

**IN THE COURT OF APPEAL
AT MALINDI**

(CORAM: MURGOR, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E002 OF 2023

BETWEEN

AGRICULTURAL FINANCE CORPORATION.....APPELLANT

AND

GALGALO JARSO JILLO.....RESPONDENT

*(Being an appeal from the Judgment of the Employment and
Labour Relations Court of Kenya at Malindi (B. Manani, J.)
delivered on*

25th November 2021

in

ELRC Case No. 13 of 2019)

JUDGMENT OF THE COURT

1. In this appeal, ***the appellant***, Agricultural Finance Corporation, challenges the Judgement and Decree of Malindi Employment and Labour Relations Court (***the ELRC) (Manani, J.) in ELRC Case No. 13 of 2019*** in which the ***respondent***, Galgalo Jarso Jilo, filed a Memorandum of Claim dated 15th November 2019 challenging his dismissal from employment. In a judgment dated 25th November 2021, the ELRC found in the respondent's favour.
2. The background leading to the claim before the ELRC was as follows: Following a successful interview for the position of a Branch Manager in the appellant's financial institution

on 12th May 2015, the respondent was given an offer of

employment by the appellant in that capacity *vide* a letter dated 18th June 2015. The respondent was later transferred to the appellant's Hola Branch as evidenced in a letter dated 21st August 2015.

- 3.** The employment relationship between the parties was blissful from then on until 30th May 2016 when the respondent was served with a suspension letter following discovery of alleged financial irregularities at the Hola Branch. The respondent termed the suspension as unfair for the reasons that he was not invited to show cause why the suspension should be meted out; that it was not established that he would interfere with the integrity of pending investigations; and that he was subjected to unfair labour practices and administrative action contrary to **Articles 41** and **47** of the **Constitution**.
4. By a further letter dated 2nd June 2016, the respondent was informed that formal charges of financial irregularities were being commenced against him, and that he was required to provide a detailed explanation on the charges preferred against him. In a bid to exonerate himself, he responded *vide* a letter dated 27th June 2016. After a disciplinary hearing which took place on 29th July 2016, the appellant terminated his services and communicated to him on 31st October 2016 in that regard.
5. The respondent considered his termination of employment as illegal, unprocedural, unfair and in breach of the Constitution and of the Employment Act for the following reasons:

- i. *summarily dismissing him without any lawful justification;*
- ii. *terminating his employment contract on account of invalid reasons;*
- iii. *no prima facie evidence was established on the loss of Kshs.808,330 as alleged by the appellant;*
- iv. *failure to follow proper procedure of termination of employment contract by failing to give him relevant notice;*
- v. *failing to invite him to appear for a hearing before the employer with a fellow employee of his choice of a union representative as provided for in Section 41 of the Employment Act, Cap 227;*
- vi. *failing to accord him an opportunity to cross-examine any witnesses during a disciplinary hearing;*
- vii. *the disciplinary process took an unduly lengthy period rendering its credibility doubtful and it amounted to a breach of the rights to fair administrative action and fair labour practices; and*
- viii. *the termination was not notified to the Director of Employment and the Labour Office of the County as required by Section 78 of the Employment Act, Cap 227.*

6. The respondent maintained that he was not involved in the alleged misconduct or at all, and that he served his employer diligently and industriously. For those reasons, he prayed for judgement against the appellant for:

- a) *A declaration that the suspension from employment was unfair, unlawful, breached the employment contract and violated the respondent's constitutional rights coupled with the payment of ½ salary and allowances from June 2015 to October 2016 at the rate of Kshs.75,375 per month totaling to Kshs.376,875;*
- b) *Damages for breach of contract, constitutional rights to fair labour practices and fair administrative action under Articles 41 and 47 of the Constitution of Kenya*

respectively over the suspension from employment;

- c) *Full salary and allowances for May 2016 and November 2016 at the rate of Kshs.150, 750 per month totaling to Kshs.301,500;*
- d) *3 months' pay in lieu of notice basic pay of Kshs.150,750 per month totaling to Kshs.452,250;*
- e) *Annual leave one (1) month totaling Kshs.150,750.*
- f) *NSSF contributions totaling Kshs.2,800;*
- g) *NHIF contributions of Kshs.23,800;*
- h) *Damages for breach of contract, right to fair labour practices and fair administrative action by the process undertaken in the termination and review of the summary dismissal decision;*
- i) *Certificate of service; and*
- j) *Costs and interest of the claim."*

7. In a Reply to the Statement of Claim dated 25th November 2019, save for the fact that the respondent was employed as a branch manager by the appellant and posted to the Hola Branch, the appellant denied the allegations raised by the respondent in the Memorandum of Claim. The appellant stated that, soon after the respondent was confirmed after 6 months probationary period, it was established that there were funds being withdrawn despite the Hola Branch not having any activities during that season; and that the basis upon which the respondent was suspended was after an audit report revealed financial irregularities, namely that some funds were being credited to individual accounts of persons who never delivered any services.

