

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
MILIMAN COMMERCIAL COURTS
ELRC NO. E089 OF 2022

(Before Hon. Justice Abuodha Jorum Nelson)

MORANDE SERETA.....CLAIMANT

MORRIS

CO-OPERATIVE BANK OF KENYA LTD.....
.....RESPONDENT

JUDGMENT

The Claimant through a Statement of Claim dated 10th February, 2022 pleaded in *inter alia* as follows: -

- a. The Claimant averred that he was amongst the staff hence among the unionisable employees in the bank at the time. That he joined the bank on 22nd April, 2013 as a temporary staff engaged in selling of the bank's products. That he was assigned and attached to the bank's Mulolongo and Embakasi Junction Branch as a sales executive.
- b. The Claimant averred that while at Embakasi Junction Branch, his exemplary performance as a sales executive was recognized by the bank and on 8th September, 2017 he was offered employment as a graduate clerk on permanent and pensionable basis. He was posted to Gigiri Mall Branch of the bank until the time of termination on 14th

February, 2019 almost two years after the alleged conflict of interest and soliciting of kickbacks.

c. The Claimant averred that on 14th December, 2018, the Claimant received a show cause letter from his branch manager on allegations of conflict of interest and soliciting of kickbacks from bank customers at Embakasi Branch. The same alleged that on 7th April, 2017 and 10th May, 2017 he received Kshs 63,400/= and Kshs 17,600/= respectively from bank customers after processing their flexi loan.

d. The Claimant averred that on 13th December, 2018, he responded to the show cause letter and denied the allegations levelled against him to the effect that he did not know the alleged customers, he did not process their flexi loans, the amount received from the alleged customers were salary deposits. That he did not meet the alleged customers through the interaction in the bank and he did not profit from the customers' transaction with the bank in any way.

e. The Claimant averred that he was not involved in acts amounting to conflict of interest, he did not solicit any kickbacks, he was not involved in any way in the processing of the flexi loans and he was not involved in alleged suspicious cash deposits to customer's account. That all these transactions were taking place at the Embakasi Branch and not Embakasi Junction branch where he was stationed.

f. The Claimant averred that on 3rd January, 2019 he was called for a disciplinary hearing with the issues being the same as in the show cause letter. That he appeared before the disciplinary hearing on 21st January, Judgment cause E089 of 2022

2018 and exonerated himself from any blame and maintained that he was not aware of the allegations brought before him and that the allegations were unfounded. That no evidence was tabled to prove the allegations.

g. The Claimant averred that he maintained that he had sold his TV sets to the alleged customers to settle his father's medical bills and settlement of legal fees. That he was not aware that the TV's he sold his TV's were bank customer and/or they had applied for the flexi loan from the bank.

h. The Claimant averred that he was terminated from employment on 14th February, 2019 under a charge of breach of security relating to matters affecting the bank's business, conflict of interest and contravention of bank's operating manual, staff manual, the bank's business code of conduct, policies and exposing the bank to disrepute.

i. The Claimant averred that at the time of termination he was earning a gross salary of Kshs 81,485.85/ month.

j. The Claimant averred that he appealed against the termination on the grounds that the termination was invalid, unrelated to his conduct, capacity, roles and responsibilities as an employee and it was not based on operational requirements of employment.

k. The Claimant averred that the Respondent refused to invite him for an appeal hearing where the Claimant had sought to be represented by a union official to review his termination from employment.

l. The Claimant averred that the termination was in violation of Clause A5 of the collective bargaining agreement and the Human Resources Policy on Judgment cause E089 of 2022

Disciplinary Policy and Procedure manual which provides for termination after two warning letters.

1. The Claimant in the upshot prayed for the following against the Respondent:

- i. A declaration that the Claimant's termination of service was substantively and procedurally unlawful/unfair.
- ii. Spent
- iii. Payment of 12 months' gross salary as compensation for unfair termination of employment amounting to Kshs. 97,830/=.
- iv. The Respondent to pay 25% of the claim.

2. The Respondent filed his response to the Statement of Claim dated 3rd March, 2022, which averred inter alia:

- a. *The Respondent averred that the Statement of Claim was issued with the show cause letter of 14th December, 2018 after an investigation carried out by the Respondent revealed that he had on two occasions, namely on 7th April, 2017 and 10th April, 2017 respectively solicited for and received kickbacks and/or bribes of Kshs.63,400/= and 17,600/= respectively from two customers of the Respondent after processing their respective flexi loans.*
- b. *The Respondent averred that on the said 2 occasions the Claimant solicited for kickbacks from the Respondent's 2 customers, the amounts were sent to his Mpesa number 0713404083 immediately after their respective flexi loans were processed. That for the flexi loans of the said two customers who had processed their respective outstanding flexi plus loan balances of suspicious cash deposits to their respective accounts and upon processing of the loans immediately the said sum of Kshs 63,400/= and 17,600/= was sent from the customer's bank accounts to the Claimant.*

c. The Respondent averred that the Claimant's conduct of soliciting for kickbacks and/or bribes from its customers amounted to a gross misconduct and hence the issuance of the notice to show cause.

d. The Respondent averred that Claimant's allegation that he was able to exonerate himself from the accusations is a blatant falsehood.

e. The Respondent averred that the termination was as a result of the Claimant's failure to explain satisfactorily the circumstances and/or reasons why he was sent money by the Respondent's customers immediately after their flexi loans were processed.

f. The Respondent averred that the Claimant's appeal did not raise any new evidence and/or matters for a hearing of the same and/or review of the decision of the disciplinary committee and this was duly communicated to him via the Respondent's letter of 12th March, 2019.

