



**Okinyi v Diamond Trust Bank (Employment and Labour Relations Cause
444 of 2019) [2026] KEELRC 781 (KLR) (18 March 2026) (Judgment)**

Neutral citation: [2026] KEELRC 781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 444 OF 2019**

**NJ ABUODHA, J
MARCH 18, 2026**

BETWEEN

DENNIS OURU OKINYI CLAIMANT

AND

DIAMOND TRUST BANK RESPONDENT

JUDGMENT

1. The Claimant through a Statement of Claim dated 2nd July, 2019 pleaded inter alia as follows: -
 - a. The Claimant averred that he was employed on contract in January 2014 and thereafter issued with a letter of permanent employment with effect from 1st January, 2015 by the Respondent vide the letter dated 6th November, 2014. That the terms of employment were the Claimant was employed as teller with a basic salary of Kshs 22,500/= and house allowance of Kshs 22,500/=. That he was entitled to notice of termination of one month and leave of 21 working days.
 - b. The Claimant averred that his remuneration was reviewed by the Respondent on 25th March, 2015 increasing both the basic salary and house allowance to Kshs 27,500/=. The same was reviewed again on 26th April, 2018 to Kshs 33,705/= for both the basic salary and house allowance.
 - c. The Claimant averred that on May, 21st 2018 the Respondent issued a staff benefits review to basic/house allowance ratio where house allowance was 15% of gross salary that is 15% of Kshs 67,416/= (Kshs 10,112.40p.m, leave allowance of 0-10 years at Kshs 9,000/= and over 10 years -Kshs 10,000/= and leave days at 24 days.
 - d. The Claimant averred that on 9th May, 2018 he was issued with a show cause and suspension from duty letter dated 9th May, 2018 where he was accused of sharing customer information without the customers consent and gave it out to a 3rd Party and he attempted



to open a fraudulent account while disregarding the Respondent's HR Policy on procedure, confidentiality.

- e. That he was suspended from duty effective 9th May, 2018 to pave way for further investigation. That he was called to show cause why severe disciplinary action should not be taken against him for contravening the bank's laid down policies and procedures and that his written explanation was to reach the Respondent by 11th May, 2018.
- f. The Claimant averred that he responded to the show cause letter by writing to the Head of Human Resource Management. He raised his concerns that he had not been kept abreast of the progress of the investigation and the linkages to him on the serious allegations, he acknowledged the occurrence of 28th April, 2018 where a gentleman had posed as a prospective client expressing interest in opening a new bank account with the Respondent's bank and he asked to be given information about a particular customer of the Respondent who he claimed had been doing business with but became unreliable as he was issuing him with cheques that bounced. That the showed him the image of the bounced cheque which he would have wished to have that client's account balance checked to allow him deposit the cheques issued to him. That the Claimant declined those requests and reported that occurrence to Mr. Peter Koome of the bank's fraud investigation department but instead of the bank following up on the fraudster they turned against him the whistle blower.
- g. On the second incident the Claimant averred that he had received a call from a client about a customer he preferred to be helped to open a bank account and when he found the customer in the banking hall he was shown account opening forms already filed. That he made further inquiries on the nature of the business that the referred client dealt with and he was told the company dealt with distribution of food stuff and was located in Lunga Lunga.
- h. That the Claimant stamped the documents and took them to the branch Manager to consult her whether they could hold the forms as they await for a letter introducing Bernard Otieno as an agent and also to let Bernard fill the correct agent application form. That he also requested her to verify if all other requirements were in order for account opening process.
- i. That when the branch Manager looked at the forms and name of the company (Mahitaji Enterprises) she asked him how he knew those people and he answered that they had been referred to him by a western Union client known as Dickens who was now like his friend because of regular interaction they had in the bank. That at that time Mr. Bernard was still in the banking hall, she held the forms and told him to just release Mr. Bernard and she was going to advise on the way forward.
- j. That when the forms were referred to Mr. Koome the Claimant was summoned to explain how he knew those people who were fraudsters. That fraud was stopped because of due diligence. That he challenged the Respondent's investigation officers to avail evidence to him in form of video, evidences or so linking him to the attempts to hack the bank's systems by hackers or fraudsters.
- k. The Claimant averred that on 25th May, 2018 he was invited to a disciplinary hearing which invitation fall short of requirement of the law for lack of the charges he was to defend himself after the investigations were carried out and he was not reminded to attend the hearing with union official or a colleague.
- l. The Claimant averred that on 4th July, 2018 he was served with termination of services letter which concluded that he had his services terminated on the allegations that he had attempted



to facilitate a fraudulent account opening in the month of March, 2018 at his bank branch of the Respondent.