8. The appellant maintained that the evidence linked the respondent directly to the loss of funds to which he admitted; that, as a result, the respondent's employment was properly terminated in accordance with the law; that the respondent was called to defend himself against the allegations; and was subsequently invited to a disciplinary hearing, which was conducted in strict adherence with the law.
9. The appellant further averred that, during the suspension period, the respondent was receiving allowances as stipulated by the Human Resource Manual; that, upon termination, the respondent's terminal dues were tabulated and applied to partially offset the amount lost under his watch; and that, the respondent having been terminated due to gross misconduct and after a thorough disciplinary process, he was not entitled to the reliefs sought. Accordingly, the appellant prayed for dismissal of the claim.
10. The claim was heard by way of oral evidence. The respondent adopted his witness statement dated 4th June 2021 and produced the documents set out in the list of documents dated 1st November 2019 as '**PEXH 1 - 9.**' The respondent denied being complicit to any financial impropriety to the appellant's detriment. He testified that he was not the custodian of the keys to the strong room, which were under the custody of the Branch Accountant, Abdulahi Galgalo, and the Senior Credit Officer, Wako Herring. He demonstrated through evidential documents that the withdrawals done on diverse dates between 16th

January 2015 and 16th May 2016

were mostly sanctioned by Abdulahi Galgalo and Wako Herring; and that he never authorized any illegal payments.

11. The respondent also testified that he was invited to a disciplinary session by a letter dated 21st July 2016; that the letter did not inform him of his rights as an accused person; that he responded to the charges leveled against him; that he was not allowed to be accompanied by a co-employee in the disciplinary session; that he was also not supplied with investigation and audit reports that formed the basis of the accusations against him; and that he was also not allowed to cross-examine the appellant's witness.
12. On behalf of the appellant, **Andrew Wanga (DW1)**, the appellant's head of audit and quality assurance, adopted his witness statement dated 24th September 2021 and, additionally produced a list of documents as '**DEXH 1 - 20**' of even date. He testified that, soon after the respondent was confirmed in employment after probation, some questionable financial transactions at the Hola Branch were discovered; that the system showed that funds were being credited to some clients' accounts despite their not having undertaking any cropping or deliveries; that this prompted an audit query which revealed massive financial irregularities; that, the respondent being the overall head of the Hola Branch, was held accountable since he could not account for Kshs.664,700.
13. **Charles K. Meli (DW2)**, the appellant's Human Resource

Officer, likewise adopted his witness statement dated 24th September 2021 and relied on the list of documents produced

by DW1. He maintained that the appellant followed the proper procedure in terminating the respondent's employment even though they (the appellant) did not file the minutes of the proceedings; that the Branch Manager was in charge of the branch finances; and that the respondent, being the branch manager, must have been aware of the manipulation of the records that led to financial loss.

14. In the Judgment, and referring to **sections 41, 43, 44(4) (g), 45 and 47** of the **Employment Act, (the Act)**, the learned Judge held that the law obligates the employer to observe certain procedural steps that guide in upholding the principles of natural justice; and that, where the employer fails to do so, the resultant termination is deemed unlawful.
15. The trial court was of the view that the explanation by the respondent that he could not be held accountable for the loss of Kshs.664,700 was startling as he was the head of the branch; that, as the head, he ought to have been aware of the activities taking place in the branch; that the attempt by the respondent to avoid responsibility on the grounds that he was not in charge of finances was tantamount to abdicating his role as the head of branch; that, even if there were 4 signatories, the respondent was the principal signatory charged with the responsibility of overseeing what was going on with respect to the accounts; that the actions by the respondent to fuel private vehicles using the respondent's funds and deliberately inserting the wrong vehicle registration

details in the Local Purchase Orders was intended to defraud the appellant; and that there were sound

and valid grounds to terminate the respondent's employment in terms of **sections 43(2)** and **44(4)** of the Act.

