

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**

**CAUSE NO. E053 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**EZEKIEL OERO ONYANDO.....**  
**CLAIMANT**

**VERSUS**

**I & M BANK.....**  
**RESPONDENT**

**JUDGMENT**

The claimant commenced the instant suit vide a Memorandum of claim dated 19<sup>th</sup> June 2025 filed on 26<sup>th</sup> June 2025 alleging unlawful termination of employment by the respondent.

The claimant's case is that he was employed by the respondent in 2017 as a contract staff in Kisumu and on permanent and pensionable terms effective 1<sup>st</sup> April 2019 and his salary had risen to Kshs.107,000.00 per month as at the date of termination of employment and served diligently until 11<sup>th</sup> April 2024.

The claimant alleged that the respondent dismissed him from employment summarily without notice or valid

reason or notice to show cause and was not afforded adequate opportunity to respond to the allegations.

The claimant averred that he was the only person who was targeted yet his supervisor approved the Account Opening forms in question. The claimant disputed the termination of employment by the respondent and contends that it was unlawful. The claimant prayed for:

- (i) A declaration that the summary dismissal was unfair and unlawful.*
- (ii) General damages for discrimination.*
- (iii) Compensation for unlawful termination of employment.*
- (iv) Certificate of service.*
- (v) Interest on (ii) and (iii) above.*
- (vi) Costs of the suit.*
- (vii) Any other or further relief the court deemed fit and just to grant.*

### **Respondent's case**

The respondent admitted that the claimant joined in 2017 as alleged and was subsequently promoted to Customer Service Officer based at the respondent's Kisumu Branch at a gross salary of Kshs.107,000.00 and served diligently until his dismissal when his diligence was questioned.

The respondent averred that the claimant was notified about the disciplinary hearing in advance and was aware of the background circumstances and he was accorded an opportunity to explain his case on 14<sup>th</sup> March 2024.

That he had been suspended for one month in January 2024 at the onset of the investigations and was paid 50% salary and was notified of the grounds of dismissal and the respondent had lost trust in him for gross negligence in not following the correct procedure of account opening which exposed the respondent to losses.

It was the respondent's case that the claimant was not victimized and the summary dismissal was substantively and procedurally fair as he was accorded sufficient notice of the hearing and was heard.

The respondent prayed for dismissal of the case with costs.

On cross-examination, the claimant confirmed that he was serving as a Customer Service Officer, Kisumu Branch and was aware of the fraud perpetrated by opening of accounts such as Vaika Paper and Stationery

which were used as conduits to defraud ADL Aviation Ltd. He denied being aware of the source of the Account Opening form but testified that the Account Opening Application form was given by an officer who signed for it and the form he received had the name of the issuing officer; one Olivia Otieno and the claimant opened the account and the Operations Manager had approved it.

The witness admitted that the form was not from Kisumu and he did not call anyone to verify its source or information as it was normal to open accounts for other branches and there was no verification procedure.

That the sum of Kshs.53 million passed through the account as per the investigation report.

The claimant admitted that during the investigation he did not mention that the Operations Manager had signed the account opening forms.

**CWI** confirmed that he was accorded an opportunity to be heard and responded to questions, appealed the dismissal and received a response.

On re-examination, the witness testified that at the hearing the charge was introducing the account of Vika Paper and Stationery and the customer was introduced by the Direct Sales Representative (DSE), one Olivia Atieno, and there was no other charge.

That the introducer of the account verified the documents.

### **Respondent's evidence**

**RWI**, Mr. Robinson Wachira confirmed that no document showed that the claimant was an Account Opening Officer and he was a diligent employee but was negligent for certifying documents without having seen the originals and the forms were obtained from the Sarit Centre Branch in Nairobi and the charge was introducing the account of Vaika Paper and Stationery and the matter was investigated which indicated that the account was introduced by one Olivia Atieno and the witness was unaware whether she was subjected to any disciplinary action.

The witness confirmed that a notice to show cause ought to have been given to the claimant.

**RWI** further admitted that he could not explain why the claimant was facing only one charge at the hearing but the letter of dismissal had four.

That the Operations Manager approved the Account Opening Application forms for Vaika Paper and Stationery Ltd.

**RWI** confirmed that customer service staff explained the account opening requirements to prospective account holders and issued the application forms and in this case the forms were issued by the Direct Sales Representative, Sarit Centre, Nairobi.