- m. That he wrote to the Respondent's Head of Human Resource Manager requesting for full outcome of investigation report which was not honoured.
 - n. The Claimant averred that during the entire period of employment by the Respondent from 6th November, 2014 up to the date of termination of services on 4th July, 2018 he was underpaid both in the basic salary, house allowance and leave days and allowances to the tune of Kshs, 2,352,322/=
 - o. That the Kenya Bankers Association the umbrella body of the commercial banks in Kenya have a CBA with the banking Insurance and Finance Union (K) running from January, 2001 to-date which have binding rates of pay and other allowances for section heads, clerks and messengers.
 - p. That the Claimant was invited to a disciplinary hearing on 8th June where he appeared before a board chaired by head of HR Lilian Ngala together with Mr. Otiende, the head of the branch and Mr. Favouk head of products. That he was asked to explain verbally about the two incidents and to show cause why his services with the bank should not be terminated for aiding attempted frauds on the two occasions. That after the disciplinary hearing he was told to go and await the verdict on the two incidents.
 - q. The Claimant averred that on 8th June 2019 he was called to see HR Manager Yvonne who asked him to resign because he had failed to follow bank procedure but he refused to resign. That he was again summoned to the Respondent's offices on 12th June 2019 then on 13th June, 2019 when he was told by Yvonne that the bank had no case against him on the two incidents and was allowed to go on leave but on 4th July, 2019 he was terminated.
2. The Claimant in the upshot prayed for the following against the Respondent: -
- i. This Honourable Court to find that the Claimant suffered unlawful termination of his services for want of proper and lawful investigation procedures.
 - ii. This Honourable court to find and award the Claimant maximum compensation as provided in law for unlawful termination of services.
 - iii. This Honourable court to find and award for the Claimant that he was underpaid as enumerated i.e to the tune of Kshs 2,352,322/=
 - iv. Notice in lieu of notice.
 - v. Unpaid leave days
 - vi. Costs.
3. The Respondent filed its Response to the Statement of Claim dated 4th December, 2019 and averred inter alia: -
- a. The Respondent confirmed that the Claimant was employed on a fixed term contract of one-year effective January, 2014 which was later confirmed on a permanent basis effective January, 2015. That his salary was also revised in April and May 2016.
 - b. The Respondent averred that the Claimant admitted that sometime in April 2018 he was approached by a third party who requested access to a customer's bank account domiciled at the Respondent's Nakuru branch. That even though the Claimant stated that he did not share



the account details the Respondent's system logs indicate that he accessed and viewed the said account details and in particular the signatures and balance in the said account.

- c. The Claimant failed to give a reason or an explanation for viewing the said account details without any relevant authorization or express instructions from the account holder. That the said account was subsequently marked for no debits on suspicion that it was being targeted by the fraudsters and on 3rd May, 2018 a parallel cheque number 000157 drawn on the said account for Kshs 96,400/= was presented for clearance at the Respondent's Nakuru Branch. The Account holder confirmed that she had not written the said cheque and in fact still had that particular cheque leaf in her cheque book.
- d. The Respondent averred that contrary to the Claimant's averments about the second incident the Claimant had initially informed the Bank's investigators that he had received account opening forms in respect of a company that was an existing customer of the bank from his friend known as Mr. Dickens Ochieng. That it later emerged from a review of the Bank's CCTV footage that the person who delivered the account opening was one Benedict Otieno Odhiambo whose passport photo had been attached to the account opening form as the third signatory.
- e. That when the Claimant was confronted with this discovery the Claimant recanted his earlier statement and instead claimed that he had received a call from Mr. Dickens Ochieng informing him that the said Benedict Otieno Odhiambo was to deliver the account opening documents.
- f. That it was subsequently established that the directors of the company for which the Claimant was in the process of opening a new account had not authorized the account opening thereby casting aspersions in to the credibility of the Claimant's statement. The Claimant also stated that he had visited the customer's premises more than a month before receipt of the account opening forms which turned out to be inaccurate.
- g. That no director of the company was at the banking hall at the time of the attempted account opening. This was against the Bank's policy which requires the physical presence of directors during an account opening process. That to compound the suspicion the fraudster seeking to open the account insisted on being served by the Claimant who was at the time away from the branch.
- h. The Respondent averred that the Claimant had access to and was given all the documents and materials that the Respondent's Investigators relied upon during the investigation. Further the Claimant admitted that he was shown the CCTV footage that was relied upon by the bank's investigators. That the Claimant had prior knowledge of the charges facing him all the details had been outlined in the notice to show cause dated 9th May, 2018 and in the invitation letter for a disciplinary hearing dated 25th May, 2018.
- i. The Respondent averred that the Claimant was not employed in a unionisable position and was therefore a non-unionisable employee who is not subject to the terms of the alleged CBA. The Claimant's employment was only governed by his terms of services as contained in his letter of appointment and other relevant policies of the bank.
- j. The Respondent averred that sometime in April 2018 the Claimant was involved in an incident of sharing a customer's information to a third party. On or about the same period the Claimant again attempted to open a parallel fraudulent corporate account for an already existing customer of the Respondent.



