



REPUBLIC OF KENYA



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**Kisegei v Spire Bank Limited (Cause 1786 of 2016)
[2026] KEELRC 504 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 504 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1786 OF 2016
JW KELI, J
FEBRUARY 20, 2026**

BETWEEN

SIMON KISEGEI CLAIMANT

AND

SPIRE BANK LIMITED RESPONDENT

JUDGMENT

1. Vide an amended memorandum of claim dated the 6th of April 2017, the Claimant sued the Respondent and sought the following Orders:-
 - a. A declaration that the Respondent is in breach of the provisions of the Employment Act and the law by unfairly terminating the employment of the Claimant contrary to Section 45 (1) of the Employment Act in that:
 - i. there was no valid reason to terminate the Claimant's employment
 - ii. the reason for the termination is not based on any operational requirements of the Respondent, and
 - iii. the procedure adopted for termination of the Claimant's employment was inherently unfair.
 - b. A declaration that the Respondent is in breach of the terms of the contract of service by terminating the Contract of Service without any just or lawful cause
 - c. An order for a permanent injunction prohibiting the Respondent, whether by itself, its servants and or agents or otherwise howsoever from terminating the Claimant's employment on the grounds adduced in the letter of 12th August 2016.
 - d. An order for reinstatement of the Claimant on grounds of S.49 (3)(1) of the Employment Act.



- e. In the alternative:-
 - i. 3 months' salary in lieu of notice amounting to Kshs.1,200,000/-
 - ii. 12 months' salary as compensation for unfair termination amounting to Kshs. 4,800,000/-
 - iii. Leave days amounting to one month's salary: Kshs. 400,000/-
 - iv. Service pay calculated at 15 days per year for 2 years worked (Kshs.400,000/2x2) Kshs.400,000/-

Total Kshs. 6,800,000/-.
 - f. Costs of the suit.
 - g. Any other or further relief that the court may deem fit to grant.
2. The Claimant in support of the claim filed his witness statement dated 1st September 2016; and list and bundle of documents of even date.
 3. The Respondent entered appearance through the law firm of Coulson Harney LLP Advocate and filed an amended memorandum of reply dated 2nd May 2017. In support of their response, they filed a witness statement of BRIAN KILONZO dated 31st January 2025; and list and bundle of documents dated 26th January 2017.

Hearing and evidence

4. The claimant's case was heard on the 16th July 2025 when the claimant testified on oath, produced his witness statement dated 1st September 2016 as his evidence in chief and produced his documents as C-exhibits 1-9. He was cross-examined by the counsel for the respondent, Ms Okuta and re-examined by his counsel.
5. The respondent's case was heard on the 30th of September 2026, where Brian Kilonzo as a witness, RW1. He adopted as his evidence in chief his witness statement dated 31st January 2025 and produced documents under the list dated 26th January 2017. He was cross-examined by counsel for the claimant Ms. Mumbua and re-examined by their counsel.

The Claimant's case in summary

6. The Claimant's case is that he was employed by the Respondent through an Employment Contract dated 18th November 2013 as the Head of Human Resources (Unit Head Band II), at a gross monthly salary of Kshs.400,000/- payable in arrears at the end of each month. As a professional with 20 years exemplary working experience in the banking industry, the Claimant was headhunted by the Respondent from his former employment at ILD Consulting Limited. The Claimant states that his employment was governed by the Respondent's Human Resource Policy 2013, which contains elaborate provisions relating to Performance Management with the aim of advancement and promotion of employees and to determine the training and development needs of the organization.
7. The Claimant laments that performance management has, however, been converted into a disciplinary tool, whereby employees are subjected to unreasonable targets, and upon failure to achieve them, terminated from employment.



