00. The Respondent did not demonstrate the manner in which it arrived at the higher figure of Kshs. 5,421,500.00. Accordingly, the Counterclaim in respect of the pilfered funds succeeds only to the extent of Kshs. 3,732,000.00.

Orders

128. In the upshot, the Claimant's claim is hereby dismissed in its entirety with no orders as to costs.
129. Judgment is accordingly entered in favour of the Respondent on the Counterclaim in the sum of Kshs. 4,457,742.00, being the outstanding loan liability owed by the Claimant, and Kshs. 3,732,000.00, representing the total unexplained credit amounts reflected in the Claimant's bank account 01109009387600. The said sums shall attract interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2025.

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STELLA RUTTO

JUDGE.

In the presence of:

For the Claimant Mr. Odhiambo

For the Respondent Mr. Munene

Court Assistant Millicent

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