16. It was held that the only plausible way by which the appellant would have discharged its burden of proof that it adhered to the procedure provided for under the Act prior to the respondent's dismissal was through production of the minutes of the meeting of the disciplinary session; that, those minutes not having been produced, it was doubtful that the appellant complied with the procedural structures set out in the law; and that, therefore, it could not be said that the respondent was fairly terminated.
17. As for the remedies, the respondent was awarded one month's basic salary in lieu of notice in the sum of Kshs.116,500; one month's salary on account of accrued leave in the sum of Kshs.150,750; and nominal damages equivalent to one month's salary, being Kshs.150,750 for the appellant's failure to observe procedural fairness leading to the termination. The appellant was also directed to issue the respondent with a Certificate of Service. Each party was to bear their own costs.
18. Aggrieved by the trial court's decision, the appellant filed this appeal raising five (5) grounds of appeal faulting the learned Judge for:
 - i. failing to find that the termination of the respondent's services was proper, procedural and lawful;***
 - ii. holding that termination of the respondent's employment was procedurally unfair despite***

the respondent unequivocally admitting during cross-

examination that he was accorded a chance to defend himself in accordance with the law and appellant's Human Resources Regulation and Policy Manual;

iii. giving the respondent unwarranted multiple awards that are unreasonable and manifestly excessive thus subjecting the appellant to double jeopardy of losing money through the respondent's misappropriation of funds and an award of damages purportedly for procedural unfairness;

iv. ignoring the appellant's evidence and proceeding to give inordinate and unwarranted weight to the evidence of the respondent despite obvious contradictions and admissions in his evidence; and

v. failing to determine the case on merit.

19. The appellant thus prayed that the Judgement of the ELRC be reversed; that an order be issued that the termination of the respondent's services was proper and lawful; that the multiple awards be set aside; and that the appellant be awarded the costs of the suit and of this appeal.

20. This appeal was canvassed by way of written submissions. Learned counsel **Mr. Manga** was present for the appellant while learned counsel **Ms. Oloo** holding brief for **Mr. Kilonzo** appeared for the respondent. Counsel relied entirely on the respective parties' written submissions. The appellant's submissions are dated 13th February 2025 while those of the respondent are dated 25th February 2025.

21. The appellant submitted that the uncontroverted oral evidence tested on cross-examination was that there was

proper procedure followed in terminating the respondent's employment, and that the learned Judge ought not to have

found that the minutes of the meeting be availed; that the respondent admitted in his testimony that he was given an opportunity to defend himself and, therefore, there was compliance with the law; and that, in the circumstances, the trial court should have arrived at a finding that the termination of the respondent's services was lawful.

22. It was the appellant's case that the trial court failed to properly put the necessary weight on the appellant's evidence; that the court failed to consider the numerous admissions of irregularities and illegalities on the part of the respondent; and that, had the trial court properly considered the appellant's evidence, it would have reached a different decision. Reliance was placed on the decision of the predecessor to this Court in **Peters Sunday Post Ltd (1958) E.A, 424** for the proposition that, *while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.*
23. On the award of damages, the appellant contended that the award of nominal damages and one month's salary in lieu of notice each awarded at Kshs.150,750 was excessive and punitive, more so after the respondent admitted having been given an opportunity to be heard at the disciplinary process.
24. The appellant accordingly urged us to reconsider the

record after which the proper conclusion we should arrive at is to set aside the decision of the ELRC and find in its favour.

25. On his part, the respondent submitted that the provisions of **Section 41** of the Act were not adhered to prior to his dismissal; that it is true that he was invited for a disciplinary hearing, but that he was not allowed to have a representative of his choice or to cross-examine any of the appellant's witnesses, or even to adequately defend himself; and that, instead, and to his detriment, he was bombarded with questions from the appellant's side.
26. It was submitted that, in the absence of minutes of the disciplinary hearing, it can only be concluded that he (the respondent) was dismissed without having been accorded a fair hearing contrary to the provisions of **Article 50** of the **Constitution, Section 41** of the Act and **sections 4(3) (a) and (b)** of the **Fair Administrative Action Act, 2015**. The appellant urged us to be persuaded by the decisions of the ELRC in **John Rioba Maugo vs. Riley Falcon Security Services Limited (2016) KEELRC 419 (KLR); Janeth Chepkemoi Machira & Another vs. Laikipia University (2021) KEELRC 1180 (KLR); Emily Chepkurui Sang vs. County Public Service Board, Kericho County & another (2021) KEELRC 968 (KLR);** and **Josephat Nyakundi Omweri vs. K-Rep Bank Ltd (2015) KEELRC 1371 (KLR)** where the court held that termination is unlawful where an employer fails to adhere to the statutory procedural fairness.
27. Regarding the awards made, it was submitted that they were merited and ought not to be disturbed. We were thus

urged to dismiss the appeal with costs.