8. The Claimant avers that he was taken through a performance evaluation in August 2016 which was unfair and did not meet the statutory and contractual thresholds and was carried out by the Respondent's managing director. Following the said evaluation, the Claimant was placed on a performance improvement plan which comprised of unreasonable targets with the tacit threat that his employment would be terminated if he did not meet them. The Claimant states that he disputed the results of the performance appraisal to the Respondent's Board as stipulated in the Respondent's Human Resource Policy 2013. The Claimant also filed suit before the court, and while his appeal before the Respondent's Board, and the suit were pending, his employment was unfairly terminated on the basis of the disputed performance review.
9. The Claimant explains that he is indebted to the Respondent to the tune of Kshs. 2,500,000/- hence his unfair termination of employment has caused him to default on his financial obligations, in addition to damaging his reputation. The Claimant expresses his willingness to continue serving the Respondent with utmost dedication and drive until his retirement.
10. It is the Claimant's case that the Respondent flouted the provisions of Section 45 (1) of the *Employment Act* during the termination of his employment, in that there was no valid reason for the termination; the reason given for the termination was not based on the Respondent's operational requirements; and the procedure adopted during the termination was unfair.

Respondents' case in brief

11. The Respondent admits that the Claimant was its employee, having been employed by the Respondent on 18th November 2013 as the Head of the Human Resources Department who reported directly to the Respondent's Managing Director. The Claimant's terms and conditions of employment were that: the Claimant's duties and responsibilities would be set out in his job description and would include any other duties and responsibilities he would be called upon to perform and assume from time to time; the Claimant would abide by the Business Ethics Policy of the Respondent which formed an integral part of the terms and conditions of employment and conduct himself in a manner that shall not bring discredit to himself or the Respondent; at all times during the employment, the Claimant would be subject to, and would be required to conform with all the rules, regulations and procedures in force in the company from time to time and to abide by the decisions, instructions or orders given by any person in authority over him; and the Claimant's employment could be terminated forthwith and without notice in case of, amongst others any serious breach by the Claimant, or any breach continued after warning from the Respondent. Further, other terms of the Claimant's contract of employment were that: the Claimant would be entitled to loan benefits in accordance with the Respondent's Staff Loans Policy with particular emphasis that the outstanding balance in respect of loans advanced to the Claimant would be paid in full in the event the Claimant left employment for whatever reasons or attained the retirement age, whichever would be earlier; and the Claimant would be entitled to 28 working days leave per annum which would accrue pro rata and which would be taken as such time as the Respondent would determine.
12. In respect of the Claimant's job description which was issued to him on 2nd December 2013, the same provided that the purpose of the Claimant's job was to ensure the smooth running of the Human Resource Department, and to develop and implement cutting edge HR practices that enable staff to realize their full potential resulting in year-on-year increase in productivity and profitability. The Claimant's key responsibilities were set out as: to establish and communicate clear targets/performance expectations to staff and refine measurement of ROI (Return for Investment) in Human Capital as well as align measurement with reward and recognition programs which task particularly included:



- i. full implementation of the performance management using Balanced Score Card ("BSC");
 - ii. tracking staff performance monthly; and
 - iii. managing non-performance.
13. His other key responsibilities involved reviewing, updating and implementing the HR policy and developing the HR Strategy which role included reviewing the existing policy and recommending changes in line with best practices; taking charge of staff training and career development which role included development of a solid human resource base that is multi-skilled; and handling recruitment, induction, placement functions, staff grievance and discipline.
14. In addition to the Employment Contract, Job Description and the Business Ethics Policy, the employment relationship between the Claimant and the Respondent was also governed by the Respondent's Human Resource Policy 2013 (the 'HR Policy'), which among other clauses empowers the Managing Director and the Executive Director of the Respondent, under the Authority of the Respondent's Board to establish, interpret and administer the policies and guidelines to direct the operations of the Respondent. Specifically, the Respondent's Managing Director has the right to: determine the Bank's goals, objectives, programs, services and employees in a manner designed to effectively and efficiently meet these purposes; exercise complete control and discretion over amongst others the method of performing the work required; set performance standard of service and determine the procedures and standards of selection for employment; establish, interpret the work rules, policies and procedures for all employees: manage and direct employees, including select, hire, promote, transfer, assign, evaluate, supervise, layoff, recall, reprimand, suspend, discharge and discipline them; and determine the duties included in each job classification as well as the standard of quality, productivity and performance to be maintained.
15. It is the Respondent's case that Regulation 8 of the HR Policy, requires the Respondent to adopt a Performance Management System that encourages the employees and the managers to match their individual goals to those of the Respondent and its respective departments. The said Performance Management System involves planning for performance, supporting employees to achieve their performance plans and at the end of the performance period, reviewing employees' performance and identifying the development needs which support the achievement of the set objectives. Under the same Regulation: performance evaluations are carried out twice a year or more frequently if deemed desirable and are completed in the prescribed format; performance reviews are conducted by an employee's immediate supervisor; upon being evaluated, the employee should sign the evaluation form and record on the form any reasons why they do not agree with their evaluation; employees are rated on a scale of 1 to 5 with 5 being the highest score; and if it becomes apparent that an employee's performance has fallen below expected standards, the employee's respective Head of Department with the Human Resource Manager shall discuss the situation and review the reasons for the shortcomings, after which a plan of action may be prepared, which will determine the extent of improvement required and the objectives in the form of a written improvement plan including specific activities, deliverables, along with a timeline for achievement of those expectations. The Regulation is clear that if an employee continues to fail to meet the Respondent's standards of performance and behaviour, disciplinary action including termination may be considered.
16. According to the Respondent, the aforementioned Performance Management System was established with the aim of: providing a communication system between staff and the Managers/Supervisors; enabling staff and immediate supervisors to review annual progress towards achievement of business goals and objectives within individual's performance plan; and providing a performance rating for pay and bonus purposes.