The person verifies the original documents from the customer and the claimant was based in Kisumu.

On re-examination, the witness testified that the claimant was a Customer Service Representative and his role was to receive customer's instructions, account opening and collection of cheque books among others and because a prospective customer may or may not have all the required documents he or she may collect the Application form and complete it later as the customer did in this case but presented the form at the Kisumu Branch which

were supposed to confirm having seen the original documents but the claimant had not.

According to **RWI**, introduction meant bringing the customer into the system or banking space and the claimant confirmed that the documents were in order and was thus culpable for introducing the account.

That Olivia Otieno issued the Account Opening Application Form to obtain credit for it.

**RWII**, Mr. Ben Shichenga confirmed, on cross-examination that he did not interview the claimant nor prepare the investigation report and was surprised that the Account Opening Forms the claimant dealt with was not on record and had no evidence to show that the claimant opened the account and his employment was terminated on the basis of investigation report for introducing the account to the bank and it was the only charge.

On re-examination, **RWII** testified that the contents of the Investigation Report were factual and he owned it and the claimant was dismissed from employment for failure of know your customer (KYC) being the initial contact with

the customer at the Kisumu Branch, and although Olivia Atieno issued the application forms at the Sarit Centre Branch, the customer did not return the forms to the branch for completion of the process.

That the claimant could not remember who presented the Account Opening Application forms.

**RWIII**, Mr. John Nyamaiko confirmed that while the Branch Manger in Kisumu was Mr. Ashok, the Operations Manager was one, Evans Mukhono and he approved the account opening application forms for Vaika Paper and Stationery and was charged with receiving the sum of Kshs.40,000 from a customer and failing to conduct due diligence in withdrawal of funds as opposed to account opening.

The witness wondered why the account opening forms were not produced as exhibits.

The witness further confirmed that a notice to show cause was necessary and an employee ought to be accorded reasonable time to prepare his/her defence.

According to **RWIII**, the account in question was opened on 5<sup>th</sup> September 2023, the claimant was invited for a disciplinary hearing vide letter dated 9<sup>th</sup> March 2024 and hearing took place on 14<sup>th</sup> March 2024 and was thus accorded reasonable time and was summarily dismissed.

On re-examination, the witness testified that the items on the dismissal letter related to opening of the account and the lending of the money was discussed during the hearing.

That the claimant certified the documents and the Operations Manager did not have to do the same thing and but for the claimants role, the account would not have been opened.

### **Claimant's submissions**

On whether termination of the claimant's employment was unlawful, reliance was placed on the sentiments of the court in **Postal Corporation of Kenya V Andrew K. Tanui** [2019] eKLR and **Paul Odhiambo Onyango & another V. Kalu Works Ltd** on the elements of a fair termination of employment to submit that based on the evidence on record, the respondent had no valid reason(s) to summarily dismiss the claimant as he had

been a diligent employee for 8 years, did not introduce the account as it was introduced and opened in Nairobi Sarit Centre Branch.

That the account was introduced by one Olivia Atieno the DSE, Sarit Centre Branch and the only issue at the hearing was introduction of the account.

Counsel submitted that the respondent's explanation of the term introduction was not convincing because Olivia Atieno gave out the forms and thus introduced the account and the respondent failed to adduce evidence of how the account was opened as it did not avail the account opening form because it would have been adverse to the respondent's case.

Reliance was placed on the sentiments of the court in **Nesco Services Ltd V CMC Construction (EA) Ltd** [2021] eKLR on adverse inference where evidence is not adduced.

Counsel submitted that the respondent adduced no evidence to substantiate the claim that the claimant introduced the account to the bank and the Branch Operations Manager who approved the account was not

questioned on the issue and there was no valid ground for the claimant's summary dismissal.

On procedure, counsel urged that the same must be fair, that the employee must be informed of the charges via a notice to show cause, which the respondent did not issue.

Reliance was placed on the sentiments of the court in **Jonathan Chepkwony V George Makateto Acting CEO EPZA & 2 others** on contents of a notice to show cause, to urge that the claimant was directly invited to appear for the disciplinary hearing and was thus denied the opportunity to adequately respond to the allegations citing the sentiments of the court in **Paul Odhiambo & another V Kalu Works Ltd** and **Jaqueline Kanja V Visa Cemea Holdings Ltd**, to reinforce the submission.

