

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC CAUSE NO. E938 OF 2021**

***(Before Hon. Lady Justice Hellen Wasilwa, J)***

**PATRICK ODIPO.....CLAIMANT**

**VS**

**ABSA  
KENYA.....RESPONDENT** **BANK**

**JUDGMENT**

1 The Claimant instituted this claim vide a Statement of Claim dated 12<sup>th</sup> November 2021 and prays for judgment against the Respondent for orders that: -

- a) the Respondent violated the Constitutional and statutory rights of the Claimant to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- b) the Respondent's action amounts to wrongful, unfair, unjustifiable, and illegal termination of employment.*
- c) the Claimant be paid Ksh. 125,914,719.20 being the total entitlement to the Claimant as follows:*
  - i. Severance Pay being 15 days for each of the 14 years worked from 4<sup>th</sup> June 2007 to 25<sup>th</sup>*

- May 2021 (Ksh 8,006.60 x 15 days x 14 years)  
= Ksh. 1,681,386.00*
- ii. Bonus pay for the year 2020 that was due for  
payment on 23<sup>rd</sup> March 2021=Ksh. 1,300,000*
- iii. Three (3) months' salary in lieu of Notice (Ksh  
240,199.75 x 3 months) = Ksh.720,599.20*
- iv. Loss of earnings for 21 years being the  
balance of years before retirement at age of  
60 years (Ksh240,199.75 x 252 months) =  
Ksh. 60,530,337*
- v. Damages for wrongful termination equivalent  
to 12 months' salary (Ksh 240,199.75 x 12  
months) = Ksh. 2,882,397*
- vi. Medical cover of Ksh 2,500,000 for inpatient  
and Ksh 300,000 outpatient for 21 years (Ksh  
2,800,000 x 21 years) = Ksh. 58,800,000*
- d) the Claimant be awarded costs of the entire suit.*
- e) Interest on item (c) at 6% per annum and on item  
(d) at prevailing Bank rates until payment in full.*
- f) the Claimant be issued with Official performance  
rating for 2019 and 2020 in addition to the  
certificate of outstanding performance for 2020 by  
the Respondent as well as the last pay slip for April  
2021.*
- g) the Claimant Loan facilities be maintained at staff  
rate of 9% and the Respondent not to list the  
claimant on Credit Reference Bureau (CRB) until he*

*obtains gainful employment and is able to service his Loan facilities accordingly.*

*h) Any other reliefs that the Honourable Court may deem just and expedient.*

### **Claimant's Case**

- 2 The Claimants avers that he was employed by the Respondent as Graduate Clerk effective 4<sup>th</sup> June 2007 at a consolidated Gross Salary of Ksh 408,180 per annum inclusive house allowance.
- 3 Vide a letter dated 24<sup>th</sup> October 2014, he was promoted to the position of Personal Banker and transferred from Kisumu to the Respondent's Wundanyi Branch with effect from 25<sup>th</sup> June 2007. Thereafter, he was promoted to a Branch Manager Taveta Branch vide a letter dated 6<sup>th</sup> April 2017 with effect from 15<sup>th</sup> April 2017.
- 4 The Claimant avers that as the Branch Manager, he was earning a gross monthly salary of Kshs.240,199.75 and was in charge of the operations and staff of the said Branch and in particular, to Delivery and Drive excellent Retail and Business Performance.
- 5 The Claimant avers that vide an email of 1<sup>st</sup> July 2021, he requested to be supplied with the performance

ratings/appraisal for the year 2020 but the Respondent did provide the same despite reminders.

- 6 It is the Claimant's case that he received a written dispute dated 10<sup>th</sup> February 2021 from the Respondent's customer Veruli Pius Chuwa in respect of suspicious transactions in his Bank Account Number 204\*\*\*\*678 INO. He escalated the issue as required to his line Manager Mr. Jonesmus Mwambire and the Respondent's forensics department were fully briefed prompting an investigation.
- 7 The Claimant avers that the investigation unearthed that the account was set up on 18<sup>th</sup> March 2019 by Mr. Paul Maneno and Mr. Wycliffe Owino Muok in the Respondent's system in their capacities as the Respondent's Branch Operations Officer and Universal Banker at Absa Taveta Branch respectively. The Customer is a Tanzanian National and holder of Passport No. AB781448 and he did not avail a work permit and Kenya Revenue Authority Pin Number during the account opening.
- 8 The Claimant avers that the funds from the customer's account were fraudulently digitally moved using mobile number 0795283180 and the beneficiaries were MPESA wallets 0722618367, 0793964230 and Bank account number 1268478997 domiciled at KCB Taveta Branch. The

said fraud was perpetrated by the Respondent's Employee Wycliffe Owino Muok.

- 9 The Claimant avers that Wycliffe Owino Muok thereafter deserted duty and went into hiding from 15<sup>th</sup> February 2021 before eventually being dismissed from employment by the Respondent for absconding duty.
- 10 The Claimant avers that he reported the fraud at Taveta police station on 09<sup>th</sup> May 2021, OB number 20/09/05/2021. However, he was suspended with full pay vide a letter dated 5<sup>th</sup> March 2021, ending investigations into incidents involving fraudulent transactions.
- 11 The Claimant avers that at the time of the said fraud a Mr. Felix Wambua Kithuka was the Branch Manager of KCB Taveta Branch, the receiving bank of the proceeds of the fraud and is the current Branch Manager of Respondent's Taveta Branch.
- 12 Subsequently, he was issued with a letter dated 20<sup>th</sup> March 2021, giving the Claimant four days to Show Cause why disciplinary action as the Respondent had reasonable grounds to conclude as follows:
  - i. *That in March 2019, he acted in gross negligence when he failed to take appropriate action on customer account Number 204\*\*\*\*678 INO Pius Chuwa opening stage where the customer was*

*categorised as Resident Foreigner though he was well aware that the said customer resided in Moshi, Tanzania.*