17. The Respondent explains that the dispute between the Claimant and Respondent began on 3rd August 2016, when the Respondent's then Managing Director (the "Former MD"), while acting in line with the Respondent's HR Policy, reviewed the Claimant's performance for the first half of the year 2016. During the review, the Claimant and the Former MD agreed on the Claimant's score for the period under review and they both signed the Claimant's individual Balanced Score Card (the "BSC"), where the overall score for the period under review was 2.25. Under Regulation 8.3 of the HR Policy, a rating of 2.25 meant that the Claimant's Performance was dismal, below expectations and that some development or training was needed to improve the Claimant's performance.
18. To improve the Claimant's performance, the Claimant and the Former MD agreed on an action plan aimed at revamping the Human Resource Department of the Respondent, which included very clear and specific performance targets. The Claimant and the Former MD also signed a performance score card containing the agreed targets and weighting that would apply for the period between 1st July 2016 and 31 December 2016. For clarity and to enable the former MD to track the implementation of the agreed action plan, the former MD reduced the action plan into writing and sent the same to the Claimant for acknowledgment. By an email sent on 4th August 2016, the Claimant expressly acknowledged the above-mentioned action plan and reiterated that together with his team, he would deliver on the plan.
19. Further, the Respondent states that in accordance with Regulation 8.3 of the HR Policy, the Claimant was placed on a Performance Improvement Plan (the "PIP") aimed at not only improving his performance but also at ensuring that he delivered on the agreed action plan to revamp the human resource department and assist the Respondent meet its performance targets. The Claimant was informed that he had been placed on the PIP by way of the Respondent's letter dated 12th August 2016. By the time the Claimant was issued with the letter placing him on the PIP, he had not started any work on any of the agreed deliverables, and had not achieved aspects of the deliverables that ought, as a matter of urgency, to have been concluded by then, namely: the report on all staff members placed on PIP which was due on 11th August 2016; the career development Management Program which was due on 11th August 2016; and a review of customer experience which was due on 11th August 2016.
20. It is averred that in a clear act of defiance, insubordination and disobedience of lawful and reasonable instructions and directions as issued to him by the Former MD, the Claimant refused to sign the letter dated 12th August 2016 by which he was informed that he had been placed on the PIP; proceeded on leave without seeking and obtaining the Respondent's approval as stipulated under clause 5.2 of the HR Policy; and refused to carry out any of the tasks or meet any of the deadlines set out in the agreed action plan. Indeed, the Claimant failed to submit the induction program by 17th August 2016 as earlier agreed without notifying the Respondent of the reasons for the failure; failed to prepare and present all policies by 17th August 2016 without providing any reasons thereof; failed to put together an in-house training program by 17th August 2016 without providing any reasons thereof; and failed to conduct job grading by 17th August 2016.
21. The Respondent admits that on 24th August 2016, the Claimant appealed against his performance rating and placement on the PIP to the Respondent's Compensation and Human Resource Board Committee (the "Committee"). Shortly thereafter, and while his appeal was still pending for consideration, the Claimant commenced legal proceedings against the Respondent and he also sought interlocutory injunctive orders against the Respondent vide his Notice of Motion application dated 1st September 2016, which was filed based on a mere apprehension that the Respondent wanted to terminate him from employment. While the above-mentioned interlocutory application and appeal were pending, the Claimant approached the Respondent's Former MD on 5th September 2016 and