Relatedly, counsel submitted that the claimant was only invited to address one issue namely; introduction of the account, not certification of the documents or lending of money.

Reliance was placed on **Modern Mail Ltd V Brian Onyango Masinde** ELRCA No. E028 of 2025.

Counsel, further submitted that the respondent did not furnish the claimant with the forensic report which was the basis of the summary dismissal.

Reliance was placed on **Omollo V Toyota Kenya Ltd** [2025] KEELRC 3052 (KLR) on avilment of evidence the accuser intended to rely on, to urge that the procedure used by the respondent was irregular and termination of the claimant's employment was unlawful.

On reliefs, counsel submitted that the claimant was entitled to 12 months compensation placing reliance on the sentiments of the court in **National Bank of Kenya V Samuel Nguru Mutonya** [2017] eKLR and 3 months salary in *lieu* of notice, certificate of service, costs and interest.

### **Respondent's submissions**

As to whether the respondent had a valid and fair reason to terminate the claimant's employment, counsel submitted that the claimant breached the provisions of Section 44(4)(c) of the Employment Act because he opened the Vaika Paper and Stationery account with verification of documents issued elsewhere and certified the documents without having seen the originals.

Reliance was placed on the decision in **Barmao V G4S Security Services (K) Ltd** [2024] KEELRC on improper performance of duties and carelessness.

Counsel urged that in banks, the employment relationship was based on absolute trust and strict adherence to protocols and the claimant's conduct eroded it.

Reliance was also placed on decision in **Njuki V Bank of Africa Kenya Ltd** [2025] on negligence of a bank employee and exposure to potential financial and reputational risk.

Counsel submitted that the respondent had a valid and fair reason to terminate the claimant's employment.

Concerning procedure, reliance was placed on the decision in **Standard Group Ltd V Jenny Leusty** [2018] eKLR on procedural fairness irrespective of the employees misconduct as provided for by the provisions of the Constitution of Kenya and Section 41 of the Employment Act to submit that the respondent complied with the law and the processes ensured that the

principles of natural justice were upheld and the termination of employment was procedurally fair.

On entitlement to the reliefs sought, reliance was placed on the sentiments of the court in **Wambui V Standard Chartered Bank of Kenya** [2025] KEELRC 1495 (KLR) to submit that since the termination of employment was not unfair, compensation was unwarranted and the claimant was only entitled to a Certificate of Service.

Counsel urged the court to dismiss the case with costs to the respondent.

### **Analysis and determination**

It is not in dispute that the claimant joined the respondent in October 2016 initially on 4 months at Kshs.30,000.00 per month which later rose to Kshs.45,000.00 and Kshs.50,000.00 and as at the date of summary dismissal in 2024 it was Kshs.107,000.00

It is equally not in contest that the claimant was a customer Service Officer at the respondent's Kisumu Branch and his employment was terminated summarily

vide letter dated 11<sup>th</sup> April 2024 which the claimant received on 13<sup>th</sup> April 2024, effective 18<sup>th</sup> April 2024.

Also not in contest is the fact that account of Vaika Paper and Stationery, whose opening the claimant played a key role was used as a conduit for monies from the account of ADL Aviation Ltd as evidenced by the Forensic Investigation Report dated January 2024, and on the basis of which the claimant's employment was terminated by the respondent.

While the claimant observed, testified and counsel submitted that termination of his employment by the respondent was unfair, the respondent maintained that it was fair and justified on the circumstances.

It is trite law that for a termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to do so and conducted the termination of employment in accordance with a fair procedure.

In other words, there must have been a substantive justification for the termination of employment and procedural fairness, as exquisitely captured by Ndolo J (as

she then was) in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR as follows;

*“...However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness...”*

See also **Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR.

Section 43 of the Employment Act 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.**

Similarly, Section 45 of the Act provides:

- (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 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.**

### **Reason**

Although the claimant averred that the respondent terminated his employment without any reason, on cross-examination the claimant admitted that he was aware of the fraud where several accounts were used as conduits of monies from ADL Aviation Ltd's account. He also admitted having opened one of the accounts used by the fraudsters.

The claimant further admitted that the account opening forms he received at the Kisumu Branch had the name of the officer who issued them and it was not an employee at the Kisumu Branch and did not call any one to verify.