- ii. That on various dates in the period, March 2019 to 22<sup>nd</sup> July 2020, the Claimant visited the customer at his premises in Moshi, Tanzania, and irregularly and unprocedurally collected cash from the said customer for further deposit in the said account with the Respondent Bank.*
- iii. That in October 2019 or thereabout, the Claimant acted in gross negligence when he failed to take appropriate action when during his visit to the said customer, he reported the loss of his mobile phone line 0795283180 thereby facilitating the mentioned fraud done through mobile banking.*
- iv. That on various occasions between January 2020 and July 2020, the Claimant unprocedurally authorised irregular Mobile Banking PIN reset on the said customer account initiated through BOC System by Wycliff Muok (Staff at Taveta Baranch) without customer consent/ instructions.*
- v. That between January 2020 and July 2020, the Claimant unprocedurally authorised irregular linkage of the said customer's US Dollar account 205\*\*\*651 to the Mobile banking-enabled account 204\*\*\*678 initiated through BOC system by Wycliff Muok without customer consent/instructions.*

- vi. *That the Claimant acted in gross negligence of his oversight responsibility as the Branch Manager when the Claimant failed to mitigate on the various instances of irregular and unauthorised maintenance on the customer accounts which indicated laxity in the implementation of controls at the Respondent's Taveta Bank Branch.*
- vii. *That on 30<sup>th</sup> January 2021, the Claimant acted in gross negligence when he delayed upto 10<sup>th</sup> February 2021 in escalation for appropriate action and investigation the customer dispute raised with the Claimant in regards to the mentioned fraudulent transactions. Further the Respondent noted with great concern that despite being aware that Wycliff Muok who was adversely mentioned in the dispute, was privy to the customer complaint same day it was reported, the Claimant delayed action thereby creating exposure to the bank.*
- viii. *That the above the above actions/omissions not only exposed the bank to financial loss of Ksh 7.96 million through fraud but also to regulatory, litigation and reputational risks and amounts to gross misconduct/ gross negligence warranting disciplinary actions upto and including summarily dismissal.*

- 13 The Claimant avers that despite the inadequate notice, to respond to the letter to Show Cause, he made his response vide a letter dated 22<sup>nd</sup> March 2021. Thereafter, vide a letter dated 1<sup>st</sup> April 2021 and served upon him on Saturday 3<sup>rd</sup> April 2021, he was invited to attend a Disciplinary Hearing on 8th April 2021 and extending his suspension for another thirty days from 6<sup>th</sup> April 2021.
- 14 The Claimant avers that he attended the disciplinary hearing in which he pointed out his suspension was without reason; the suspension varied his contractual terms without explanation as he had not received his bonuses and pay review for 2020; malicious email by an employee who perpetrated fraudulent transactions; and the defamatory statements that he is a suspect in fraudulent transaction in the customer bank account.
- 15 It is the Claimant's case that he was advised by the Disciplinary Hearing Panel to take up all his grievances with his line manager, which he did by a letter dated 12<sup>th</sup> April 2021.
- 16 The Claimant avers that his employment was terminated vide a letter dated 17<sup>th</sup> April 2021 on the grounds stated in the letter to show cause. The Respondent further indicated that the actions/omissions not only exposed the bank to financial loss of Ksh 7.96 million through fraud but also to regulatory, litigation and reputational risks and amounts to

gross misconduct/ gross negligence warranting summarily dismissal.

- 17 The letter of termination informed the Claimant of his right to appeal within five working days and he lodged the appeal vide a letter dated 17<sup>th</sup> April 2021. This was despite the appeal period being shortened contrary to the appeal period which stipulates “the appeal should be lodged within 10 working days after receipt of the decision in writing.”
- 18 The Claimant avers that he was invited to the Appeal Hearing on 7<sup>th</sup> May 2021, however, it took place virtually on 10<sup>th</sup> May 2021. The Respondent vide a letter dated 25<sup>th</sup> May 2021 upheld the decision to dismiss him from employment.
- 19 It is the Claimant’s case that the Respondent’s Disciplinary and Grievance Handling Policy requires the Disciplinary Committee to be constituted of at least 2 or more independent managers appointed to handle disciplinary issues. The invitation to the meeting must be advised in writing to the employee, and the letter should give details of the allegations or criticisms to be addressed together with the date, time and place of the disciplinary meeting and the right of the employee to be accompanied by a representative.

- 20 The Claimant avers that he has suffered irreparable loss of means of livelihood, trauma, and mental anguish as a result of the actions of the Respondent taking into account that he is living with disabilities (NCPWD registration number is NCPWD/P/386560) requiring enhanced medical cover after being involved in an accident in the year 2015.
- 21 The Claimant avers that he instructed his advocate on record to issue a letter to request for information pursuant to Article 35 of the Constitution and Access to Information Act. His advocate served the Respondent with a demand letter dated 26<sup>th</sup> July 2021 to admit liability for the wrongful termination of Employment and seeking information details, supporting documents, response and explanations for the purposes of realising and enforcing Article 41 and 47 to the Constitution of Kenya on fair labour practices and Fair Administrative Action.
- 22 The Respondent, by a letter dated 30<sup>th</sup> July 2021 denied liability but did not comply with the constitutional right to access information requested thereby necessitating the filing of this claim.

### **Respondent's Case**

- 23 In opposition, the Respondent filed a Memorandum of Response and Counterclaim dated 6<sup>th</sup> April 2022.

- 24 The Respondent admitted the Claimant was its employee and initially served as a clerk and rose to the ranks to a Branch Manager effective 1<sup>st</sup> April 2017 earning a basic salary of Kshs.2,110,297 p.a.
- 25 The Respondent denied that the Claimant's performance was exemplary and diligent as alleged and avers that in the year 2019, the Claimant was issued with a warning letter dated 13<sup>th</sup> February 2019 due to poor performance for the year of 2018 where he was rated underperforming.
- 26 The Respondent avers that it did receive a letter of dispute dated 10<sup>th</sup> February 2021 from its customer Veruli Pius Chuwa which was addressed to the Manager Absa, Taveta. However, the Claimant was not made aware of the suspicious transactions through the dispute letter as he was made aware of the said transactions in the month of January.
- 27 The Respondent disputes the assertion that the Claimant was required to escalate the issue to his line Manager. It avers that it is a requirement that as soon as the Claimant became aware of any fraudulent transaction, he was supposed to raise the issue immediately to the Financial Crime team (which he did not) and not to his line manager. The Claimant failed to follow the suspicious

transaction reporting process, a confession that he made during the disciplinary hearing.

