

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E840 OF 2023

MARTIN OMIDO MMATTA.....CLAIMANT

-VERSUS-

CONSOLIDATED BANK KENYA LIMITED.....

RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 19th October 2023, the Claimant, Martin Omido Mmata, sought the following reliefs against the Respondent:-

a) A declaration that the termination of his employment was unlawful, unfair, and illegal for want of substantive justification and procedural fairness.

b) A declaration that the Respondent's actions amounted to discrimination in violation of

Section 5 of the Employment Act and Article 27 of the Constitution of Kenya, 2010.

- c) Compensation for unlawful and unfair termination equivalent to 12 months' salary.***
 - d) Payment of full terminal dues, arrears, and unpaid allowances totaling Kshs. 13,079,933.00, later amended to Kshs. 12,441,080.00.***
 - e) Damages for breach of the Claimant's constitutional rights under Articles 27, 41, and 47 of the Constitution.***
 - f) Damages for breach of legitimate and reasonable expectation.***
 - g) Interest at court rates.***
 - h) Costs of the suit.***
2. The Respondent opposed the claim through its Response to the Statement of Claim dated 12th January 2024, asserting that the termination was lawful, substantively justified, and procedurally fair. Therefore, it prayed for the suit to be dismissed with costs.

3. The matter proceeded to hearing and both sides gave evidence and filed submissions. The main dispute in the suit was whether the respondent terminated the claimant's employment unfairly and unlawfully.

Background

4. The Claimant was employed by the Respondent as Head of Information Communication and Technology (ICT) vide a letter of offer dated 31st May 2016 at a monthly salary of Kshs. 580,000, later reviewed to Kshs 690,090. His employment was terminated on 14th February 2023.
5. The termination followed a protracted procurement process for a new Core Banking System (CBS). The Respondent's existing CBS license was due to expire on 31st May 2022. In June 2021, the Claimant as Head of ICT, led the collation of user requirements for the new system. The procurement process commenced with an open tender in July 2021, which received nine bids. The Tender Evaluation Committee

recommended awarding the tender to Inlaks Computers Limited, a recommendation supported by the Procurement Manager's professional opinion dated 9th September 2021.

6. However, the then Acting Chief Executive Officer (CEO), Mr. Japheth Kisilu, declined to approve the award following several memoranda to him by the claimant challenging the Evaluation Committee's findings and the Procurement Manager's opinion. These memoranda raised issues such as database costs, system requirements and evaluation criteria. The open tender process was subsequently cancelled on 18th October 2021 for being "non-responsive."
7. The Respondent then pursued a direct procurement process. The Claimant, in a memo dated 18th March 2022, recommended direct procurement from MFI Technology Solutions Limited, the agent of the current CBS licensor. The direct tender was awarded to MFI on 4th May 2022. The

contract was later terminated on 6th June 2023 due to non-performance.

8. Following the said procurement, the Respondent commissioned internal and external audits. The Internal Audit Report and a Quality Assurance Review by PricewaterhouseCoopers (PwC), both dated 16th December 2022, highlighted irregularities and interference in the procurement process, implicating the Claimant and the then Acting CEO.
9. Based on the audit findings, the Respondent issued a Show Cause letter to the Claimant on 21st December 2022, listing seven charges related to non-adherence to bank procedures and the Public Procurement and Asset Disposal Act. The Claimant was simultaneously suspended on half-salary pending a disciplinary hearing. He responded to the Show Cause on 4th January 2023. A disciplinary hearing was held on 31st January 2023, after which the Respondent's Board

resolved to terminate his employment. A termination letter dated 14th February 2023 was issued followed by payment of his terminal dues allegedly less Kshs.920,000 for the lost ICT equipment.

Claimant's case

10. The Claimant testified as CW1 and adopted his witness statement dated 19th October 2024 and a bundle of 61 documents as his evidence. He then stated that his termination was unlawful, unfair, and malicious. He contended that the Respondent failed to conduct meaningful investigations as required by the HR Manual; that he was not supplied with the audit reports forming the basis of the allegations against him; that his suspension was not in accordance with Clause 10.5 of the HR Manual, which only permits suspension for investigations into fraudulent activities; and that the disciplinary hearing was procedurally flawed, with no accurate minutes produced and no opportunity afforded to him to confirm the recorded proceedings.