g. The Respondent averred that in its letter dated 15th January, 2019 the Claimant was duly informed of his right to be accompanied by a member of staff or a union staff official for the disciplinary hearing but chose not to exercise his said right.

h. The Respondent averred that the Claimant's contention that the Respondent refused to invite him for an appeal where he would have been represented by a union official for review of his termination is baseless and without merit.

i. The Respondent averred that Clause A5 of the CBA provides for acts and/or instances on the part of an employee which shall amount to a gross misconduct and/or serious neglect and thereby justifying a summary dismissal. That in case of gross misconduct for which clause A5 of the CBA provides for summary dismissal does not call for any warning letters.

j. The Respondent averred that besides clause A5 of the CBA Appendix 14 of the Respondent's Staff Manual and/or clause 10.5 provides for acts and/or instances on the part of the employee which constitute a gross misconduct and/or serious neglect and thereby calling for instant

dismissal. That the conduct and/or breaches of the Claimant amounted to one of the instances justifying for summary dismissal and therefore his termination was lawful, justified and for a valid reason.

k. The Respondent averred that although the Claimant's conduct amounted to gross misconduct which called for a summary dismissal without notice, the Claimant was nevertheless paid one month's salary in lieu of notice which was lenient turning it to normal termination instead of summary dismissal.

l. The Respondent averred that despite having been given an opportunity to defend himself of charges, the Claimant failed to tender any sufficient evidence to exonerate himself. That the Respondent as a financial institution and a reputable commercial bank the integrity and honesty of its employees was paramount.

m. The Respondent averred prior to the termination of the Claimant's employment, an investigation was carried out and he was found culpable and was furnished an opportunity to defend himself. That the Claimant's allegations that the Respondent did not discharge its statutory obligation and procedural justice and that it breached the provisions of Section 43, 45 and 45(4) of the Employment Act and Article 47[1] of the Constitution of Kenya 2010 is baseless and without any merits whatsoever.

n. The Respondent averred that the Claimant's conduct/breaches put his honesty, integrity and trust which was a fundamental aspect of his employment to question and hence making his continued employment with the Respondent untenable.

3. The Respondent in the usual way prayed as against the Claimant that the Claimant's statement of Claim be dismissed with costs.

4. Both the Claimant's and Respondent's case was heard on 24th June, 2025 and the Claimant (CW1) testified and adopted his documents and witness statement as his evidence in chief. He further stated that he was accused of doing business with bank customers which was not true. That the loans were processed by Chepkoech and J Muke and his name did not appear in the loan application forms. According to him, he never carried out those transactions.

5. CW1 further testified that he was based at Embakasi Junction branch while the transactions were done at Embakasi branch and that he was a temporary employee then and had no access to the bank's systems. It was his evidence that he was not issued with Respondent's policies and he was just a sales executive. That he was not issued with a warning letter.

6. In cross-examination CW1 stated that the amounts from the two customers were sent to him immediately the loan was drawn down and the loan cleared. That being a temporary staff he had no knowledge of bank terminologies. He

conceded that it was a coincidence that he was paid after loan settlement and the customers were paying for items he sold to them and that the payments were done past working hours while he was at home.

7. CW1 further averred that he wanted to start a video business which never materialized because he did not have license or permit and it was just a dream. He admitted that he did not have the receipts for the TV and the decoder and that he could not remember if he produced the receipts at the Disciplinary Committee. He confirmed that he did not have receipts for any other business. He stated that his salary was Kshs 25,000.

8. CW1 confirmed that he never produced his bank statement before the disciplinary committee to show he had savings and that he was not able to assist in the raising of loans from his position. He further admitted that he did not produce any documents to show his father was hospitalized, before the disciplinary committee and that he came to know the two customers through his neighbor and he did not know where

they lived. It was his evidence that the items were sold as second-hand items and they agreed on the price when the two customers came to buy them.

9. CW1 confirmed that he was invited to disciplinary hearing and informed of his right to be accompanied by a colleague of his choice but he attended alone. He confirmed that he signed the attendance sheet and was taken through the disciplinary process before termination. That the termination letter had reasons for termination. Upon termination he was issued with a certificate of service.

10. CW1 confirmed that he appealed the termination and the appeal was responded to and further that he was paid his terminal dues. It was his evidence that he was not aware the persons he dealt with were the company's customers and he learnt they were when he saw the show cause letter on the offence of "prohibition of incurrence". He admitted that the money came to his Mpesa account.

11. In re-examination CW1 clarified that he never processed the transaction or made the deposits or clear the loans. That he

received the money on account of items he sold. That he was not given the staff manual upon employment.

12. The Respondent on the other hand called one witness Leah Kerich (RW1) who stated that she was the Head of Employee Relations of the Respondent. She adopted her witness statement and the Respondent's documents as her evidence in chief and further testified that she knew the Claimant and it was not true that he did not facilitate the clearance of the loans and that the clearance was irregular. That the Claimant was to receive cash from the customers he assisted and the bank did not approve of this. RW1 further stated that the Claimant assisted the customers irregularly to clear their loans which exposed the bank's assets and that a customer did not have to be assisted from that branch and further that due process was followed in handling the claimant's issue.

13. In cross-examination RW1 confirmed that the Claimant was stationed at Embakasi Branch and the incident arose when the Claimant was at that branch. She further stated that the Claimant did not process the cheques. The Claimant was accused of receiving money after processing of loans and that

the loans could be processed by anyone else. It her evidence that the CCTV did not show the Claimant as the one who deposited the money and confirmed that she did not know the source of Kshs. 59,850/= the claimant received and that the customer did not have the money in the account. It however he evidence that the claimant received kickbacks. The money received by the claimant was from Co-operative bank to his Mpesa.