made the following proposals: that the Respondent should allow him to leave employment and pay him the equivalent of one (1) year salary; alternatively, that if the above proposal was not workable, that the Respondent should disregard the PIP and start afresh. After consideration of the Claimant's request, the Claimant was given the following feedback: under the Claimant terms of service, he was entitled to voluntarily leave employment by giving 1 month's notice and the Bank would only be able to pay him 1 month's salary in the event of a voluntary departure by him: and disregarding the PIP was tantamount to stating that the appraisal process that the Bank used was flawed and therefore all staff members on PIP would need to receive equal treatment, while those not under PIP would need a review as well.

22. The Committee met on 16th September 2016 and after hearing the Claimant's appeal directed him to proceed on the PIP as had been recommended by the Former MD. The Claimant was then issued with a letter dated 16th September 2016 requesting that he acknowledges and accepts the decision to place him on the PIP and undertakes to implement the agreed action upon plan. 34. The Claimant refused to do so, and expressly noted his said refusal on the Respondent's letters dated 12th August 2016 and 16th September 2016. From 24th August 2016, when the Claimant's PIP commenced, he refused to carry out any meaningful work forcing the Respondent to rely on his subordinates to ensure the full functioning of the Human Resource Department.
23. The Respondent states that during the pendency of the Claimant's interlocutory application before court, specifically from 7th September 2016, the Claimant's attendance at the Respondent's office for work had been haphazard. To illustrate the foregoing, it is indicated that on 19th September 2016, the Claimant reported to work at 10:00 a.m. and left at 2:30p.m, without giving any explanation or attempting to comply with the HR Policy. Similarly, on 20th September 2016, the Claimant reported to work at 10:00 a.m. and left at 4:30 p.m., again without giving any explanation or attempting to comply with the HR Policy.
24. It is the Respondent's case that the Claimant's above described conduct was in direct violation of Clause 5.2 of the HR Policy which provides that: staff shall not absent themselves from the office without permission from the Head of Department; if a member of staff is absent from work on any working day without permission or lawful cause, they will be subject to the disciplinary process and will lose pay for the period they are away; if absence is due to illness, the staff must submit a doctor's certificate in support of the illness; and frequent absenteeism or tardiness without lawful cause will lead to disciplinary action. In accordance with the stated Clause of the HR Policy, the Respondent instituted disciplinary measures against the Claimant by issuing him with a notice to show cause dated 20th September 2016 requesting him to show cause why disciplinary procedures should not be taken against him. The Claimant responded vide a letter dated 22nd September 2016, but did not provide any reasonable, valid, genuine and/or compelling reason as to why he had: refused to perform work which was within his duties; refused to comply with and undermined the Bank's policy: refused to obey valid instructions from persons in authority over him; absented himself from work without any reasonable excuse; and fundamentally breached his obligations arising under his contract of employment.
25. After considering the Claimant's response as aforesaid and finding it to be wanting, by an email sent on 23rd September 2016, the Former MD invited the Claimant to attend a disciplinary hearing scheduled for 26th September 2016. The Claimant duly attended the disciplinary hearing and denied the charges against him, save for the following which he admitted: that on 3rd August 2016, his performance for the first half of the year 2016 was appraised following which he was rated and the relevant appraisal form was approved and signed by him; that he subsequently refused to accept and sign the PIP; that he did not achieve the tasks set out in the PIP; that he proceeded on leave between 15th and 19th August without a duly approved leave application; and that he reported to work late and left early



on 19th August 2016 and 20th August 2016. Following the disciplinary hearing, the Respondent considered all the relevant facts and the Claimant's representations and decided to terminate the Claimant's employment with immediate effect. It issued the Claimant with a termination letter dated 27th September 2016 communicating its decision and the reasons thereof. The Claimant was paid all his terminal dues and all the outstanding leave that he had earned and not taken.