- 28 It is the Respondent's case that the findings of the investigations it conducted are as captured in the Forensic Investigation Report (Kenya Investigation Ref: ASKE-2102-00020). The Respondent further states that the fraud was enabled by the resetting of the customer's Mobile Banking PIN without the customer's consent an act which was authorised by the Claimant. The Claimant also placed a further USD 50000 held in the customer's name at risk by authorising the linkage of the customer's USD account to Mobile Banking.
- 29 The Respondent admitted that Wycliff Muok absconded duty to the to the extent that the Claimant did send the letter dated 22<sup>nd</sup> February 2021 with the reference "Desertion of Duty Notice".
- 30 The Respondent avers that it unaware that the Claimant reported the fraud and contends that this was aimed to sanitize himself in the fraud case by pretending to go the extra mile of reporting bearing in mind that he became aware of the fraudulent transaction in the month of January 2021.

- 31 The Respondent avers that the Claimant was sent on suspension vide a letter dated 5<sup>th</sup> March, 2021 with full pay pending investigations into incidents involving fraudulent transactions in the Taveta Branch Account of its customer.
- 32 The Respondent avers that it issued the Claimant with a Show Cause letter and that the Claimant had the liberty to request for more time if he were of the opinion that he needed more time. However, he made no such request and therefore the Respondent can only conclude that the Claimant had ample time to respond.
- 33 The Respondent avers that the Claimant was issued with a notification of disciplinary hearing dated 1<sup>st</sup> April, 2021 which made reference to the Show Cause letter dated 20<sup>th</sup> March 2021 which listed the allegations against the Claimant. Hence, he was aware of the allegations.
- 34 The Respondent aver that the act of extending the Claimant's suspension was neither a procedural irregularity nor an illegality as this was necessitated by the need to conduct a thorough and fair investigation. The extension was also for a reasonable period and did not infringe the internal policies of the Respondent.
- 35 It is the Respondents' case that the Claimant participated in the virtual disciplinary hearing on the 8<sup>th</sup> of April 2021 in

which he also aired grievances, which were addressed by the disciplinary panel accordingly as shown in the minutes dated 8<sup>th</sup> April 2021.

- 36 The Respondent avers that the disciplinary panel informed the Claimant that the reason for the suspension was to give way to investigations and he agreed with the rationale of the suspension as captured in the minutes.
- 37 The Claimant was requested by the disciplinary panel to raise the remuneration issue as a grievance, so that it could be addressed by his line manager. The Respondent states that the People Managers and Pay Review Policy categorically states that there is no automatic entitlement to a bonus and that a salary review does not entitle an individual to an increase.
- 38 The Respondent avers that that there is nothing defamatory about conducting investigations and that being a suspect does not necessarily or instantly amount to being liable until the due process has run its course. Additionally, the email was not malicious but it contained Wycliff Muok's response to the allegations.
- 39 The Respondent avers that the Claimant's employment was terminated through a letter dated 17<sup>th</sup> April 2021 and he was informed of his right to appeal.

- 40 It is the Respondent's case that the period of appeal as provided by the Respondents Disciplinary, Capability and Grievance Procedure Clause 5.3.5.2 is within five (5) working days calculated as from the date the disciplinary decision in question having been communicated in writing.
- 41 The appeal hearing did not take place on 7<sup>th</sup> May 2021 but rather on 10<sup>th</sup> May 2021 for reasons that were communicated to the Claimant and receipt of communication acknowledged.
- 42 The Respondent avers that the grounds raised by the Claimant are as captured in the minutes dated 10<sup>th</sup> May 2021. The Respondent considered all the grounds raised in a just and fair manner and came to the decision of upholding the Claimant's termination.

### **Counter-claim**

- 43 The Respondent avers that Claimant had on his own volition taken various staff loans from the bank and which he had expressly undertaken to repay and the loan balance is Ksh.4,308,560.
- 44 These loans were taken on the basis of the rules and regulations set out in several key documents attesting to the loans disbursed to the Claimant among them being: the loan agreements entered into between the

Respondent and the Claimant; the Claimant's letters of appointment; the Respondent Staff loan Policies; and the Respondent's Disciplinary Capability and Grievance Policy and Procedure.

45 The Respondent avers that the parties had voluntarily expressly covenanted, among other things, that; Upon the Claimant's contract of employment being terminated, the Respondent had the discretion to charge interest on the loans at commercial rates.

46 Based on this agreement, on 17<sup>th</sup> April 2021, the Respondent demanded that the Claimant start paying interest on her outstanding loan at commercial rates after 30 days from his last working day.

47 The Respondent thus prays that the Claimant's suit be dismissed with costs, and judgement /award be entered in its favour for:

- a) The total amount of; Ksh.4, 308,560 plus interest as against the Claimant as aforesaid.
- b) Interest on a) above at commercial rates with effect from 30 days after the date of the Claimant's termination as aforesaid.
- c) Costs and interest thereon at court rates
- d) Any Such further relief as may be appropriate in the circumstances.

## **Evidence in Court**

- 48 The Claimant witness, (CW1) adopted his witness statements and documents dated 12<sup>th</sup> November 2021 and 28<sup>th</sup> September 2023 as his evidence in chief.
- 49 During cross examination, CW1 testified that he was appointed as a Branch Manager, he was made aware that if he comes across any irregularities, he should inform his supervisor. Additionally, the activities of the branch stopped with him.
- 50 In the letter of 24<sup>th</sup> November 2014, he was to keep the Respondent's business confidential and also prevent anyone from gaining entry to Respondent's computer and data storage
- 51 CW1 testified that he was issued with a suspension letter dated 5<sup>th</sup> March 2021 which he received on the same day and the reasons for his suspension were spelt out in the letter
- 52 CW1 testified that he has issued with a Notice to Show Cause letter dated 20<sup>th</sup> March 2023 which he responded vide a letter dated 22<sup>nd</sup> March 2021. Subsequently, he was invited for a capability hearing which he attended on 8<sup>th</sup> April 2021 and thereafter he was issued with termination letter dated 17<sup>th</sup> April 2021.