14. RW1 confirmed that the bank had a CCTV system and she did not have the name of who deposited the money. That the customer deposited Kshs. 121,600/= and the Claimant received Kshs 17,600/= and the money received did not have to be the entire amount of money. She confirmed that the sales executives interacted with customers before they interacted with the bank. The claimant knew the two customers before introducing them to the bank and that the applications were through the system.

15. In re-examination RW1 clarified that there would be no difference if the Claimant was at Embakasi branch or Embakasi Junction branch.

CLAIMANT'S SUBMISSIONS

16. The Claimant through Banking, Insurance & Finance Union, filed written submissions dated 13 August, 2025 and on the issue of whether the termination of the Claimant from employment was procedurally fair, counsel submitted that the Claimant was not involved in any transactions being carried out at Embakasi branch. He was employed as a temporary staff at Embakasi Junction branch and not at Embakasi Branch.

17. Counsel submitted that the Claimant had no access to the banking system and this fact was admitted by the Respondent. That the Claimant could never facilitate the two customers to clear their flexi loan. Counsel contended that the Respondent did not substantiate how the Claimant facilitated the clearance of the flexi loans. The Claimant did not deposit the alleged suspicious cash deposits nor process

the alleged flexi loans and that the Respondent was the custodian of the bank statement for the two customers and in a position to know who deposited or cleared the alleged flexi loan through cash deposit if not the account holders themselves. That the flexi loans were processed by Jepkoech and Mukere and not the Claimant.

18. It was the Claimant's submission that the Claimant received the cash from the two customers after he had sold them his electronic items. He did not know that the two customers were bank employees at the time he was dealing with them. That the said customers were introduced to him by the caretaker and he was not expected to know each and every bank customer. That the Claimant was not precluded from dealing with bank employees in the community of persons.

19. Counsel submitted that he even produced the sales receipt to the disciplinary panel to prove that he had bought the items he sold but the disciplinary panel was only interested on production of ETR which the Claimant did not have as he was not given any by the seller.

23. Counsel submitted that the Respondent's assertion that the Claimant acted contrary to Policy in the Banks manual was unsubstantiated and lacked any evidentiary basis. The Claimant was not made aware of any such policy as he was not provided with any bank documents binding him to the bank at the time of the alleged misconduct in April and May 2017.

24. Counsel relied on Sections 107-109 of the Evidence Act and the case of **Maria v Annah Mutua Ndwiga & Another**, Civil Appeal No. 297 of 2015 [2017] eKLR to submit that the burden of proof rests with the party asserting a fact, and this burden was discharged through the adducing of evidence. While the evidentiary burden may shift during trial, the initial and ultimate burden to prove the existence of the alleged policy violation lies with the Respondent.

25. Counsel relied on the case of **Grace Wanja Ng'ethe v Kivia Engineering Services Limited** (2023) KEELRC 1226 (KLR) to submit that sections 42 (1) and 45 of the Employment Act places a burden on the employer to prove

that the reason for termination of employment was fair and valid. The Respondent herein had failed to produce evidence of the alleged Policy and CBA violation and to conclusively link the suspicious cash deposit to the Claimant. That the reason for termination was not proved to be valid or fair.

26. On the issue of whether the Claimant was accorded procedural fairness when he was terminated from employment, counsel submitted that the Respondent admitted that the Claimant was not an employee of the bank as at the time of the alleged misconduct on 7th April, 2017 and 10th May, 2017 and was not on the basis of any disciplinary sanction.

27. Counsel submitted that the Claimant was a temporary staff as from April 2013 to 7th September, 2017 and was offered employment in the bank as a graduate clerk on 8th September, 2017. This was the clearest indication that the Claimant was not provided with any employee rights or any bank policy to bind him when he was a sales executive under a temporary contract of employment.

28. Counsel submitted that the Claimant was not bound by the Human Resources Policy, the CBA, bank's staff manual and the business code of conduct and ethics which were not known and or/ given to him.

29. Counsel submitted that the investigation report that formed the basis of commencing disciplinary hearing against the Claimant was not provided to the Claimant or presented in the disciplinary hearing nor was this court and further that the alleged bank procedures that the Claimant had allegedly breached were not presented before the court and neither did the Respondent state the provisions that had been breached by the Claimant as at May 2017 when the alleged misconduct was committed.

30. Counsel submitted that the Respondent's failure to provide him with the investigation report and documents related to the alleged misconduct prior to the termination of service and to produce the same before court constituted a grave violation of procedural fairness and rules of natural justice.

31. Counsel submitted that disciplinary hearing should relate to behaviors and conduct at work where this has a direct bearing

on the Claimant suitability for work and in discharge of lawful duties.

32. Counsel submitted that a disciplinary hearing should not to be a matter of ticking boxes but to enable the employee to defend himself and the employer to make consideration of any representation made.

33. Counsel relied on among other cases, the case of **William v Bonere Africa Logistics Limited (Cause 1494 of 2017) [2023] KEEL 100 (KLR) (Supra)** to submit that an employer relying on an investigation report as the basis for termination of service must furnish the employee with the said report to enable them to adequately prepare their defence.

34. Counsel submitted that the respondent did not provide or present any investigation report or findings crucial to the allegations against the Claimant to afford him an opportunity to understand and challenge the conclusions reached. That the only reason why the investigation report was not provided was because there was no ground to pin the Claimant on the allegations that the cash deposits were done

by him and not the account holders and the Mpesa amounts sent to him were for items sold to the alleged customers.