26. The Respondent is categorical that it complied with the law, the Claimant's Employment Contract and its Human Resources Policy in its dealings with the Claimant especially in the review of his performance which was found to be unsatisfactory, his subsequent placement on PIP and eventual dismissal on 27th September 2016, and urges the court to dismiss the Claimant's claim, bearing in mind that the Respondent lost all trust in the Claimant and the parties' relationship has completely broken down.
27. The Respondent agrees that the Claimant took out loan facilities while in the employ of the Respondent, and as at December 2016, the outstanding balance stood at Kshs. 2,981,353.27.

DETERMINATION

28. The parties filed written submissions.

Issues for determination

29. The court having heard the parties and perused the pleadings, was of the considered opinion that the issues for determination in the suit were-
 - a. Whether the termination of the employment of the claimant was fair
 - b. Whether the claimant is entitled to relief sought.

Whether the termination of the employment of the claimant was fair

The claimant's submissions

30. On claim of unlawful and unfair termination -Section 45(2) of the [employment act](#), 2007 provides that no employer shall terminate the employment of an employee unfairly. A termination is unfair if the employer fails to prove that it was based on a valid and fair reason, and that fair procedure was followed. The Claimant was placed on a Performance Improvement Plan (PIP) on 12th August 2016. The said PIP was irregularly initiated as per the Respondent's HR policy, which provides that performance targets are to be set at the beginning of the year, not mid-year. Clause 8.1 of the Respondent's HR policies provided that the Performance Management shall be aimed to set out performance targets that a staff will be expected to achieve over a 12 months period. This was not the case. The Managing Director placed the Claimant on deliverables to be achieved within 2 weeks. Moreover, the Managing Director expressly declined to offer the Claimant any assistance, contrary to the policy that requires a supervisor to guide and support an employee on PIP. The two-week PIP and refusal by the Managing Director to assist rendered the process a disguised disciplinary action, not developmental tool. Similarly, in *Alois Makau Maluvu v Cititrust Kenya Limited & another* [2018] eKLR Onyango J stated cited in *Robert Muchiri v St Mary Academy a* [2022] KEELRC 997 (KLR): In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvement as was stated in the case of *FREDRICK OWEGI V CIC LIFE ASSURANCE AND JANE WAIRIMU MACHIRA* (supra)." The Respondent alleged poor performance yet failed to produce any objective performance appraisal records. The Claimant



herein had never received any warning or reprimand regarding his work. As held in *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR, poor performance must be demonstrated through valid appraisals and the employee must be given sufficient time and assistance to improve. The Learned Judge, M. Mbaru went further to explain that it is important to note as where poor performance is shown to be a reasons for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5 (8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance. Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse. My Lady, the Claimant was ranked as a non-performer by the Respondent by mere allegations made by just one employee who was the Managing Director yet the same Claimant was not accorded any assistance by the Respondent (Managing Director) to try and improve on his performance. This is captured in one of the email correspondence that the claimant has adduced as evidence before this court where the Managing Director insists that there is no help that he could provide to the Claimant. Furthermore, the Managing Director of the time, Tim Gitonga went ahead and added new deliverables for the Claimant to achieve within two weeks which again was against the Human Resource Policies under clause 8.1 which clearly stated that performance Management shall aim to set out performance targets that staff will be expected to achieve over a 12 month period. The Claimant was later issued with a Notice to Show Cause on 20th September 2016, and directed to respond within a day a clear violation of the right to adequate time to prepare a defense. He responded on 22nd September 2016, only to be summoned before a disciplinary panel on 26th September 2016, without notice of the hearing or the right to be accompanied by a representative as required under Section 41 of the *Employment Act*. For this we place reliance in *David Wanjau Muhoro v Ol Pejeta Ranching Limited* [2014] eKLR; Cause 1813 of 2011 where Rika J held; The principle of fair hearing requires the Employee has sufficient opportunity to prepare. This entails: The Right to sufficient time to prepare. The Claimant received a notice to show cause letter on the 20th September 2016 and ordered to respond by close of business of the 21st September 2016. The right to fully understand the charges. Even as he was granted more time, the Claimant was not availed of any specific charges which he was required to respond to. General charges such as 'dishonesty,' 'fraud' and fraudulent activities' are vague and offer the Employee no opportunity to respond intelligibly, or at all. The right to documentation. Employee must be given the documents the Employer intends to rely on at the hearing. The Claimant herein received no documents from the Respondent neither has the Respondent adduced any evidence before this court to proof that indeed the disciplinary took place in the right manner or even shared minutes of the said meeting. The Claimant was dismissed via email on 27th September 2016 immediately after attending a disciplinary hearing on the 26th September 2016. This clearly shows that the Respondent's decision to terminate the Claimant's employment was pretty predetermined. In the case of *Kenya Science Research International Technical and Allied Workers Union (KSRITWAU) v Stanley Kinyanjui and Magnate Ventures Limited* (Industrial Court, Case No. 273 of 2010) (unreported) cited in *Lubengwa v Officer in Charge Ministry of Works, Welfare & Sports Association*, the Court held that once poor performance of an employee is noted, the proper procedure is for the employer to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time of about 2 to 3 months. *Kenfreight (E.A.) Limited v Benson K.Nguti* [2016] eKLR cited in *Lubengwa v Officer in Charge Ministry of*