He testified that since the Operations Manager had signed the forms he had no option but to open the account, a fact he had not disclosed during investigation.

The claimant admitted that he was a Customer service Officer or representative.

The claimant further averred that the respondent did not issue him with a notice to show cause and RWI and RWII confirmed as much on cross-examination, testifying that procedurally, the notice to show cause ought to have been given.

Needless to gainsay, the notice to show cause marks the commencement of the disciplinary process in that it requires the employee to formally respond to a particular charge or charges set out therein with supportive evidence, if any.

The claimant learnt of the charge from the letter dated 9<sup>th</sup> March 2024 which invited him for a disciplinary hearing scheduled for 12<sup>th</sup> March 2024, namely Introducing the account of Vaika Paper and Stationery Ltd which was later used as a conduit for stolen funds and this was the only charge and the claimant was found culpable for having not make inquiries to ascertain how account opening forms issued by the Sarit Centre Branch found their way to Kisumu. The committee recommended summary dismissal.

The letter of dismissal dated 11<sup>th</sup> April 2024 identified four (4) conclusions:

- (i) The claimant introduced the account of Vaika Paper & Stationery Ltd to the bank and it was used as a conduit for stolen funds.*
- (ii) The claimant admitted that he verified/stamped copies of documents presented in relation to the account of Vaika Paper & Stationery Ltd as true copies of the original without having seen the originals contrary to the guidelines.*
- (iii) The claimant's statement to the disciplinary committee had gaps for instance could not recall who presented the account opening forms.*

*(iv) The claimant conflicted himself by lending Kshs.4,000.00 to the Branch Operations Manager and failed to disclose the conflict of interest to the respondent as required.*

Both **RWI** and **RWII** confirmed on cross-examination that the letter of summary dismissal had more than one charge yet the claimant faced only one charge at the disciplinary hearing and the disciplinary committee found that the Vaika Paper & Stationery Ltd was introduced by the Direct Sales Executive at the Sarit Centre Branch.

According to **RWI**, the person who interacts with the prospective customer verified the original documents. While such procedure served the respondent where the account was opened in the same branch and the employee deals with a particular customer from the beginning to the end, in the instant case, while the Direct Sales Executive (Sarit Centre Branch) issued the account opening forms to some person(s), the forms were presented at a branch 355KM away by a person the claimant could not recall but he stamped the copies as true copies of the original. The committee found that he had not seen the originals.

Intriguingly, the respondent did not file the alleged account opening forms as evidence and **RWII** and **RWIII** wondered why the documents were not filed to embellish the respondent's case.

The non-availability of the forms was in the court's view not fatal to the respondent's case because the claimant admitted on cross-examination that he opened the account in the name of Vaika Paper and Stationery Ltd and was unaware of how the forms found their way to the Kisumu Branch.

In the court's view, there was sufficient room for suspicion in as much as the claimant testified that they occasionally opened accounts for other branches.

According to the respondent's witnesses, the claimant was negligent as he ought to have enquired from the Sarit Centre Branch as a basis for the decisions he took.

Although the claimant's evidence was that he relied on the approval by the Branch Operations Manager, the Manager had neither seen nor dealt with the customer and relied on the claimant's certification, and according

to RWI, he remained culpable for introducing the account into the banking system.

According to **RWII**, there was failure of know your customer (KYC) by the claimant as borne by the conclusions of the disciplinary committee.

Did the claimant “introduce” the Vaika Paper and Stationery Ltd’s Account?

This is an important issue because the disciplinary committee found that the account was “introduced” by one Olivia Atieno (the DSE at the Sarit Centre Branch who issued the account opening forms).

According to **RWI** “introduction” meant bringing the customer into the banking space or system.

It is unclear to the court whether the disciplinary committee used the term introduction in a narrow or wider sense since opening a bank account is not a single act but a chain of acts which culminate in a bank account.

In this case, two employees dealt with one or two individuals in relation to the same application.

It is possible that the person who obtained the forms at the Sarit Centre Branch was not the person who presented them at the Kisumu Branch.

Even assuming it was the same person, both employees played a significant role in bringing the customer to the bank. While the DSE handed over the forms for completion and subsequent presentation, the claimant consummated the process.

The claimant, in the court's view, played the key role because collection of account opening forms from a bank or Savings and Credit Society or other place does not necessarily translate to the person becoming an account holder or member.