35. Counsel submitted that the explanation of the alleged misconduct, specifically the term 'breach of security and conflict of interest' was not provided in a manner that he genuinely understood.

36. Counsel relied on Section 40 of the Employment Act to submit that an employer must explain the reasons for considering terminating the employee in a language the employee understands.

37. Counsel submitted that a disciplinary hearing is not a mechanical process and fairness entails an objective reasonableness. The allegations have not been proved and the Claimant's representations were not taken into account.

38. Counsel relied on case of **Co-operative Bank Kenya Limited v Banking Insurance & Finance Union (Kenya) (Civil Appeal 240 of 2018) (2021) KECA 173 (KLR)(5 November 2021) (Judgment)** to submit on the interpretation and minimum standard of fair procedure under section 41 of the act. That the burden of justifying the

grounds for the termination or wrongful dismissal shall rest on the employer. The alleged conduct of the Claimant herein did not constitute dismissible offences.

39. Counsel submitted that failure to meet the threshold under section 41 rendered the termination unlawful which was substantively and procedurally unfair for going contrary to section 41, 43 and 45 of the Act. Counsel relied on the case of **Bomas of Kenya v The State (Civil Appeal 379 of 2019) (2022) KECA 100 (24 June 2022) (Judgment)** on this assertion.

40. Counsel further submitted that failure by an employer to observe its own disciplinary procedure may amount to repudiation of contract and that the Claimant was unfairly and unprocedurally terminated from employment while relying on the case of **Kenya Plantation and Agricultural Workers Union vs Finlay's Horticulture Kenya Ltd (2015) eKLR**.

41. On the issue of whether the Claimant was entitled to the reliefs sought, counsel submitted that the evidence on record showed that the Claimant was entitled to all reliefs sought as

the termination from employment was both substantively and procedurally unfair.

RESPONDENT'S SUBMISSIONS

42. The Respondent's Advocates Kimondo Mubea & Company Advocates filed its submissions dated 15th September, 2025 on the issue of whether the termination of the Claimant's employment was substantively fair. Counsel relied on the case of **Nugul Kanida v Access Kenya Group Ltd [2022] eKLR** to submit that substantial justification for the termination of employment entails proving that the reasons for termination were fair within the meaning of sections 43 and 45 of the Employment Act.

43. Counsel relied on the case of **Kenya Revenue Authority v Reuwel Waithaka Gitahi, Felicitas Gathoni Waweru & Gedion Kathila Mutuku [2019] eKLR 300 (KLR)** to submit that the standard of proof of the reasons for termination was on a balance of probability, not beyond reasonable doubt and all that the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services.

44. Counsel submitted that there existed a valid reason for the termination of the Claimant's employment being the conflict of interest and the soliciting of kickbacks from bank customers at Embakasi Branch as disclosed in his letter of termination of employment dated 14th February, 2019. That the chronology of events leading to the Claimant's dismissal were disclosed by the Respondent in its statement of response as well as in the witness statement by Leah Kerich.

45. Counsel submitted that regardless of where the Claimant was stationed at the time he solicited the kickbacks as evidenced by the bank's remittances to him despite the Claimant's contention that he was not stationed at Embakasi branch where the said flexi-loans were processed but rather at Embakasi Junction branch.

46. Counsel submitted that the Claimant failed to call as a witness the said caretaker who had allegedly introduced the 2 customers to him before the Labour court or before the Disciplinary panel and similarly failed to produce any hospital receipts or records of his father to substantiate his claims.