Works, Welfare & Sports Association, the Court of Appeal held: "Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....." The Respondent's action in terminating the Claimant's employment less than twenty-four (24) hours after receiving his response demonstrates that the decision had been made without fair consideration or objective evaluation, contrary to the requirements of Section 41 of the *Employment Act*, 2007 and the principles of procedural fairness. The disciplinary committee that summoned the Claimant was the same HR Board that had earlier declined to hear his appeal against the Performance Improvement Plan thus acting with apparent bias. The HR Board acting both as appellate body and disciplinary committee was basically violating the rule against double jeopardy and impartiality under the rules of natural justice. 16. After His access to the workplace was blocked, his accounts frozen, and he was denied an opportunity to collect his personal belongings actions that underscore the arbitrary and humiliating nature of the termination. The Court in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR cited in *Lubengwa v Officer in Charge Ministry of Works, Welfare & Sports Association* held that for termination to be fair, there must be both substantive justification and procedural fairness. The Respondent met neither standard.

31. On procedural fairness - in the invitation letter to the disciplinary hearing, allegedly sent to the Claimant's email on 23rd September 2016, the Claimant was informed that he was entitled to appear in the company of an employee of his choice. However, procedural fairness under Section 41 of the *Employment Act* requires more than mere attendance with another employee. It was the Respondent's duty to ensure that the Claimant was fully informed of all his rights, including the right to have access to and rely on any documentation in his defence, and the right to cross-examine the Respondent's witnesses. None of these safeguards were accorded to the Claimant. We further submit that the Claimant had only gone to the Respondent's offices on 26th September 2016 to deliver a sick sheet, when he was unexpectedly informed by the then Secretary to the Managing Director that a disciplinary hearing had been scheduled for that very afternoon. The Claimant had not read or even received the alleged email communication earlier sent on 23rd September 2016, as claimed by the Respondent. He was abruptly directed to the Boardroom, where he found members of the HR Board Committee, who informed him that the same committee had now been converted into a disciplinary committee. At the said meeting, the Claimant was not informed of his right to representation, was not given an opportunity to review the evidence or documents relied upon, and was not allowed to cross-examine or question any witnesses. The committee merely read out the allegations attributed to the Managing Director and directed the Claimant to leave the room thereafter. The entire process was therefore procedurally flawed, biased, and contrary to the principles of natural justice, denying the Claimant any meaningful opportunity to defend himself against the allegations. We place reliance in *David Wanjau Muhoro v Ol Pejeta Ranching Limited* [2014] eKLR; Cause 1813 of 2011 where Rika J held; The principle of fair hearing requires the Employee has sufficient opportunity to prepare. This entails: The Right to sufficient time to prepare; The Right to fully understand the charges and the Right to documentation. The Right to sufficient time to prepare. The Claimant herein was given only 24 hours to respond to the notice to show cause which was dated 20th September 2016 and asked to respond by close of business of 21st September. Time however, is not the totality of sufficiency of opportunity. The right to fully understand the charges. The Claimant was not availed of any specific charges in form of documentation neither was he given opportunities to ask any question to the Respondent's witnesses during the Hearing that took place on the 26th September 2016. The Respondent went ahead to testify before this Honourable court that during the disciplinary Hearing, the Claimant