11. He further asserted that he did not interfere with procurement but merely provided technical feedback as requested by the Acting CEO, who was the Accounting Officer. He contended that the Respondent discriminated against him by failing to subject his supervisor or the HR Manager to any disciplinary action. He also challenged the deduction of Kshs. 920,000 for the alleged loss of POS devices as unlawful. However, admitted that his claim for unpaid half salary of Kshs. 638,853, had since been paid.
12. He stated that his dismissal letter dated 14th February 2023 did not reflect the proceedings of the disciplinary hearing. He denied ever interfering with the procurement process, and contended that he was not a member of the procurement team. He explained that, as Head of ICT, his role was limited to collating and transmitting user requirements to the procurement department.

13. On cross-examination, CW1 confirmed that he was a senior management employee. He further confirmed that the Respondent wanted to procure a Core Banking System in 2018 and again in 2021, which was a period of three years apart. He stated that ICT was not a user department and that procurement decisions were made by the Procurement and Tender Evaluation Committees. He acknowledged preparing several memoranda dated 13th September 2021, 24th September 2021, 29th September 2021 and 7th October 2021, but stated that these were prepared in response to the request of the Acting Chief Executive Officer, made verbally or vide sticky notes. He clarified that the memos were advisory in nature and the Acting CEO was free to accept or decline the same.
14. He confirmed that he responded to the show cause letter on 4th January 2023, denying all the accusations therein, and clarified that he was never accused of fraud. He further testified that he did not have access to the internal or external audit reports prior to the disciplinary process.

15. Finally, he stated that the sum of Kshs. 920,000 deducted from his payslip for terminal dues related to the alleged loss of ICT equipment which did not concern him. He reiterated that the memoranda he authored were purely professional comments and not instructions.

Respondent's Case

16. RW1 was Esther Mutero, the respondent's Procurement Manager. She adopted her witness statement dated 2nd October 2025 and produced documents contained at pages 37-236 of the Respondent's bundle as Exhibits D.1-32. She then outlined the procurement process, highlighting that the Claimant submitted user requirements that closely matched the specifications of MFI Technology Solutions Limited.
17. She stated that the Claimant's authored memoranda challenging the Evaluation Committee and Procurement Manager, and thereby interfered with the procurement process leading to cancellation of the open tender. Consequently, she stated that a direct tender was awarded

to MFI Technology Solutions Limited, which later failed to perform.

18. On cross examination, she testified that the procurement process was based on user requirements collated by the ICT department and that the Claimant, as Head of ICT, provided technical specifications. She stated that although the Claimant was not a signatory to the professional procurement report, the Chief Executive Officer sought and relied on his technical advice.
19. She maintained that the Claimant interfered with the procurement process through his memoranda to the Acting Chief Executive Officer, though she conceded that the ultimate decision lay with the Chief Executive Officer. She further testified that the failure of the bidder to perform after award was not attributable to the Claimant.
20. RW2 was George Rutto (respondent's Head of Internal Audit). He adopted his witness statement dated 12th January

2024 as his testimony. He also produced two documents at pages 240–266 of the Respondent’s bundle, marked Exhibits 33 and 34. He then confirmed that the internal and external audits revealed significant procurement irregularities attributed to the Claimant and the Acting CEO. The audit reports recommended for disciplinary action against the two. He stated that the Claimant was interviewed during the audit process.

21. On cross examination, he testified that he participated in the preparation and review of the Internal Audit Report dated 16th December 2022, while the external audit was conducted by PwC Ltd. He stated that the audit report was submitted to the Chief Executive Officer and the Audit Board Committee and was not shared with the Claimant. He confirmed that the show cause letter dated 21st December 2022 was anchored on the internal audit report. He further confirmed that the Claimant did not terminate the tender process. The termination was done by the Acting Chief Executive Officer who also did the direct procurement process.