28. This being a first appeal, our mandate is well stated in **rule 31(1) (a)** of this **Court's Rules, 2022** which provides that, on an appeal from the decision of the superior court exercising its original jurisdiction, this Court is obligated to re-appraise and re-analyse the evidence and to draw inferences of fact. We are also cautious that, unlike the trial Judge, we did not have the advantage of seeing or hearing the witnesses testify so as to assess their demeanour for which we must make allowance.
29. It is also settled law that a first appellate court will not interfere with a finding of fact unless it is based on no evidence or on a misapprehension of evidence, or it is demonstrated that the trial Judge acted on wrong principles in making the impugned findings. **See: Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates (2013) KECA 208 (KLR); Selle vs. Associated Motorboat Co. (1968) E.A 123; and Bundi Murube vs. Joseph Omkuba Nyamuro (1982-88) 1KAR 108.**
30. We have considered the record of appeal, the respective parties' written submissions and the law. During the hearing, and upon inquiry by the Court, counsel for the appellant conceded that, under the employment contract between the parties, what was awarded to the respondent by the trial court was provided for, namely one month's basic salary in lieu of notice - Kshs.116,500; one month's salary on account of accrued leave in the sum of Kshs.150,750; and a Certificate of Service. However, the appellant disputed the

award of nominal damages equivalent to one month's salary in the sum of Kshs.150,750 on account of failure to observe procedural fairness leading to the termination. In view therefore, the issues that fall for our determination are: whether the respondent's termination was unfair and unlawful; and whether he was entitled to nominal damages as awarded.

31. The employment relationship between the parties is undisputed. The appellant defended the move to terminate the respondent's employment following an internal audit report which revealed financial impropriety at its Hola Branch where the respondent had been deployed as the Branch Manager. The appellant postulated that its audit report revealed a loss of Kshs.664,700 through fictitious payments made to persons who did not deliver any services to the appellant. The learned Judge opined that the respondent had a high calling of fiduciary duty to protect public funds under his watch, and that he could not wish away that responsibility merely by stating that he was not the sole signatory to the appellant's accounts. Therefore, it was the learned Judge's view that he (the respondent) was liable.
32. It is also common ground that there was indeed a disciplinary hearing, which took place on 29th July 2016 presided over by the appellant's Disciplinary Committee. This is conceded by the respondent save to state: that he was not given an opportunity to have a co-employee at the hearing; that he was not allowed to cross-examine the appellant's witnesses who were present; and that he was

not allowed access to the

material he intended to rely on, contrary to the mandatory procedure laid down in **section 41(1)** of the **Act**. On those allegations, the learned Judge held that, in the absence of minutes of the meeting confirming what transpired during the disciplinary hearing, it would be difficult to make a definitive finding that the termination process was fair.

33. **Section 41(1)** of the **Employment Act** provides as follows:

Notification and hearing before termination on grounds of misconduct.

“(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 representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

34. At any point prior to termination of an employee's

employment, a disciplinary hearing must be conducted. The hearing should not necessarily take the form of what would

ordinarily take place in a court of law but, at the very least, the presiding disciplinary committee should observe the rules of natural justice. A proper hearing cannot be said to have been held unless: (i) the employee has been clearly informed of the charges levelled against him; (ii) the witnesses are examined, ordinarily in the presence of the employee-in respect of the charges; (iii) the employee is given a fair opportunity to cross-examine witnesses; (iv) the employee is given a fair opportunity to tender his defence if he so wishes on any relevant matter; and (v) the enquiry officer records his findings giving reasons for the same in his report.

35. For emphasis, it cannot be gainsaid that it is expected that the Disciplinary Committee should record the proceedings before it for evidential purposes. The rationale is simple; the disciplinary procedure is prone to exposure to litigation. The need for written minutes as evidence in such instances has been underscored by this Court. In the case of **Kenya Union of Commercial Food and Allied Workers vs. Kisii Bottlers Ltd (2020) KECA 209 (KLR)**, while agreeing with the findings of Marete J. that the respondent's termination of employment was lawful for failure to seek leave of absence, the Court faulted the appellant for failing to produce evidence that it adhered to the mandatory prescribed procedure under **section 41(1)** of the Act. It held that:

“There was no evidence by the respondent that apart from the dismissal letter the grievant was given any explanation for the disciplinary action in the presence of

another employee or a shop floor union representative, which is a mandatory requirement. Where that is not done,

the termination of employment is deemed unfair; see section 45(2) of the Employment Act.”