made some admission and confessions against the charges that were alleged against him. However, the Respondent has not adduced any evidence to proof that indeed the Claimant made these confessions. The right to documentation. The Employee must be given the documents the Employer intends to rely on at the hearing, as well as other documents the Employee may request for. It is our submission that there was no fair hearing during the disciplinary meeting and that the process was a sham process meant to sanitize an already pre-determined decision hence irregular. The rushed process in issuing a notice to show cause, receiving a reply, and dismissing the Claimant within seven days demonstrates a predetermined outcome.

The Respondent's submissions

32. It is trite that lawful termination of employment must meet the threshold of: -
- i. substantive fairness under sections 41 and 45 of the *Employment Act*, 2007 (the *Employment Act*); and
 - ii. procedural fairness under sections 43 and 45 of the *Employment Act* which provides that reasons for termination must be demonstrated by the employer as stipulated. See, for example, this Court's decision in Cause 955 of 2011 Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR and the Court of Appeal's decision in Civil Appeal No. 31 of 2015 Kenfreight (EA) Limited vs. Benson K Nguti [2016] eKLR.
33. The Respondent respectfully submits that the bipartite test above was met in this case.
- i. The Claimant's termination was substantively fair.

A termination of employment is unfair if no reason is provided or if the reason for the termination is invalid. See Section 45(2)(a) of the *Employment Act* and the Court of Appeal decision in Naima Khamis v Oxford University Press (E.A) Ltd [2017] KECA 480 (KLR). The reasons for the termination of the Claimant's termination 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" Claimant's employment. See Section 43(2) of the *Employment Act*. Section 44 of the Act allows the Respondent to dismiss an employee summarily, without notice or with less notice than they are entitled to, for reasons such as fundamental breach of obligations or gross misconduct. Contrary to paragraphs 9 to 11 of the Claimant's Submissions, the Claimant was summarily dismissed for gross misconduct and not poor performance. The reasons for the Claimant's dismissal are categorically set out in the Termination Letter as:
 - a) The Claimant refusing to the comply with the Respondent's policies.
 - b) The Claimant refusing to obey valid instructions from a person placed under authority over him.
 - c) The Claimant being absent from work without any valid reason or lawful cause; and
 - d) The Claimant fundamentally breaching the Employment Contract.
34. All the above reasons are valid reasons for summary dismissal under Section 44(3) and (4) of the *Employment Act* and were established through the evidence produced and assessed in the Disciplinary Hearing, sufficiently enough to warrant the summary dismissal. See also pages 82 to 89 and 103 to 105 of the Respondent's Trial Bundle. Paragraphs 9 to 11 of the Claimant's Submissions only attempt to justify the Claimant's adamant defiance against the PIP, which defiance is but one of the elements of the Claimant's gross misconduct. Without prejudice to the above, the Respondent respectfully



submits that the Claimant's submissions on poor performance and the PIP are unfounded for the following reasons: Regulation 8.2 of the HR Policy necessitated the evaluation and assessment of the Claimant's performance by his supervisor, the Former MD.b) Upon evaluation of the Claimant's substandard performance, Regulation 8.3 of the HR Policy mandated the Respondent through the Former MD to prepare an action plan with clear targets and timelines, distinct and separate from the typical annual performance targets. The action plan and the PIP that the Respondent invited the Claimant to join under the HR Policy were the Respondent's good faith attempts at helping the Claimant improve his performance. It is unconscionable for the Claimant to allege that he was never supported by Respondent when he adamantly refused to accept or even acknowledge the PIP. In any case, Regulation 8.3 of the HR Policy does not allow an employee to reject a PIP, therefore the Claimant's conduct was insubordination amounting to gross misconduct. The contents of paragraphs 39 and 40 of the Claimant's Submissions are immaterial to this matter since Regulation 8.2 of the HR Policy provided for annual performance evaluations, and not the completion of one isolated task, as the proper mechanism for appraising the Claimant's performance. For the above reasons, we submit that the termination of the Claimant's employment was substantively fair, having been occasioned by the fair and valid reasons of gross misconduct and fundamental breach of obligations.