22. RW3 was Rose Mukoba (respondent's Acting Head of Human Resources). She adopted her witness statement dated 6th October 2025 as her testimony. She also produced documents at pages 237-239 and 267-334 of the Respondent's bundle, marked Exhibits 35-44. She then explained the disciplinary process was fair because the Claimant was issued with a Show Cause letter, suspended, invited to a hearing, and allowed representation.
23. She stated that the suspension was necessary because the Claimant's position as the ICT boss enabled him to access sensitive information. She denied discrimination, noting that the Acting CEO was also terminated for similar reasons. In arriving at the surcharge, the Respondent relied on extensive documentary evidence, including memoranda, audit reports, tender documents, and disciplinary records. She stated that the disciplinary process was handled by a Board sub-committee pursuant to Mwongozo Guidelines, because the Claimant was a senior manager.

24. She further testified that the Claimant was surcharged for lost ICT equipment in the sum of Kshs. 911,200, out of which only Kshs. 42,596 had been repaid, leaving a balance of Kshs.868,624. She contended that the Kshs. 911,200 was 40% of the total value of the POS devices lost.
25. On cross-examination, RW3 conceded that she did not attend the disciplinary hearing. She also admitted that she had not produced any Board resolution authorizing the disciplinary process. She further admitted that there was no evidence that the Claimant admitted the alleged offences or the surcharge. She confirmed that the Acting Chief Executive Officer, did not lodge any complaint against the Claimant.
26. As regards the Surcharge, she contended that the claimant was to pay the amount due from him in 42 months from 24th December 2022. She confirmed that the claimant never admitted liability but his appeal against the surcharge was dismissed.

Issues for determination

27. Having considered the pleadings, evidence and submissions, the dispute herein it was evident that revolves around unfair termination of employment. Section 45(1) & (2) of the Employment Act provides that:-

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

28. According to the above provision, termination of employment would not pass muster unless it is grounded on a valid reason related to the employee’s conduct, capacity,

or compatibility, or based on the operational requirements of the employer, and/or that a fair procedure is to be followed. Consequently, in this case, the court should determine the following issues:-

- a) Whether the termination of the Claimant's employment was grounded on valid reason.
- b) Whether the termination was done in accordance with fair procedure.
- c) Whether the Claimant is entitled to the remedies sought.

Reason for the termination

29. Section 43 provides that:-

“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.”

30. In the case of **Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR** where the Court of Appeal held, that:-

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law.

The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45) ... A mandatory and elaborate process is then set up

under Section 41 requiring notification and hearing before termination.”

31. The Respondent’s case is that the Claimant interfered with the CBS procurement process, resulting in the cancellation of the open tender and the award of a direct tender to a vendor who later failed to perform. The Respondent relied on audit reports and the Claimant’s own memoranda as evidence.
32. The Claimant admitted authoring the memoranda but contended that he did so on instructions from the Acting CEO. He asserted that the instructions were conveyed verbally or vide “sticky notes” none of which was adduced as evidence. However, it is clear the Respondent relied on the information collected by the auditors to conclude that the Claimants actions amounted to interference with the procurement process.
33. The audit reports (Internal Audit Report and by PwC Report, both dated 16th December 2022) established that the Claimant adopted a top-down approach in collating user

requirements, which resulted in specifications closely aligned with the system of one bidder, MFI Technologies Solutions Limited; that he repeatedly interfered with the evaluation process by authoring multiple memoranda challenging the recommendations of the Evaluation Committee and the Procurement Manager; and that he subsequently recommended a direct procurement process in favour of MFI Technologies Solutions Limited, in which he then participated as a member of the evaluation committee.

34. The Claimant's conduct, as documented, amounted to interference with procurement processes, contrary to the Public Procurement and Asset Disposal Act and the Respondent's procedures. As Head of ICT, his role was limited to collating user requirements. He had no mandate to evaluate or challenge the Evaluation Committee's work.

35. The Respondent's decision to terminate was based on a genuine belief in the Claimant's misconduct, supported by audit findings and the Claimant's admissions of authoring

the memoranda. The termination was related to the Claimant's conduct and exposed the Respondent to reputational, financial, and operational risks.

36. In the circumstances highlighted above I find that the Respondent has discharged its burden of proof of the reason for the termination under Sections 43 and 45 of the Employment Act.

The procedure followed

37. Section 41 of the Employment Act prescribes to the employers, the procedure for terminating employment of an employee, thus:

“(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.”