- 53 CW1 testified that Mr.Chuwo's account was opened on 18<sup>th</sup> April 2019 and he was not involved in the maker checker including setting up of the digital channels. The documents were checked by Wycliff Muok, a universal banker and Paul Munene, a branch operation officer.
- 54 CW1 testified that as the Branch Manager, Taveta Branch, he was the accountable, executive and overall supervisor of the other employees in the branch. He was to ensure the Respondent's funds were safe and prevent any theft.
- 55 Snap check was a delegated responsibility to the branch operating officer and he could occasionally do a snap check occasionally especially in vault. He also did monthly quality checks reports, sampling accounts and sharing with KYC. Mr. Veruli was one of the top most banker in the branch thus he did not have any reason to check his account.
- 56 CW1 testified that at Mr.Veruli's request, he went to visit in him in Tanzania together with Wycliff Muok on 23<sup>rd</sup> March 2019. It was a business trip and he had permission of the Regional Manager, however, the permission is not in court.
- 57 CW1 testified that he was invited by the customer through Mr. Muok and during each visit, he was given money to

deposit for him in Taveta Branch which was deposited in his account.

58 It is CW1's testimony that an account holder can send someone to deposit cash in his account; this is not money laundering and he informed his manager. He knows the policy.

59 On pin reset, CW1 testified that Mr Veruli opened two accounts and he did not check these accounts. He maintains that his relationship with Mr. Veruli was professional.

60 CW1 testified that he was not aware of the fraudulent activities in his account before 2021. The fraud was between 18<sup>th</sup> June 2019 and 22<sup>nd</sup> July 2020. Mr. Veruli called him on 30<sup>th</sup> January 2021 asking for his balances and upon this background, he learnt of the fraud. Subsequently, he reported the matter to his regional manager on 1<sup>st</sup> February 2021.

61 CW1 testified that he reported the fraud to the police on 9<sup>th</sup> May 2021 because the Respondent had not taken any action. He reported as an employee though he was not an employee at the time.

- 62 CW1 testified that several pin resets were made on Mr Veruli's account with the customer's account. He contends that he did not authorise the pin resets and did not report as he was not aware.
- 63 The Respondent's witness, Teresa Ogeka, (RW1) testified that she works as the Respondent's Forensic Investigation Manager.
- 64 She stated that she investigated the matter and made a report dated 4<sup>th</sup> December 2023 which she adopted as her evidence in chief.
- 65 During cross-examination, RW1 testified that there were fraudulent transactions in which Wycliff Muok ultimately benefitted; he was convicted and charged at the Taveta Law Courts in *Criminal Case No. E659 of 2023 Republic versus Wycliff Owino Muok*. There was only one accused person, the Claimant was not charged.
- 66 RW1 testified that mobile number 0795283180 transacted Kshs. 4,000 from the customer's account; this line operated under the name of Wycliff Muok. The fraudsters were Wycliff Muok, Ibrahim Kinanja and Patrick Odipo, however the last two were not charged with this fraud.

- 67 RW1 testified that the fraud started on 18<sup>th</sup> June 2019 and was reported to forensics on 10<sup>th</sup> February 2021 by the Claimant. She contends that the Claimant did not deserve any applause.
- 68 It is RW1 testimony, the pin reset was initiated by Wycliff Muok and the checker was Ibrahim and Patrick Odipo. The Claimant started checking on 1<sup>st</sup> April 2020. He checked the pin reset on 21<sup>st</sup> April 2020 to 22<sup>nd</sup> September 2020 and there were 14 pin resets in the said period.
- 69 RW1 testified that in the Respondent's report under page 137 of its documents has a summary of the transaction done from the customer's account in dispute was totalling to Kshs. 7,960,000. However, the Claimant's name is not in the table.
- 70 RW1 testified that several transactions were done without changing the pin and the Respondent suspects the pin was compromised by Wycliff Muok.
- 71 RW1 testified that the Claimant did not report to forensics late; he reported to his line manager, Mwambire but she is not aware when he reported. She does not recall if she interviewed Mwambire or not.

- 72 She testified that the company policy requires him to report the Claimant reports to forensics first and not his line manager, however, this policy was not produced in court.
- 73 RW1 testified that the beneficiaries of the fraud were Juma Arua and Loice Awino; the total loss according to her report is Kshs. 7,960,000.
- 74 RW1 testified that there were other bank officials who were found culpable and were terminated.
- 75 The Respondent's second witness, Vaslas Odhiambo (RW2) adopted his witness statement dated 6<sup>th</sup> April 2021 as his evidence in chief and produced the Respondent's list of documents dated 4<sup>th</sup> December 2023, 26<sup>th</sup> April 2024 and 8<sup>th</sup> April 2024 as his exhibits.

### **Claimant's Submissions**

- 76 The Claimant submitted on four issues: - Was the termination of employment fair in substance and procedure; Was the Claimant subjected to fair administrative and disciplinary process; Was the Claimant entitled to pay review on 01/04/2021 and bonus in March 2021; Is the Claimant entitled to the claim? If so, what is the quantum?

- 77 On the first issue, the Claimant submitted that terminating an employee's contract requires both substantive justification and procedural fairness. An employer must prove the reason for termination is valid and related to the employee's conduct, capacity, or the employer's operational requirements, and that a fair procedure was followed; as held in **Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR.**
- 78 On substantive justification, the Claimant submitted that the termination was as a result of fraud perpetrated by the Respondent's Employee Wycliffe Owino Muok for which the Claimant reported to the Respondent and to Taveta Police Station on 9<sup>th</sup> May 2021, OB number 20/09/05/2021. The said Wycliffe Owino Muok thereafter deserted duty and went into hiding from 15/02/2021 before eventually being dismissed from employment by the Respondent for absconding duty.
- 79 The Claimant submitted that the Respondent's Forensic Investigations Manager confirmed in her testimony that the Claimant discovered the fraud was committed by Wycliffe Owino Muok who was later arrested and charged in Taveta Law Courts *Criminal Case No.E659 of 2023 Republic versus Wycliff Owino Muok* particulars of the offence being as follows as follows: particulars of the offence being as follows as follows: "On diverse dates

*between 18<sup>th</sup> June 2019 and 30<sup>th</sup> July 2020 at unknown time at ABSA Bank Kenya plc Taveta Branch in Taveta Sub-County within Taita Taveta County, being a Universal Banker at the Bank stole KES 7,960,000/= Seven Million Nine Hundred and Sixty Thousand Only the property of the said ABSA Bank PLC Taveta which came to your possession by virtue of your employment.”*

80 On procedural fairness, the Claimant submitted that he was subjected to disciplinary process fraught with procedural irregularities, which did not accord him opportunity to adequately prepare and defend himself against the allegations.