35. The Claimant's termination was procedurally fair- The law on procedural fairness requires an employer to, before terminating the employment of an employee, explain to the employee the reason for which the employer is considering termination and to consider any representations which the employee may have. See Section 41 of the Act Cause No. 247 of 2013 David Gichana Omuya vs. Mombasa Maize Millers Limited [2014] eKLR. In response to the Claimant's submissions on procedural fairness, the Respondent submits that it duly complied with the statutory requirements of fair procedure in that:
- i. The Respondent issued with the Claimant with the NTSC on 20th September 2016 explaining the reasons why the Respondent was considering disciplinary action against the claimant.
 - ii. The Respondent considered the Claimant's responses to the NTSC in his letter of 22nd September 2016 and found them insufficient to explain the Claimant's gross misconduct and fundamental breach,
 - iii. Consequently, on 23rd September 2023, the Respondent invited the Claimant to attend the Disciplinary Hearing scheduled for 26th September 2023 with an employee of his choice.
 - iv. On 26th September 2016, the Respondent conducted the Disciplinary wherein the Respondent explained to the Claimant, once again, the reasons why the Respondent was considering disciplinary action against the Claimant and considered the Claimant's representations before deciding to dismiss the Claimant summarily.³⁶ Paragraphs 15 of the Claimant's Submissions is unsupported: there was no bias or jeopardy posed to the Claimant in the Disciplinary Hearing. In addition, the Claimant's allegations at paragraph 16 of his Submissions are false and unsubstantiated. The Claimant's failure to read the email invitation of 23rd September 2016 as admitted in paragraph 19 of the Claimant's Submissions further demonstrates the Claimant's persistent arrogance and abdication of his duties as an employee. The Respondent implores the Court to thus conclude, based on the above, that the termination of the Claimant's employment was procedurally fair noting that the Claimant was provided opportunities to make representation on the charges against him and was only terminated upon careful consideration of his representations and with good reasons.



DECISION

36. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the [Employment Act](#) to wit:- ‘45(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 employees 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.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the [Employment Act](#) (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).
37. Reasons given to justify termination – The Employer demonstrated insubordination in the claimant refusing to comply with Performance Improvement Policy and absenteeism (Section 43 of [Employment Act](#)). The court found there was a lapse in procedural fairness as relates to the failure of the employer to give a reason to the claimant as to the rejection of the his appeal against the performance evaluation score card. At cross-examination it was clear the claimant was aware he could not refuse Performance Improvement Policy compliance. The Letter in response was to effect he was going to comply then proceeded on leave, before approval, and gave unacceptable reports. The court only faulted the employer in failing to given reason for the rejection of the appeal.
38. On relief sought, the court finds notice was due as per the contract. The court upheld the reason for termination hence no compensation beyond the notice pay. The Respondent witness had no evidence the claimant was paid the dues which included notice as stated in termination letter. The claimant is awarded Notice for 3 months as per contract for lack of fair procedural process as stated above. Further, the termination letter indicated accrued leave days would be paid, if any. The employer did not provide evidence to controvert claim for leave equivalent of 1 month salary. I award the same. The claim for equivalent of one month leave days is awarded Kshs.400,000/=.
39. Service pay - section 35 (5& 6) of the [Employment Act](#) provides as follows-‘(5)An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of—
 - (a) a registered pension or provident fund scheme under the [Retirement Benefits Act](#);
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.” The claimant was on a pension fund as per contract thus not entitled to statutory service pay.



Conclusion

40. Termination is held to be substantially fair as the respondent had valid reasons for the termination. The court held there were flaws in the process as the Board did not give a valid reason as to the rejection of the appeal by the claimant against the performance evaluation score card. The court enters judgment for the claimant against the respondent as follows-

- a. Notice payment of 3 months gross salary – Kshs.1,200,000
- b. Leave in lieu KShs.400,000/=
- c. Interest at court rate for date of filing suit total sum award of Kshs.1,600,000/-
- d. Costs of the suit.

41. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

J. W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Claimant/Respondent: Mumbua

Applicant /Respondent: Absent