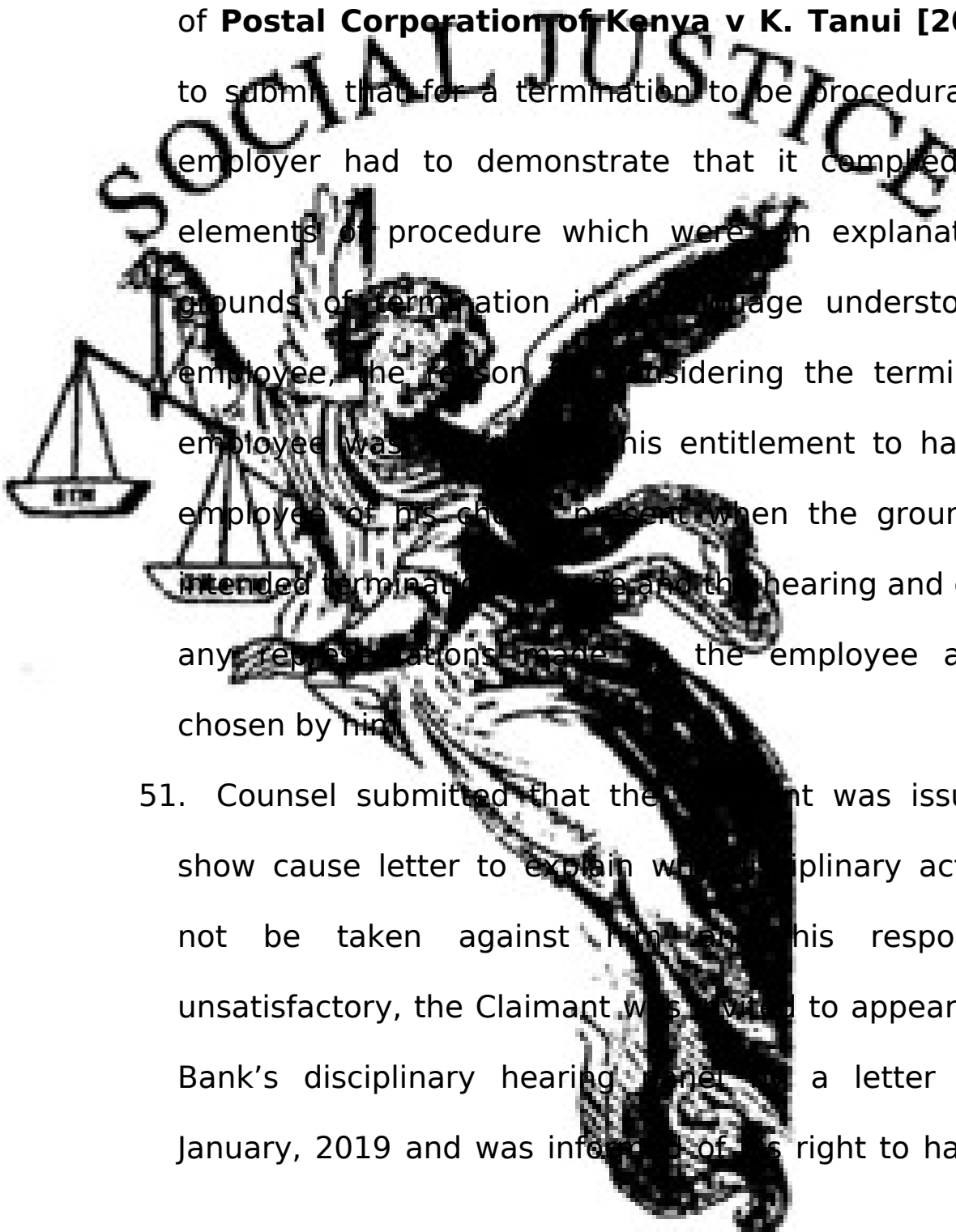
47. Counsel submitted that the Respondent had demonstrated that on a balance of probabilities, it had a genuine reason to believe that the Claimant had committed acts that amounted to a conflict of interest. Counsel relied on the Respondent's Code of Conduct and Ethics where conflict of interest and receiving gifts was provided.

48. Counsel relied on the case of **Kenya Revenue Authority v Keuvel Wanjika Githika & 2 others [supra]** to submit that for a substantial employer has to prove that it genuinely believed that the reasons for termination on a balance of probabilities existed at the time of termination and that it would be improper to expect an employer to conduct a near forensic examination of the facts.

49. Counsel submitted that the Respondent had a genuine reason to believe on a balance of probability that the Claimant was guilty of conflict of interest by receiving Mpesa cash deposits in to his account immediately after suspicious flexi loans had been processed in to accounts of the two of the Respondent's customers.

50. On the issue of whether the termination of employment of the Claimant was procedurally fair, counsel relied on the case of **Postal Corporation of Kenya v K. Tanui [2019] eKLR** to submit that for a termination to be procedurally fair, an employer had to demonstrate that it complied with four elements of procedure which were an explanation of the grounds of termination in a language understood by the employee, the person considering the termination, the employee was given his entitlement to have another employee of his choice present when the grounds for the intended termination were laid and the hearing and considering any representations made by the employee and person chosen by him.

51. Counsel submitted that the termination was issued with a show cause letter to explain why disciplinary action should not be taken against him, as his response being unsatisfactory, the Claimant was invited to appear before the Bank's disciplinary hearing panel by a letter dated 15th January, 2019 and was informed of his right to have another



member of staff or central staff union member present alongside.

52. Counsel submitted that as can be discerned from the minutes, the Claimant waived his right to any representation. At the hearing, the Claimant was given an opportunity to be heard and his responses to the charges were found unsatisfactory prompting the issuance of a termination letter dated 14th February, 2019.

53. Counsel submitted that the Claimant appealed by a letter dated 25th February, 2019 seeking to be represented after having previously waived this right. The Appeal did not disclose any sufficient grounds to warrant review of the decision to terminate him. The decision was communicated to him vide a letter dated 12th March, 2019.

54. Counsel submitted that contrary to the Claimant's submissions, he was aware of the bank's policies and procedures even prior to his confirmation as a permanent employee. Mr. Kimondo further submitted that at no point during the entire disciplinary process was the investigation report requested by the Claimant. That the same issues were

raised in his submissions and were never pleaded at trial. That at no point did the Claimant indicate to the Respondent that he did not understand the nature of the charges levelled against him.

55. Counsel relied on the case of **Ogolla v National Bank Ltd [2022] KEELRC 1502 (KLR)** to submit that the Claimant was given sufficient information of the nature of charges levelled against him, understood the charges and was therefore able to respond to the charges and the insistence of an investigation report was a matter of thought and ought to be dismissed.

56. Counsel submitted that the Respondent complied with the procedure laid out in the case of **Postal Corporation v Tanui** [supra] therefore, the termination of employment of the Claimant was procedurally fair.

57. On the issue of whether the Claimant was entitled to the reliefs sought, counsel submitted that the Claimant's termination was lawful and for all the Claimant's claim should be dismissed.

58. Counsel relied on among other cases, the case of **George Kariuki Ngugi and 2 others v Brolaz East Africa Limited (2014) eKLR** to submit that the Claimant was not entitled to any of the reliefs sought and the claim be dismissed with costs to the Respondent. That should the court hold otherwise it should be guided by circumstances provided for under section 49 of the Act and award the Claimant the 12 Months' salary as compensation for unfair termination.