81 The Claimant submitted that he was issued with a Show Cause letter dated 20<sup>th</sup> March 2021, giving him four days to respond; this was inadequate taking into account the allegation and complexity of the alleged fraud. He cited ***Rebecca Ann Maina, Monica Nyambura Wainaina & Joshua Patrick Macharia v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR***, the court observed that: “...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.”

- 82 The Claimant submitted that The Respondent's Disciplinary and Grievance Handling Policy requires the Disciplinary Committee to be constituted of at least 2 or more independent managers appointed to handle disciplinary issues. The invitation to the meeting must be advised in writing to the employee, and the letter should give details of the allegations or criticisms to be addressed together with the date, time and place of the disciplinary meeting and the right of the employee to be accompanied by a representative.
- 83 The Claimant submitted that disciplinary proceedings are an administrative action that must adhere to the standards set by Article 47 of the Constitution, Section 4 of the Fair Administrative Action Act, and the various provisions of the Employment Act as was stated in ***New Kenya Co-operative Creameries v Sigei (Appeal E002 of 2022) [2024] KEELRC 27 (KLR)***.
- 84 The Claimant submitted that Section 9(6) of The Access to Information Act stipulates that where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected. The Claimant vide a demand letter dated 26<sup>th</sup> July 2021 to the Respondent requested information, details, supporting documents, response and explanations requested information, details, supporting

documents, response and explanations for the purposes of realising and enforcing Article 41 and 47 of the Constitution on fair labour practices and fair administrative action. However, the Respondent, by a letter dated 30<sup>th</sup> July 2021 denied liability but did not comply with the constitutional right to access information requested thereby necessitating the filing of this claim.

85 The Claimant submitted that he was entitled to pay review on 01/04/2021 and bonus in March 2021, which ought to have been paid with the Claimant's salary for the month of March 2021 in accordance to the People Managers and Pay Review Policy for 2020/21. The bonus pay of Ksh. 1,300,00 for the year 2020 that was due for payment on 23<sup>rd</sup> March 2021 cannot be negated after the same has been earned. The Claimant cannot therefore be denied the benefits that accrued before the termination of employment.

86 The Claimant submitted that it is a requirement of Article 47(2) of the Constitution that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

87 On the counter-claim, the Claimant submitted that Section 12 of the Employment and Labour Relations Court Act confers jurisdiction on this court in respect of, inter alia,

disputes relating to or arising out of employment between an employer and an employee. This provision is wide enough to cover any dispute that has its origins in an employment relation including disputes which stem from staff loans granted by employers to employees.

88 The Claimant submitted that Article 162(2)(a) of the Constitution extends jurisdiction to the Employment and Labour Relations Court to hear and determine disputes relating to or arising out of employment between an employer and an employee. He cited **Abraham Nyambane Asiago -v- Barclays Bank of Kenya Limited [2013] eKLR** and **Boniface Lum Amunga Biko v National Bank of Kenya Limited [2017] eKLR** wherein the court held that employment relations is a wide concept and is not restricted to the contract of service, that this Court has jurisdiction to look into the interest rates applicable to the former employees.

89 The Claimant submitted that the termination of employment was unlawful and unfair and therefore, this Court cannot vary the interest rates. He took staff loans on the basis of the rules and regulations of the Respondent and his employment was terminated not on his volition but on the basis of a fraud committed by another employee of the Respondent.

90 It is the Claimant's submission that he was to repay the loans in question through his salary. However, since the contract of service between the parties has been terminated unlawfully, he will have difficulties in meeting his obligations under the said agreements particularly if the Respondent is allowed to adjust the interest rates from preferential to commercial.

### **Respondent's Submissions**

91 The Respondent submitted on four issues: whether there were valid reasons to warrant the termination of the Claimant; whether the procedural requirements set out in section 41 of the Employment Act were observed; whether the Claimant is entitled to the prayers sought; and whether the Counterclaim should be allowed.

92 On the first issue, the Respondent submitted that the Claimant was employed as a Branch Manager and placed in-charge of all cash handling and management matters. He was to make sure that the interest of the Respondent was protected and Customer's money was safe. Further the Claimant was the accountable executive and the overall supervisor to the other employees in the branch and he also had the responsibility of doing monthly quality check reports, sampling accounts and sharing with Know Your Customer team to review accounts opened and ask for their pipeline.

- 93 The Respondent submitted that unbeknown to it, the Claimant had developed his own way of handling money- at the branch including collecting cash from a customer at his premises in Moshi and depositing to the customer's account on various occasions contrary to bank procedures. The Claimant at all material times during the visit never requested and/or got permission from the Respondent to visit the customer in Moshi, Tanzania.
- 94 The Respondent submitted that the Claimant unprocedurally authorized irregular Mobile Banking Pin resets on a customer account initiated through BOC system by Wycliff Muok (staff at Taveta branch then) without customer consent /instructions and he failed to escalate for appropriate action and investigation the customer dispute as raised with him in regards to the fraudulent transactions The Claimant's actions defeated a very key operational rule which ensures that the money kept in the bank is safe.
- 95 It is the Respondent's submission that clause 2.2.1 of its Acceptable Use Standard provides that: *"Employees must not share their pins, codes, passwords, keys with anyone, even line managers, colleagues, " helpdesk assistants, or technicians unless subpoenaed for regulatory and investigations. It is the responsibility of the employee to*

*notify the Absa Group limited within 48hours of loss/damages /theft to the device(s) as to the occurrence and/or explanation thereto. If the device (s) is stolen, the employee must complete an Affidavit at their nearest police station within 48 hours from the estimated time of the theft and forward the original docket top the business area.”* The Claimant failed to adhere to these policies despite being aware of the same as he rightly admitted. He further admitted to the fact that a total sum of Kshs.24,000 was lost yet he never reported the same yet he was aware of the process.