36. In the same vein, this Court in ***Mini Bakeries (MSA) Limited vs. Ali Omar Faraj (2019) KECA 479 (KLR)*** had this to say on the importance of the minutes of a meeting in a disciplinary hearing:

“It is not that we prescribe that minutes for disciplinary hearing should take a certain format but that it ought to be clear from the minutes that a disciplinary hearing was conducted; that the allegations were tabled before the disciplinary committee and the employee was given an opportunity to respond to the same.”

37. We cannot agree more with the decision of ***Wasilwa, J. in Emojong vs. Henkel Chemicals (EA) (2025) KEELRC 259 (KLR)*** where she rendered herself thus:

“There is no indication that the process set out above was followed and without any minutes of what transpired and with the claimant expressing reservation of the entire process, I find the respondent did not establish the existence of valid reason for claimant’s dismissal nor is there evidence that the claimant was subjected to a fair disciplinary process.”

38. It is trite that the burden of proof that the termination was lawful rests with the employer in terms of ***section 43(1)*** of the ***Act*** which reads as follows:

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.

39. What better way would the appellant justify that it followed the laid-down procedure under **section 41(1)** of the **Employment Act** other than by producing the minutes of the disciplinary hearing which took place on 29th July 2016? Consequently, failure to show by way of the minutes or other report that the respondent was accorded a fair hearing in the disciplinary proceedings ultimately rendered his termination unfair. In the circumstances, the findings by the trial Judge that there was no evidence on the fairness or otherwise of his termination cannot be faulted. We are therefore satisfied that the learned Judge rightly found the respondent's termination to have been unfair.
- 40.** Finally, as to whether the respondent was entitled to the awards made under the different heads, we find that, other than the award of nominal damages, all other awards were conceded to by the appellants. All the same, we think that it is crucial to mention that it was a requirement under **clause 7** of the Employment Contract that, in the event of termination, a three (3) months' notice is issued, but in lieu thereof, a payment equivalent to three (3) months' basic salary is to be paid. The appellant paid the respondent two (2) months' salary instead of the three (3) months agreed by the parties. For this reason, the appellant was liable to pay the remaining one (1) month's salary, but since it was

an issue raised in the grounds of appeal, we make no order in its respect.

41. Nominal damages are defined as:

“a small monetary award given to a plaintiff in a civil lawsuit when a legal wrong is found but no substantial harm or loss is proved. It is a token sum that serves as a symbolic victory and legal acknowledgement of wrongdoing, even if there were no quantifiable financial damages.”
(<https://thelawdictionary.org>)

42. In ***Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd (1985) KECA 78 (KLR)***, this Court stated:

“In ‘Medina’ and the ‘Mediana’ [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages: -

“My Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages.

‘Nominal damages’ is a technical phrase which means that you have negated anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of

***circumstances, and it certainly does not
in the smallest degree***

suggest that because they are small they are necessarily nominal damages.”

43. In ***Kimakia Co-operative Society vs. Green Hotel (1988) KECA 114 (KLR)***, this Court held, *inter alia*, that:

“Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and he did not, he cannot have more than nominal damages.”

44. In the instant case, there was certainly violation of the respondent’s right to a fair hearing. The respondent was kept waiting from 30th May 2016 to 31st October 2016, a total of five (5) months pending the outcome of the disciplinary process. The right to a fair hearing under **Article 50(2) (e)** of the **Constitution** includes the right to have the trial begin and conclude without unreasonable delay. There were no plausible reasons given by the appellant for the delay in concluding the hearing. Consequently, and notwithstanding lack of proof of the extent of the harm done to him, protection of his rights must be vindicated nonetheless and, consequently, compensated for the minor infraction occasioned to him.

45. It is for the foregoing reason that we do not consider the nominal damages of Kshs.150,750 awarded to the respondent, which were equal to one month’s salary, were excessive or that the learned judge applied the wrong principles in awarding this amount. Accordingly, we hereby uphold the award under this head.

46. In the end, we uphold the judgement and decree of Manani,

J. in Malindi ELRC No. E002 of 2023 delivered on 25th November 2021. Consequently, we find and hold that the appeal is devoid of merit and is hereby dismissed with costs to the respondent. Orders accordingly.

Dated and delivered at Mombasa this 5th day of December, 2025.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

*I certify that this is
the true copy of the
original*

Signed

DEPUTY

REGISTRAR