59. Counsel submitted that the Claimant agreed that his employment with the Respondent was no longer tenable and he abandoned his prayer for the reinstatement to employment.

60. Counsel relied on the case of **Mweso V Newton [2022] KEELRC 1554 (KLR)** to submit that the court should take into account the Claimant's conduct as the reason for his termination hence an award of 3 months compensation would be sufficient if the court found the termination to be unprocedural or unlawful due to his conduct.

DETERMINATION

61. The court has reviewed and considered the pleadings, documents filed and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by counsels and the Court has come up with two main issues; namely:

i. Whether the Claimant's termination of employment was fair and unlawful.

ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful.

62. It was the Claimant's case that the Respondent unfairly terminated his service on allegations of conflict of interest and soliciting of kickbacks from bank customers. The Claimant claimed that he was a temporary staff then who had no access to systems, he did not facilitate the clearance of the loans or take part in those transactions and that the amounts sent to him were for TVs and decoder he sold to the customers who he did not know were bank's customers. That

he never received any warning letter from the Respondent before his termination.

63. The Respondent on the other hand alleged that the Claimant was guilty of the conflict of interest and of soliciting kickbacks from the Bank's customers at Embakasi Branch. That the Claimant's assertions that he was based at Embakasi Junction branch and not Embakasi branch did not make any difference and that the Claimant illegally assisted the customers to clear the flex loans received kickbacks immediately thereafter.

64. The requirements for employers to terminate employee's employment contract on valid and valid reasons is governed under section 43 of the Employment Act where the termination becomes unfair when there are no valid reasons for termination under section 45 of the Act. The reasons must be those the employer must have believed to exist which caused the termination of the employees' employment. The test is whether any reasonable employer put in similar circumstances would consider termination as the most appropriate action to take. The burden of proof for the parties

is as governed by section 47(5) of the Employment Act where the Claimant ought to illustrate a termination which was unfair occurred and the Respondent to justify the grounds of the termination.

65. The court is also guided by case law such as in the case of **Pius Machafu Isindu v Lavinton Security Guards Limited** [2017] 2 KLR, the Court of Appeal stated:

"There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) - prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

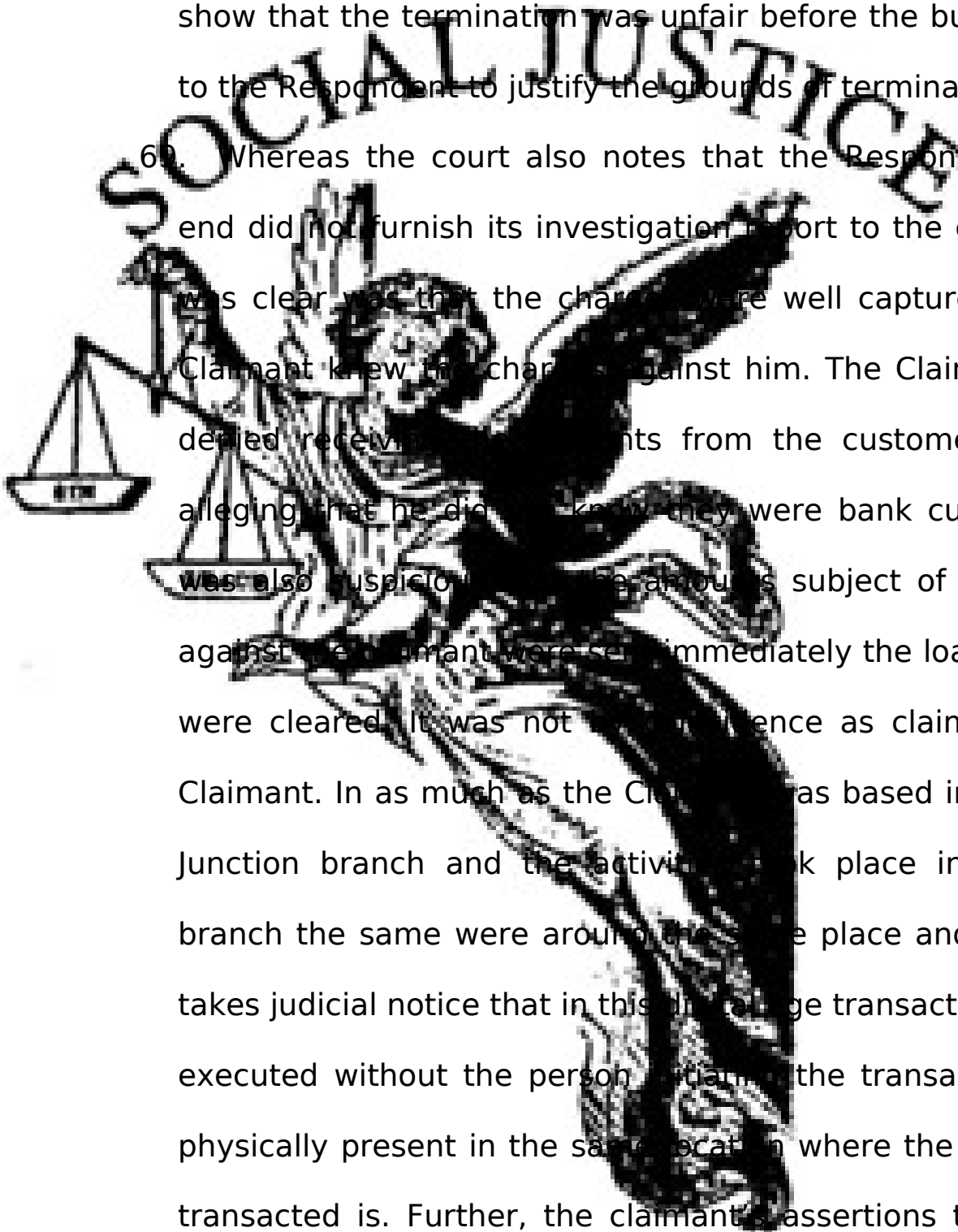
66. In this case the claimant alleged conflict of interest and soliciting of kickbacks by the respondent from the respondent's customers which was considered by the court as breach of its Human Resource and Conflict of Interest Policy . It was not in dispute that the Claimant received Kshs 63,400/= and Kshs 17,600/= in April and May respectively from two bank customers which he alleged that he had sold to TV's and decoder and that they were introduced to him by the caretaker.