- 96 The Respondent submitted that its Investigations Report revealed that a total sum of over 7 Million shillings had been lost from the customer’s account due to the reset of Mobile Banking Pin done in January 2020 and July, 2020 by Wycliffe Muok and authorized by Ibrahim Kinanja as well as the Claimant.
- 97 The Respondent submitted that clause 5.2.2 of its Disciplinary, Capability and Grievance Policy and Procedure defines gross misconduct as a severe breach of the Bank’s rules, work practices, policies, procedures, laws regulations or other misconduct of a serious nature. If gross misconduct has occurred, the Bank is entitled to summarily dismiss an employee after following a fair procedure.

- 98 It is the Respondent's submission that it conducted investigations, which established that the Claimant acted in gross negligence and failed to exercise his role as a Branch Manager thereby exposing the Respondent to financial loss of Kshs.7.96 million. Moreover, the Claimant failed to perform his duties and unprocedurally authorized irregular mobile banking PIN resets on the said customer account.
- 99 The Respondent submitted that RW1 testified that the procedure for pin reset is to wit; customers can reset the pin from home-self reset option or at the bank the customer fills a form for reset done by the maker, then the manager authorizes.
- 100 The Respondent submitted that several pin resets in the account of Mr. Veruli 204778678 and the Claimant failed to report the same and he authorized some of the pin resets contrary to bank procedure exposing the Respondent to financial loss of Kshs.7.96 million. Its Group Security Information Assets Standard provides that all password resets must be performed only after the identity of the user has been validated, this was not done by the Claimant.

101 The Respondent submitted that Section 5.4 of the its Cash Operations Procedure Manual requires the responsible official, either the Branch Manager or the Branch Operations Lead to; *“Review all exceptions raised by the Checkers/Call-over officials and action appropriate by escalating all Suspicious and Fraudulent transactions to Head of RBB Operations and Controls, Regional Manager and Forensics Investigations as per the existing Bank Procedures. Countersign the-report, and where exceptions were raised, annotate the action taken”*. Despite having the responsibility of reviewing all call-overs and escalating suspicious and fraudulent transactions, the Claimant failed i in his oversight role and did not note the irregular transactions which ought to have been flagged as suspicious as per the Cash Operations Guidelines.

102 The Respondent submitted that the Claimant’s termination letter referred to him acting contrary to bank procedures and exposing the Bank to a loss of Kshs.7.96 million which ‘actions amounted to gross misconduct in terms of the Respondent’s Disciplinary, Capability and Grievance Policy and Procedure. Further the termination letter referred to the show cause letter dated 20<sup>th</sup> March, 2021, the Claimant’s response to the show cause letter dated 22<sup>nd</sup> March, 2021 and the Disciplinary hearing held on 8<sup>th</sup> April, 2021.

103 It is the Respondent's submission that as a Branch Manager, the Claimant had the responsibility of exercising oversight, which he failed to. Whereas the Claimant tends to paint a picture that the reasons for his termination was his involvement in the fraud, the Respondent contends that this was not the reason in terminating the Claimant; it considered the role the Claimant was charged with and the fact that the Claimant's role was not discharged as was required of him hence the fraudulent transactions occurred under his watch.

104 The Respondent submitted that the Claimant had a supervisory role of reviewing call over and flagging suspicious transactions and which he did not do. Such supervisory responsibility attracted vicarious responsibility which saw the Claimant face disciplinary action despite the persons actively involved in the theft having resigned from the Respondent's employment. It was guided by the decision in ***Albert Mutekhele Maunda v Postal Corporation of Kenya [2019] eKLR.***

105 The Respondent submitted that the Claimant's argument that he did not handle the disputed transactions personally and that he was not responsible for call-over and should therefore not be held responsible for criminal acts of other persons does not suffice. The Claimant was aware of what was required of him as a Branch Manager

and failure to conduct his duties diligently warranted his termination from the Respondent's employment.

106 It is the Respondent's submission that there was a substantive and verifiable reason as why the Claimant was terminated. The Claimant was terminated for gross misconduct and the reasons for his termination were outlined in his termination letter.

107 On the second issue, the Respondent submitted that even where there are genuine reasons leading to the termination, an employee is entitled to challenge the same, and termination must be assessed as to its validity, fairness and reasonableness based on each case: The test of fairness must therefore be looked at with regard to the conduct of the employee, the policy procedures given by the employer and fundamentally the procedures adopted by the employer leading to the termination.

108 The Respondent submitted that procedural fairness is what entails a fair hearing provided under Article 41 of the Constitution. It cited ***Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR*** in which it was held that; *"Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment*

*contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities. And what does section 41 of the Act require? The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction:"*

109 The Respondent submitted that Clause 5.3 of its Disciplinary, Capability and Grievance Policy and

Procedure provides for disciplinary procedures in the following steps: investigation, disciplinary hearing, decision & sanction, communications- informing the employee of the decision and appeal procedure.

110 The Respondent submitted that investigations were conducted, an investigation report prepared, charges were preferred against the Claimant, the Claimant responded to the show cause letter, thereafter he was invited to a disciplinary hearing which he attended. The Claimant was put on his defense and his representation considered. Consequently, the panel found the Claimant culpable and recommended his termination. In the termination letter, the Claimant was advised to appeal which right he exercised and on consideration of the appeal, the Respondent upheld the decision to terminate the Claimant's employment.

111 It is the Respondent's submission that it accorded the Claimant a fair hearing before proceeding to embark on terminating his employment. The Respondent can therefore not be said to have failed to comply with the provisions of section 41 of the Employment Act.

112 The Respondent submitted that the Claimant allegation that a notice of four days to show cause was inadequate, however, he did not raise any issues concerning the

timeframe allocated to issue a response neither did he indicate he needed more time or requested to be granted more time. Reliance was placed in ***Henry Isaiah Onjelo v Maridadi Flowers Limited (2015) eKLR.***

- 113 The Respondent submitted that had the Claimant wanted to Cross-examine any witnesses, he would have sought for an opportunity to do so at the disciplinary hearing. It beats logic for the Claimant to allege at this point that he did not have the opportunity to cross-examine the witnesses when he never raised the same.
- 114 The Respondent submitted that the Claimant's assertion that the extension of his suspension was irregular is misguided. The Claimant has not stated any prejudice he suffered when during the period of suspension, he was on full pay.
- 115 The Respondent submitted that its Capability and Grievance Procedure provides thus *"the request for appeal should be lodged within 10 working days after receipt of the decision in writing"*. The meaning of within is *"in or into the scope or sphere of"* as such the Respondent's five working days was within the terms stipulated in the manual. Further, the Claimant never raised any issue contesting the timeframe.