The application process is completed when the completed forms are returned and all attendant requirements are fulfilled. These may include copies of documents to be attached and deposit, if any.

Clearly, but for the claimant's role, the Vaika Paper and Stationery Ltd would not have been opened the account.

The role played by the DSE and the Branch Operation's Manager was in the court's view different.

As to whether the respondent had a reason to dismiss the claimant from employment, the court is guided by various decision.

In **Galgalo Jarso Jillo V Agricultural Finance Corporation** [2021] eKLR, B. O. Manani held;

*"In terms of section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination".*

The court is in agreement with these sentiments.

Similarly, in **Kenya Revenue Authority V Reuewel Waithaka Gitahi & 2 others** [2019] eKLR the Court of Appeal stated:

*“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all that the employer is required to prove are the reasons that it “genuinely believed to exist” causing it to terminate the employee’s services. That it is a partly subjective test”.*

The court is further guided by the Halsbury’s Laws of England on the range of reasonable responses test as well as the decision in **Thomas Sila Nzivo V Bamburi Cement Co. Ltd** [2014] eKLR.

Applying the foregoing principles of law to the facts and circumstances of this case the court is satisfied that the respondent has evidentiary demonstrated that it had a reasonable basis to genuinely believe that it had a reason to terminate the claimant’s employment in the manner it did.

The court is satisfied that a reasonable employer in similar circumstances would not have retained the

claimant as its employee and more so because the respondent is a bank where trust, confidence and good faith are the hallmarks of the employment relationship.

A perusal of the records revealed that the disciplinary committee dealt with many employees depending on the role they played, and in particular the action they took prior to making the decision.

### **Procedure**

As adverted to elsewhere in this judgment, procedural fairness is the second pillar of a fair termination of the employment contract by the employer as ordained by the provisions of Section 41 and 45(2)(c) of the Employment Act.

The claimant's case was that he was not accorded an opportunity to defend himself as regards conclusions 2, 3 and 4 enumerated in the letter of summary dismissal and termination of his employment was procedurally unfair.

Needless to emphasize the respondent's witnesses confirmed, on cross-examination that the respondent did not issue a notice to show cause, an important procedural

step, but confirmed that he was informed of his right to be accompanied by an employee of his choice.

It is trite law that the right to a fair hearing is a constitutional imperative and is fairly expansive and encompasses the principles of natural justice namely *audi alterum partem* (no one shall be condemned unheard) and *nemo iudex in causa sua* (no man shall be judge in his own cause or rule against bias).

The right to fair hearing ordains that the employee must be accorded a reasonable opportunity to be heard on the charges preferred against him or her.

The right includes the right to be furnished with the materials the employer shall rely on in its case against the employee, the right to cross-examine witnesses, if any, and adduce evidence in support of his case.

The respondent's failure to issue the claimant with a notice to show cause showed that the claimant had no prior notification of the charge (s) prior to the invitation for the disciplinary hearing.

A notice to show cause generally signifies the commencement of a disciplinary process against the employee and generally identifies the charge and the relevant particulars which the employee is required to respond to in writing, a critical opportunity for the employee to explain his account and provide necessary evidence in support.

It additionally, accords the employee an opportunity to notify the employer whether he/she requires particular documents in preparation of his/her response.

The claimant was denied this opportunity which would have given the respondent the first response to the allegation for its consideration and if it was persuaded that the explanation was sufficient, no disciplinary hearing would have been necessary.

Clearly, the notice to show cause provides the employee with a critical safeguard and the response may be determinative and as **RWI** and **RWII** confirmed, a notice to show cause was necessary in this case.

The claimant was accorded about 5 days to prepare for the hearing.

Strangely, while **RWI** declined to comment on reasonableness or otherwise of the 5 days, **RWIII** stated that it was essential that the claimant be accorded reasonable time and it was reasonable in this case.

What is reasonable time in any given scenario is a question of fact dependent on the peculiar circumstances of the case as held in **Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd** [2013] eKLR.

While the (5) days ought to be sufficient for an employee to respond to charges in certain circumstance, in this case, the respondent tendered no evidence to show that the letter of invitation was received on the same day, and even if it was, the respondent had already denied him the opportunity to interact with and respond to the charge in writing and had to prepare his defence and search for a person to accompany him during the hearing.