38. The above section lays down a mandatory procedure for termination of employment including explaining the reasons for termination in a language the employee understands, allowing the employee to be accompanied by a fellow employee/union representative of his choice, hearing and considering the employee's representations before the decision to terminate is made. Courts in the land have uphold the said principle firmly.

39. In **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**, the Court of Appeal held that:-

“Even assuming for once that the Appellant had a valid and fair reason for terminating the Respondent’s services, we must go further and interrogate whether the right procedure was followed to determine whether the termination was fair under the Act. The termination can be held to be unfair if it is proved that the termination procedure was unfair. The import of the foregoing case law is that even if the employer proves the reason(s) for the dismissal to be valid and fair and that there was misconduct, failure to prove that the procedure was fair would result in an unfair dismissal.”

40. Further, the essential requirements for procedural fairness were laid down in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** as follows:-

“Four elements must thus be discernible for the procedure to pass muster:

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

41. In the instant case the Respondent contended that it followed a fair procedure in terminating the employment but the Claimant was of a contrary view. He argued that his suspension was unlawful because Clause 10.5 of the HR Manual only permits suspension for investigations into fraud. However, the Respondent correctly distinguished between investigative suspension and administrative suspension. I agree that an employer, like in this case, may impose

administrative suspension where operational interests require it.

42. The Claimant was suspended due to the seriousness of the allegations and his sensitive position as Head of ICT, which gave him access to crucial company information. The suspension was a preventive measure to safeguard the Respondent's systems and therefore, I find the suspension lawful and justified.

43. The Respondent also stated that it issued a detailed Show Cause letter on 21st December 2022, listing specific allegations and the Claimant responded on 4th January 2023. Subsequently, he was invited to a disciplinary hearing vide letter dated 13th January 2023, which gave him the right to be accompanied by another employee. The hearing was held on 31st January 2023.

44. The Claimant contended that he was not supplied with the audit reports nor was he involved in the audits, and thereby

prejudicing his defence. However, the Respondent contended that the substance of the allegations was within the Claimant's knowledge. Besides, the charges in the Show Cause letter, and the hearing focused on the memoranda authored by the Claimant, which he admitted having copies of.

45. In **OI Pejeta Ranching Limited v David Wanjau Muhero [2017] eKLR**, the Court of Appeal emphasized the importance of providing evidence in advance. However, in this case, the Claimant failed to show how the absence of the audit reports prejudiced him in proving his innocence.
46. The Claimant also challenged the accuracy of the disciplinary hearing minutes. He alleged that the Respondent promised to provide handwritten minutes for confirmation but failed to do so. However, the Claimant did not produce an alternative version of the minutes or specify the inaccuracies. It is trite law that bare allegations without proof cannot impeach an official record made in writing.

47. Having considered the evidence on record, I am satisfied that the Respondent has proved on a balance of probability that it followed a fair procedure before terminating the claimant's employment. It accorded him an opportunity to defend himself in writing by serving him with a show cause letter. Thereafter it accorded him another opportunity to defend himself orally in a disciplinary hearing. The minutes of the hearing reflect a fair hearing. Consequently, I find that the Respondent complied with Section 41 of the Employment Act and the termination was procedurally fair.

Claimant of Discriminated

48. The Claimant alleged discrimination because his supervisor and the HR Manager were not disciplined. However, the only proper comparator is not the HR Manager but the Acting CEO who was implicated in the interference with the procurement process. It was proved that the Acting CEO was subjected to disciplinary process and he was also dismissed like the Claimant on the basis of the audit findings.

49. Article 1 of the **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)** defines discrimination as follows:-

“1. For the purpose of this Convention the term discrimination includes—

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations,

where such exist, and with other appropriate bodies.”

50. In addition, Black’s Law Dictionary 10th Edition defines discrimination *inter alia* as follows:

“Differential treatment; esp., a failure to treat all people equally when no reasonable distinction can be found between those favoured and those not favoured.”

51. The Supreme Court of Kenya also defined discrimination in the case of **Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** as follows:-

“... where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex, disability etc or due to unfair practice and without any objective and reasonable justification.”