- 116 The Respondent submitted that it is trite law that a party in a civil suit needs to invoke the law on discovery under section 22 of the Civil Procedure Act and Section 69 of the Evidence Act to file a Notice to produce to compel the Respondent to produce the stated documents. The Claimant did not raise at any stage during the trial of this matter as such he is estopped from raising the same.
- 117 It is submitted that Article 35 of Constitution can only be invoked in proceedings for enforcement of rights or where there is an allegation that the citizen's right to access information has been violated as held in ***Federation of Women Lawyers-Kenya & 28 others v Attorney General & 8 others [2015] eKLR.***
- 118 On reliefs, the Respondent submitted that a party is entitled to damages and/or compensation upon providing and/or establishing that their termination was procedurally and substantially unfair. The Claimant is therefore not entitled to prayers (a) and (b) of the Statement of Claim since the termination was lawful and fair and there was no violation of his rights.
- 119 The Respondent submitted that the Claimant is not entitled to severance pay as his contract was not terminated on account of redundancy. Section 40 (1) of the Employment Act, requires that only those terminated

on account of redundancy be paid severance pay. Hence, the Claimant is not entitled to this kind of pay.

120 The Respondent submitted that the Claimant is not entitled to Bonus pay for the year 2020 as prayed as its Short-Term Incentives Guidelines provides in no unclear terms that there was no automatic entitlement to a bonus, regardless of his colleagues rating. Bonus is paid at the discretion of the Respondent and is not a right.

121 The Respondent submitted that Clause 2.2.2.1 of the Respondents Remuneration policy provides that *“An STI is a discretionary annual bonus which may be awarded to employees subject to the achievement of pre -determined Absa Group, business area, team and individual performance measures and targets based on the Absa Group’s strategic objectives for the relevant performance period.”* Further Clause 2.3 provides that *“There is no automatic entitlement to an STI payment on termination, and employees who resign or are dismissed for underperformance or misconduct are not considered for an STI award. In exceptional circumstances, an STI award may be considered at the RemCo’s discretion and subject to specific performance measures being met STI awards may be pro-rated for time in service.”*

- 122 The Respondent submitted that the prayer for three months' salary in lieu of notice is untenable as the Claimant in terms of his Contract of employment was only entitled to one month salary in lieu of notice and the same was paid as communicated in the termination letter dated 17<sup>th</sup> April, 2021.
- 123 It is the Respondent's submission that the relationship between the parties was governed by the Employment contract and there was no legitimate expectation that the Claimant would be in the employment service of the Respondent until retirement. The Claimant is therefore not entitled to compensation for loss of earnings for 21 years.
- 124 The Respondent submitted that the termination of the Claimant's employment was both substantively and procedurally fair, thus, he is not entitled to damages for wrongful termination equivalent to 12 months salary as prayed.
- 125 The Respondent submitted that the Claimant is no longer its employee and for that reason it has no obligation whatsoever to continue offering medical cover to him.
- 126 The Respondent submitted that a party is entitled to costs and interest upon providing and/or establishing that their termination was procedurally and substantially unfair

which is not the case, therefore, the prayer for costs and interest on payments claimed succeed.

127 The Respondent submitted that the Claimant had voluntarily expressly covenanted, among other things, that upon the Claimant's contract of employment being terminated, the client had the discretion to charge interest on the loans at commercial rates. The Claimant is no longer an employee of the Respondent and is therefore not eligible to enjoy the preferential rate available to Bank staff for loans and cards. Again, the procedure on loan defaulters is clear and the Respondent has a duty to follow these procedures including listing such individuals on CRB hence the Claimant is not entitled to this prayer.

128 On his disability, the Respondent submitted that the Claimant has not presented before this court a certificate of disability issued to him by the National Council for Persons with disabilities. Therefore, the Claimant did not lay proof that he was enjoying tax exemption in terms of Section 12(3) of the Persons with Disability Act, Cap 133 and further the Respondent has never received incentives under Section 16(1) and (2) of the Persons with Disability Act as such the same is an afterthought and such claim dismissed.

- 129 On the counter-claim, the Respondent submitted that the Claimant had on his own volition taken various staff loans from the Respondent Bank and which loans he had expressly undertaken to repay.
- 130 The Respondent submitted during the hearing of the matter the Claimant conceded that he had been granted loan facilities. It is only right and just that the Respondent be paid for monies it advanced to the Claimant pursuant to freely entered loan agreements.
- 131 It is the Respondent's submission 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. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved as held in the case of ***National Bank of Kenya Limited vs Pipe Plastics Sumkolit (K) Ltd & Another (2001) KLR 112***. Therefore, the court should not import into the agreement clauses that were not intended by the parties themselves.
- 132 I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows:

1. Whether there were valid reason to warrant the claimant's termination.
2. Whether the claimant was subjected to due process before termination.
3. Whether the counter claim is proved.
4. Whether the claimant is entitled to remedies sought.

### **ISSUE NO 1**

133 The claimant was terminated by the respondent vide a letter dated 17/4/21 which set out reasons for the termination:

*Absa Bank Kenya P  
Retail  
and Business Rating  
Taveta Branch  
P.O. Box 269-80302  
Taveta, Kenya.*

*Saturday, 17 April 2021*

*Patrick Odipo  
Staff ABP0097, Brid H10035567  
C/O Taveta Branch*

*Dear Patrick,*

### **TERMINATION LETTER**

*Reference is made to the Suspension letter dated 05 March 2021, suspension extension letter dated 01 April 2021, the Show Cause Letter dated 20 March 2021, your response dated 22 March 2021 and the Disciplinary Hearing held on 08 April 2021 in regards*

to the incidents that occurred at Taveta Branch involving disputed fraudulent transactions totalling Kes. 7.96 Million in the account 204\*\*\*\*678 ING Veruli Pius Chuwa that occurred between 18 June 2019 and 22<sup>nd</sup> July 2020