67. During hearing the Claimant stated that the buyers were introduced to him by the neighbour. In his pleadings he stated that the two customers were introduced to him by the caretaker. The caretaker of the neighbor was not called as a witness. The Claimant did not produce any evidence of the purchase of the said TV's and the decoder that is to say the receipts for purchase of the same. The Claimant never produced the medical evidence of the alleged hospitalization of his father. When asked about them at the disciplinary hearing he also failed to mention the advocate who was to take the matter by indicating that they dropped their matter and agreed to settle out of court.

68. The court is of the view that the Claimant ought to have produced those critical documents in order to prove that it was true that the amount received for the sold items. The Claimant ought to have produced his bank statements to show that it was his savings as alleged during hearing. The court therefore does not believe the claimant's assertions without any proof as required by section 107 of the Evidence Act which requires that a person who alleges a fact has the

burden to prove the same further Employment Act under section 47(5) places the burden of proof on the Claimant to show that the termination was unfair before the burden shifts to the Respondent to justify the grounds of termination.

69. Whereas the court also notes that the Respondent on its end did not furnish its investigation report to the court, what was clear was that the charges were well captured and the Claimant knew the charges against him. The Claimant never denied receiving payments from the customers despite alleging that he did not know they were bank customers. It was also suspicious that the amounts subject of the charge against the Claimant were so immediately the loan amounts were cleared. It was not a coincidence as claimed by the Claimant. In as much as the Claimant was based in Embakasi Junction branch and the activities took place in Embakasi branch the same were around the same place and the Court takes judicial notice that in this day and age transactions can be executed without the person initiating the transaction being physically present in the same location where the item being transacted is. Further, the claimant's assertions that he did



not have access to the Respondent's system may not help the court in understanding why the amounts were sent to him immediately the customers' loans were cleared. The reasonable deduction is that the claimant must have worked with the customers in question and possibly an insider in the bank.

70. For the above reasons the court is in the view that the Claimant did not discharge the burden of proof cast upon him by law, that is to show that his termination of his service took place. In the case of **Shri. Michael Isindu (supra)** the court held as follows:

14. Section 25-B of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:

"(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving the fact of termination of employment or wrongful dismissal has been proved shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer."

[Emphasis added]

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 42(1): "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.”

15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43.

71. Section 43 of the Employment Act states that for termination or dismissal of employment to be held valid, an employer must have genuinely believed the reasons existed which caused termination of the employee's service. The Court of Appeal in **Case No. 66A of 2017, Kenya Revenue Authority v Revenue Authority & 2 others [2019]**

Authority v Revenue Authority & 2 others [2019]

Authority v Revenue Authority & 2 others [2019] held as follows on the standard of proof: -

“The court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that employers would have to undertake a near forensic examination of their records and seek proof beyond reasonable doubt as in a criminal case where it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that "genuinely believed to exist," causing it to terminate the employee's services.”

72. From the above, it was clear the Respondent genuinely believed the Claimant to have received the said amounts as kickbacks after the customers' loans were cleared. The court notes that any reasonable employer in the same position as

the Respondent would have lost trust in the Claimant more so when it is a financial institution where trust and honesty was paramount.

73. The test is always whether a reasonable employer would terminate an employee based on the same facts as was held by Lord Denning in the often cited case of **British Leyland UK Ltd v. Swift [1981] IRLR 60** stated:

The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. If a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would probably keep him on. Both views may be quite reasonable. If it is quite reasonable to dismiss him, then the dismissal should be upheld as fair even though some other employers may not have dismissed him.

74. The Claimant though stating that he was a temporary employee working with the Respondent from 2013 to 2017 before he was confirmed as a permanent employee, was already a term employee and governed by the rules and regulations of the Respondent. He could not therefore claim that he was not given the Respondent's policies and manuals yet the same existed and he never requested for the same and they were never given. The Court is therefore inevitably