Relatedly, although **RWII** confirmed on cross-examination that termination of the claimant's employment was based on the investigation report dated 18<sup>th</sup> January 2024, none of the witness adduced evidence to show that a copy was

forwarded to the claimant for purposes of preparing his defence to the charge.

It is trite law that availment of the materials the employer proposes to rely on at the hearing to the employee to enable him/her prepare a defence is an integral part of the right to fair hearing and although most employers seldom do so even after a formal request, it is the employee's right to have the documents including any investigation report as was in this case.

The documents not only contextualize the charge, they simultaneously enable the employee to respond to the charges more comprehensively and effectively.

In **Postal Corporation of Kenya V Andre K. Tanui** [2019] eKLR, the Court of Appeal stated:

*"The board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials which are more serious in nature, an accused is entitled to the statements that support the charge laid against him. That is the essence of fairness even outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future".*

These sentiments apply with equal force to the circumstances of the instant case.

See also **Regent Management Ltd V Wilberforce Ojiambo Oundo** [2018] eKLR and **OL Pejeta Ranching Co. Ltd V David Wanjau Muhoro** [2017] eKLR.

Finally, it is not in dispute that while the letter inviting the claimant to the disciplinary hearing dated 9<sup>th</sup> March 2024 had only one charge, and all respondent's witnesses confirmed as much, on cross-examination. The letter of termination of employment had a total of four (4) conclusions arrived at by the committee, more specifically, conclusion number four (4) concerning the lending of money fell outside the rubric of the other three (3) which related to the account of Vaika Paper and Stationery Ltd generally.

Although **RWIII**, Mr. John Nyamaiko testified that the issue was discussed during the disciplinary hearing, he adduced no evidence to prove that the respondent had brought the charge to the claimant's attention prior to the hearing.

Clearly, the respondent ambushed the claimant with the issue at the hearing which denied him the opportunity to respond to the issue effectively which implicated his right to fair hearing.

An employer is not permitted to terminate an employee's employment on grounds other than those that had previously been brought to the attention of the employee to respond to or be heard on it.

However, in this case the 1<sup>st</sup> conclusion which the disciplinary committee arrived at and which had been brought to the claimant's attention before the hearing took place, was sufficient.

Under Section 45(4) of the Employment Act,

**A termination of the employment shall be unfair for purposes of this part where-**

- (a) the termination is for one of the reasons specified in Section 46; or**
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with the justice and equity in terminating the employment of the employee.**

Sub-section (5) outlines the parameters which the court must consider in determining whether the termination of employment was just and equitable, including the procedure adopted, handling of the appeal, if any, and issuing of the certificate of service among others.

From the foregoing analysis, the court is satisfied and finds that the claimant demonstrated that termination of his employment by the respondent was procedurally unfair.

Another issue for consideration is whether the claimant was discriminated by the respondent or the latter acted in a discriminatory manner when it terminated his employment.

Although the claimant neither pleaded nor enumerate particulars of discrimination, he prayed for a declaration that the summary dismissal was discriminatory and general damages for discrimination.

It is trite law that the provisions of Article 27 of the Constitution of Kenya and Section 5(3) of the Employment Act outlaw direct and indirect discrimination on the ground of race, pregnancy, sex, marital status,

health status, ethnic or social origin, colour, age, disability, religion, culture, dress, language or birth.

Section 5(7) of the Employment Act imposes a heavy burden of proof on an employer whose employee alleges discrimination as it is required to disprove it.

In **Nyarangi & others V Attorney General** [2008] eKLR the court stated:

*“Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion, compared to someone without that attribute in the same circumstances”.*

Similarly, in **Simon Gitau Gichuru V Package Insurance Brokers Ltd** KESC 12 (KLR) the Supreme Court held:

*“From the above definition, it is clear that discrimination can be said to have occurred 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 without any objective and reasonable justification”*

See also **Samson Gweer & 5 others V Kenya Medical Research Institute & 3 others** [2020] eKLR, and **Mohammed Abduba Dida V Debate Media Ltd & another** [2018] eKLR.