Further to the disciplinary hearing, we have reasonable grounds to conclude as follows;

1. That, in March 2019, you acted in gross negligence when you failed to take appropriate action on the above mentioned customer at account opening stage where he was categorised as Resident Foreigner though you were well aware that the said customer resided in Moshi, Tanzania.
2. That, on various dates in the period, March 2019 to 22<sup>nd</sup> July 2020, you visited the customer at his premises in Moshi, Tanzania, and irregularly and unprocedurally collected cash from the said customer for further deposit in his said account with the bank.
3. That, in October 2019 or thereabout, you acted in gross negligence when you failed to take appropriate action when during your visit to the said customer he reported the loss of his mobile phone line 0795283180, thereby facilitating the mentioned fraud done through mobile banking.
4. That, on various occasions between January 2020 and July 2020, you unprocedurally authorised irregular Mobile Banking PIN resets on the said customer account initiated through BOC system by Wycliff Muok (staff at Taveta Branch then) without customer consent/instructions (see attached extract attached).

5. *That, between January 2020 and July 2020, you unprocedurally authorised irregular linkage of the said customer's US Dollar account 204\*\*\*651 to the mobile-banking-enabled account 204\*\*678 initiated through BOC system by Wycliff Muok without customer consent/instructions (see attached extract attached).*
6. *That, you acted in gross negligence of your oversight responsibility as the Branch Manager when you failed to mitigate on the various instances of irregular and unauthorised maintenance on the customer's accounts which indicated laxity in the implementation of controls at the Branch.*
7. *That, on 30 January 2021, you acted in gross negligence when you delayed upto 10 February 2021 in escalation for appropriate action and investigation the customer dispute raised with you in regards to the mentioned fraudulent transactions. Further we note with great concern that despite being aware that Wycliff Muok, who was adversely mentioned in the dispute, was privy to the customer complaint same day it was reported, you delayed action thereby creating exposure to the bank.*

134 Before this termination, the claimant was served with a show cause letter and suspended from duty vide the letter of 20/3/2021. He responded to suspension and show cause letter vide his letter of 22/3/21 where he denied the allegations of fraud levelled against him. He indicated that he was actually the one who raised the issues of the fraud and the master mind of the fraud were one Wycliffe Owino

Muok and Juma Nassir and he also listed how these two had benefited in the fraud.

135 He also indicated that he was not involved in Marker-cheker process of on boarding the customer including setting up the customer on digital channels. He also indicated that the documentation relating to residency status of the customer were obtained and reviewed physically and electronically by Wycliffe Owin Muok - G09628626 (Universal Banker) and Paul Maneno - H10034564 (Branch Operations Officer) respectively. He also denied inviting the customer between March 2019 and 22<sup>nd</sup> July 2020 and that the statement is a disinformation and half truth because the Kenyan-Tanzania Border was locked because of Covid 19 pandemic. He however admitted visiting the customer between late March 2019 and May 2019 on varied dates of about 4-5 times at the request of the customer and direct liaison with Wycliffe Muok. That the customer made a reasonable request on the basis of his health since he was diabetic and hypertensive and that no funds were lost during the said period.

136 He also denied visiting the customer in October 2019 and also authorising any pin resets between January 2020 and July 2020. He denied all the allegations against him. The

claimant was thereafter invited for a disciplinary hearing which took place on 8/4/21.

- 137 I have looked at minutes of the disciplinary hearing and note that the claimant was given an opportunity to respond to the allegations against him. He was found culpable for gross negligence of his oversight responsibility as branch manager when he failed to mitigate on the various instances of irregular and unauthorised activities on the customer accounts which indicated laxity in the implementation of controls at the branch and occasioned financial loss.
- 138 The claimant was accused of negligence in his duty. He was indeed the branch manager of his branch and was therefore the overall in charge. He was expected to oversee the workings of all employees including the ones he says were responsible for the fraud occasioned.
- 139 During the hearing, the claimant conceded that he visited the customer at his home in Moshi and deposited money in the customer's account and this was contrary to the collection of cash from the customer regulations 5.2 which show that the service only relates to the movement of cash and valuables in locked/sealed containers, tamper-evidence bags from a designated collection (customer's premises) point to an approved delivery point (an ABSA

bank Kenya PLC branch or the service provide cash centre).

140 The respondents concluded that the claimant failed to adhere to the respondents policies despite being aware of the same as per his admission that the customer requested them to collect cash and deposit and they did.

141 From the minutes of the disciplinary hearing, the claimant admitted flaws and breaches in the bank processes including the manner of escalating any suspicions.

142 Having analysed these minutes, it is evident then that the respondents had valid reasons to terminate the claimant who was a bank manager and the responsibility of running the branch rested squarely on him. Whereas it is true that he may not have been involved in the fraud directly he was the branch manager and in performing his work in a negligent manner he failed or ignored to detect the fraud that was happening right under his note.

143 Section 43 of the employment act 2007 states as follows:

**(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 termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

144 The respondents believed that the claimant was negligent in his duties and participated in the fraud whereas there is no evidence of the fraud. I find that he was negligent and failed to perform his duties as expected.

## **ISSUE NO 2**

145 On the issue of due process, the process envisaged in as provided under section 41 of the Employment Act 2007 which states as follows:

**41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union**

146 From the minutes of the disciplinary hearing, the claimant was informed of the allegations against him. He had a chance to respond and was even allowed to call a witness

which he did. It is therefore my finding that the claimant was subjected to a fair disciplinary process.

### **ISSUE NO 3**

147 On the issue of the counter claim, the respondents have counter claimed against the claimant for kshs 4,308,560/- which was the loan balance he had taken and has not paid to date. The claimant admitted that he took the said loan and had not completed payment which he owes at staff rates.

148 Following this admission, it is my finding that the counter claim is proved and is payable as prayed.

### **ISSUE NO 4**

149 Having found as above it is my finding that the claim by the claimant fails and is dismissed accordingly . The counter claim is allowed against the claimant and is payable with interest with effect from the date of this judgment. I exercise my discretion and decline to grant costs in this claim.

**Dated, Signed and Delivered Virtually at Nairobi this 29<sup>th</sup> Day of October 2025.**

**HELLEN WASILWA**

**JUDGE**

**ORIGINAL**