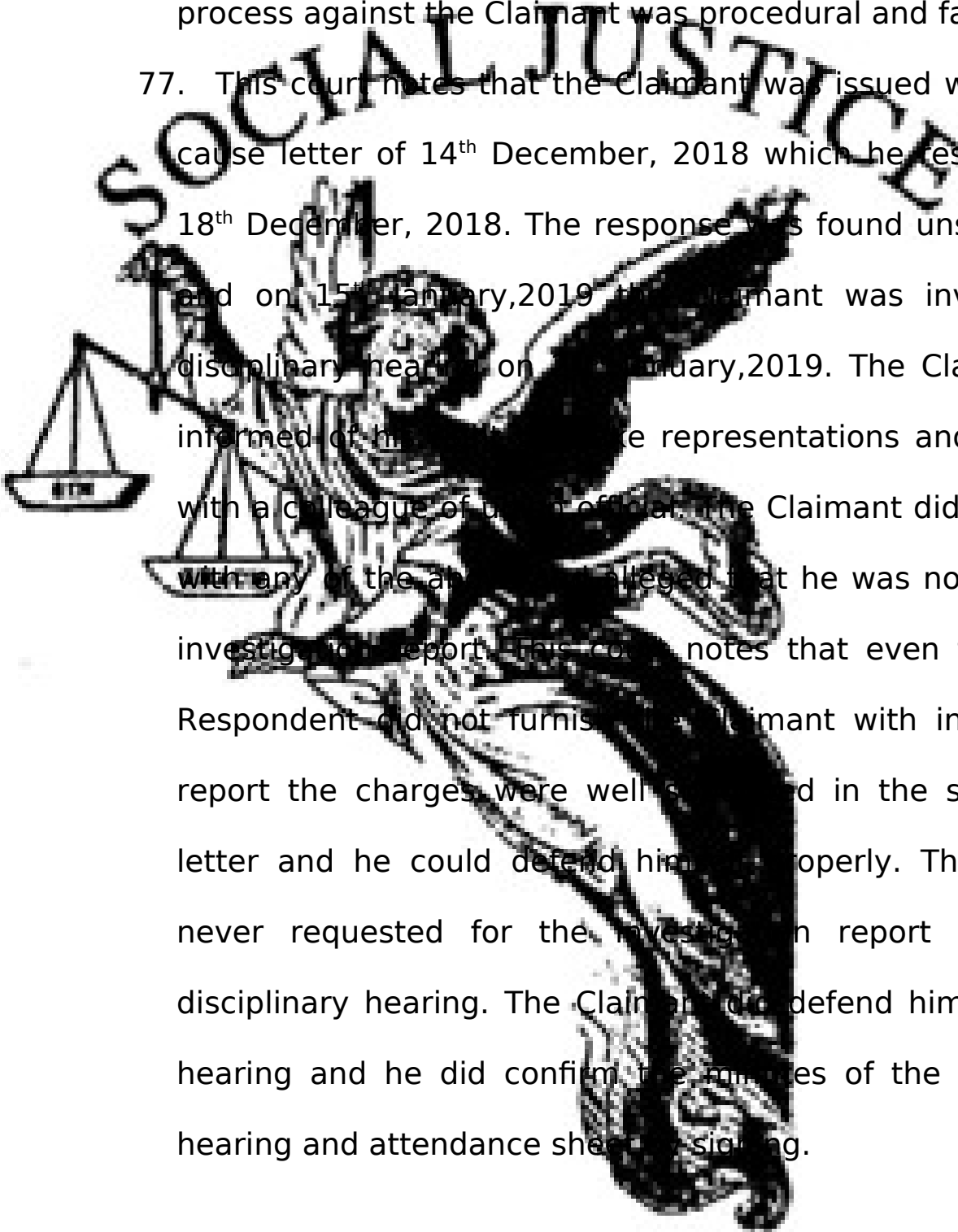
driven to find and hold that the Respondent had valid and reasonable grounds to summarily dismiss the Claimant as it did.

75. Gross misconduct as governed by section 44(4) of the Act entitles an employer to summarily dismiss an employee. The Claimant's assertions that he was never given any warning letter could not stand since he was charged with a gross misconduct offence warranting a summary dismissal. The same are provided in Appendix 14 clause 10.5, of the Respondent's disciplinary policy and procedure, Clause A5(a) of the CBA and clause 20 of the Respondent's staff Manual which provided for instances of acts amounting to gross misconduct with inducement and breach of code of conduct being an instance for summary dismissal.

76. Regarding procedural fairness, it is now an established principle that for termination to pass fairness test there should be both substantial and procedural fairness in a number of cases including in the case of **Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR** among others. Further Section 41 is the guiding law on the

procedural fairness which must be adhered to by an employer. It is the Respondent's case that the disciplinary process against the Claimant was procedural and fair.

77. This court notes that the Claimant was issued with a show cause letter of 14th December, 2018 which he responded on 18th December, 2018. The response was found unsatisfactory and on 15th January, 2019 the Claimant was invited for a disciplinary hearing on 22nd January, 2019. The Claimant was informed of his right to make representations and to attend with a colleague of his own official. The Claimant did not attend with any of the above. He alleged that he was not given the investigation report. This court notes that even though the Respondent did not furnish the Claimant with investigation report the charges were well set out in the show cause letter and he could defend himself properly. The Claimant never requested for the investigation report during the disciplinary hearing. The Claimant did defend himself during hearing and he did confirm the minutes of the disciplinary hearing and attendance sheet by signing.



78. The Claimant appealed the termination and the Respondent maintained its decision stating that there was no new evidence and communicated to him. The Claimant confirmed that he was terminated, paid his terminal dues and given certificate of service. The court is therefore convinced that the Respondent followed the due process in terminating the Respondent's employment even though the period taken from the time of act to disciplinary action was almost two years.

79. In the above court further finds and holds that in terminating the claimant's service the respondent followed a fair procedure.

Whether the claimant is entitled to reliefs sought.

80. Having established that the Claimant was fairly terminated the court proceeds to find that he not entitled to compensation for unfair termination and having admitted that he was paid his terminal dues upon termination these prayers cannot be granted.

81. In conclusion the Claimant's claim is hereby found without merit and is hereby dismissed with costs.

82. It is so ordered.

Dated at Nairobi this 28th day of November 2025

**Delivered virtually this 28th day of November,
2025**

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