As regards shifting of the burden of proof from the employee to the employer under Section 5(7) of the Employment Act, the decision of the Court of Appeal in **Nyachae V Kenya Orient Insurance Ltd** [2023] KECA 136 (KLR) is instructive, thus:

*“As noted above, the Section 5(7) of the Employment Act places the burden of disproving discrimination on the employer. The crux of that provision is that once an employee has made out a prima facie case of discrimination, the burden then shifts to the employer to disprove the allegation.*

*A prima facie case is one which a court properly directing itself would conclude on the evidence presented that there exists a right which has been infringed. Only then can the burden shift to the respondent to disprove the allegation...”*

In the instant case, the claimant bore the burden of establishing a *prima facie* case of discrimination. First, the claimant adduced no evidence on how the

respondent discriminated him or treated him in a discriminatory manner as neither the original witness statement dated 19<sup>th</sup> June 2025, nor the further witness statement dated 21<sup>st</sup> October 2025 isolated the particulars of discrimination.

From the original witness statement, it is discernible that the claimant appeared to be saying that because the DSE at the Sarit Centre Branch and the Operations Manager at the Kisumu Branch who dealt with the account opening forms of Vaika Paper & Stationery Ltd were not summarily dismissed, he was the only one targeted by the respondent.

Puzzlingly no evidence was adduced to show that the three employees dealt with the documents at the same stage or level or acted in a similar manner and in the case of the Operations Manager Kisumu Branch, Mr. Evans Mukhono, **RWI** testified that he was charged for receiving money and dismissed.

In the court's view, the Operations Manager did not have to be dismissed on the same ground as the claimant for equality of treatment to prevail and as adverted to elsewhere in this judgment, the claimant and the DSE

dealt with the forms at the same level generally but played very distinct roles.

The court noted that the DSE, Sarit Centre, Branch introduced the customer to the bank by handing over the account opening forms to the customer for completion and submission together with other relevant attachments. Her role ended at that point.

It is a matter of public notoriety that bank employees derive credit by introducing prospective account holders to the bank as banks compete for customers to utilize their products as confirmed by **RWI** Mr. Robinson Wachira, that Olivia Atieno issued the account of opening forms to obtain credit for it and does not appear to have been subjected to any disciplinary proceedings.

The claimant on the other hand brought the account home without making any inquiries from the Sarit Centre Branch.

From the record, other employees who played a role in the opening of the account were dismissed depending on what they did or did not do.

Without availment of evidence to show that all employees of the respondent who dealt with the account opening forms of Vaika Paper and Stationery Ltd were similarly circumstanced, it would be injudicious to find and hold that the claimant was treated differently without any justification, and in any case, other employees he did not identify were also dismissed from employment.

In the court's view, based on the materials on record, nothing turns on this issue.

### **Appropriate reliefs**

#### **Declaration that dismissal was unfair and unlawful**

Having found that termination of the claimant's employment was unfair for want of procedural propriety, the declaration sought is merited.

The declaration that the claimant's summary dismissal was discriminatory and violated his right to fair labour practices was not merited and it is declined as in the prayer for general damages for discrimination as no *prima facie* case of discrimination was made out for the respondents to disprove.

As regards salary in *lieu* of notice, Kshs.321,000.00, having found that the respondent had a substantive justification to summarily dismiss the claimant, the prayer for salary in *lieu* of notice is unsustainable by dint of the provisions of Section 44 of the Employment Act. The prayer is declined.

However, having found that termination of the claimant's employment was unfair, the claimant qualifies for compensation under the provisions of Section 49(1)(c) of the Employment Act up to a maximum of 12 months gross salary or salary as at the date of dismissal.

Although the claimant did not express his wish to remain in the respondent's employment, he testified that he appealed the decision and received a response. The claimant was an employee of the respondent for about 6 years and 7 months which is not long and had been a diligent employee until he dealt with the Vaika Paper and Stationery Ltd account and significantly, the claimant substantially contributed to the summary dismissal and availed no evidence of how he attempted to or mitigate the loss of employment.

In the circumstances, the court is satisfied that the equivalent of three (3) months gross salary is fair Kshs.321,000.00

The claimant is entitled to a certificate of service by dint of the provisions of Section 51 of the Employment Act.

In the upshot Judgment is entered in favour of the claimant against the respondent in the following terms:

- (a) *Declaration that termination of employment was unfair.*
- (b) *Equivalent of three (3) months gross salary Kshs.321,000.00 with interest at court rates from the date of Judgment till payment in full.*
- (c) *Certificate of service.*
- (d) *Costs at half the scale.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<sup>TH</sup> OF FEBRUARY 2026.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of

the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**  
**JUDGE**