52. Applying section 5 of the Employment Act, Article 27 of the Constitution and the above references, I find that the alleged

discrimination has not been substantiated. The claimant has failed to prove on balance of probability that he was subjected to differential treatment on the basis of a prohibited ground, resulting in unjust treatment. As noted above he was not the only one dismissed.

The Remedies Sought

53. Having found the termination was grounded on a valid reason and that a procedurally fair procedure was followed, I hold that the Claimant is not entitled to the declaration that the termination of his employment was unfair and unlawful. I further find that he is not entitled to compensation for unfair termination under Section 49 of the Employment Act.

Terminal Dues and Deductions:

54. The Claimant admitted in evidence that he was paid all his outstanding half-salary amounting to Kshs. 638,853. The only claim pending is in relation to the deduction from his salary and benefits being Kshs. 920,000 for loss of POS devices. Section 19(1)(b) of the Employment Act:-

“Notwithstanding section 19(1), an employer may deduct from the wages of his employee -

(a)...

(b)A reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the willful default of the employee;”

55. The claimant challenged the surcharge of Kshs.920,000 for POS Devices as unlawful and prayed for release of the sum deducted to him. He produced a letter dated 21st October 2022, signed by him and two other officers, Adrian Obote and Stephen Buoro seeking audience with the Head of the Human Resources to discuss the matter of the lost POS devices. No evidence was adduced to show that the Claimant was found liable. The Respondent, in paragraph 42 of its Response to Statement of Claim, denied that the Claimant’s entitlement to the reliefs sought under paragraphs 18 and a-j of the statement of claim and put him to strict proof thereof. The respondent never lodged any

counterclaim against the Claimant with respect to the said loss of POS devices.

56. During the hearing the Claimant produced before the court pay slip for his terminal dues showing a deduction of Kshs.830,635.65 for loss of POS devices. In addition, RW3 testified that the surcharge was against the Claimant accounted for 40% of the value of the lost items and that in December 2022 and January 2023, he had been deducted a total 42,596. A simple calculation shows that the Claimant was deducted a total of Kshs. 872,961.59 out of the alleged Kshs.920,000.
57. As already observed, the Respondent did not show how it arrived at the surcharge of Kshs.911,200 for the POS devices. It also failed to adduce evidence before the court to prove that the Claimant contributed to the loss of the POS devices to the tune of 40% or at all. Without filing and proving a counterclaim for the said sum and/or an admission

of liability executed by the Claimant, the surcharge of Kshs. 911,200 must fail.

58. In the circumstances, I find that the Claimant was not liable to pay the surcharged sum of Kshs. 911,200 or 920,000 and therefore the money deducted from his salary and terminal dues was not justified and should be refunded to him. Considering the evidence by CW1 and RW1 above the amount of deduction proved was Kshs. 872,961.65 and not the Kshs. 920,000 sought by the Claimant.

Damages for Constitutional violations

59. The Claim for alleged breach of constitutional rights did not meet the legal threshold enunciated in the case of **Anarita Karimi Njeru v Republic [1979] eKLR**. In the said case, the court held that: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure

that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

60. The Statement Claim before the court does not plead the particulars of the alleged constitutional violations and therefore no award of damages is warranted.

Costs of the suit

61. It is trite law that costs follow the events and since the suit has partially succeeded, each party shall bears own costs.

Conclusion

62. I have found that the termination of the Claimant’s employment was substantively and procedurally fair, and as such his claim for compensation fails. I have further found that the Claimant was not liable to pay the surcharged sum of Kshs. 911,200 for the lost POS devices. Accordingly, I have

found that the money deducted from his salary and terminal dues should be refunded to him.

63. In the end, I enter Judgment for him as follows:-

- a) The surcharge of Kshs. 911,200 against the Claimant for POS devices was unlawful and it is hereby set aside.
- b) The sum of Kshs. 872,961.65 being money deducted from his salary and terminal dues for the lost POS devices shall be refunded to the Claimant forthwith plus interest at court rates from the date of filing the suit.
- c) Each party shall bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2026.

ONESMUS MAKAU

JUDGE

Appearance:

Mainga for the Claimant

Aduke for the Respondent

ORIGINAL