- k. That these cases were handed over to the Respondent's security team for investigation. The Respondent's security and Investigations Department reviewed the two incidents and summarized their findings in an email dated 8th May 2018 which recommended that appropriate disciplinary action be taken against the Claimant.
- l. That by way of a show cause letter dated 9th May, 2018 the Claimant was asked to explain why he had shared a customer's account information with a third party without the customer's consent, contrary to the Bank's policies and procedures.
- m. That the Claimant was accorded ample time within which to respond to the show cause letter in accordance with the Respondent's Human Resources Policy. He responded to the show cause letter on 11th May, 2018. The Claimant was also suspended to pave way for further investigations in to the incidents in line with the Bank's Human Resources Policy on disciplinary.
- n. That the Claimant was subsequently invited by way of a letter dated 25th May, 2018 to attend a disciplinary hearing which took place on 8th June, 2018 and was attended by the Claimant. Contrary to the Claimant's allegation that he was not accorded an opportunity to be accompanied by a colleague during the hearing, the Claimant was not denied such an opportunity.
- o. That upon consideration of the Claimant's responses to the charges against him as captured in both the response dated 11th May, 2018 and the oral responses furnished by the Claimant at the disciplinary hearing the Respondent found that the Claimant's explanation was unsatisfactory and unacceptable. That the Respondent terminated the Claimant's services by way of a letter dated 4th July 2018 on grounds of gross violation of the Bank's Policies, dishonesty and negligence of duty.
- p. That the Respondent had valid reasons for terminating the Claimant's employment and did so lawfully upon following the proper procedure under the *Employment Act*.
- q. The Respondent averred that the Claimant was not entitled to the prayers sought in the Memorandum of claim and prayed that the same be dismissed with costs.

Evidence

- 3. The Claimant's case was heard on 24th July, 2025 and the Claimant herein (CW1) testified and adopted his documents, his trial bundle and his two witness statements as his evidence in chief. He stated that the Respondent was his employer and he was issued with a notice to show cause.
- 4. He stated that he was sent on compulsory leave and later called for a disciplinary hearing. That he was called and told to continue working where he worked normally and even proceeded for annual leave. That he was later issued with termination letter. That he was also arrested and arraigned in court and charged with offering false documents. That he was acquitted of the offence.
- 5. In cross-examination CW1 stated that he is an accountant and he was an officer of the Bank. That he used to open accounts for clients and answer customer queries. That it was his duty to ensure KYC when it came to opening accounts. That the duty was more stringent when it came to opening accounts for nonhumans personalities. That it was important to verify the documents before opening an account.



6. He further stated that the account opening form for Mahitaji Enterprises there was list of documents to be provided and he ticked all the documents received. That the client showed him the original documents which he was supposed to certify.
7. He confirmed that the gentleman had account opening forms in a brown envelop and were already filed. That the person was authorized to present the documents as he was a signatory to the account. That the two directors were to sign yet Benedict Odhiambo was a signatory to the account he was not a director.
8. He confirmed that he did not have a signed letter of authority to open account. He stated that he did not say he visited the site as the person who visited the site was not indicated. That he forwarded the form to the manager for further verification. That he was not allowed to access client information without the authority.
9. CW1 confirmed that he was asked by intended client to check if an existing client had money in the account because he had a cheque from the customer and his cheque kept on bouncing. That he accessed the customer's account. That he was not aware that he was not supposed to access a customer's account without a customer's authority. That customer's details are confidential.
10. He confirmed he was invited for a disciplinary hearing. He was taken through disciplinary hearing and terminated on 4th July, 2018. That he was underpaid and the computation was as per the CBA. That he was not unionisable employee.
11. In re-examination he clarified that he was not aware that the directors had to authorize in writing the opening of an account. That there were other people involved in the account opening. That he reported the issue of access to the account and the person who came to the bank to his manager. That the account was never opened. The issues raised arose during KYC.
12. The Respondent's case on the other hand was heard on 14th October, 2025 where the Respondent called two witnesses. The first Respondent witness was Peter Koome the fraud investigator of the Respondent RW1 herein. RW1 adopted witness statement dated 4th December, 2019 as his evidence in chief.
13. He stated that he examined some documents and came with a report. That he examined account opening documents. That he received a written statement from the Claimant and came up with a report after investigations.
14. In cross-examination he confirmed that he is a trained investigator but he had not filed his credentials in court. That they were unable to reach the people whose names appeared in the account opening forms as well as the person who brought the forms. That the CCTV footage only showed Claimant receiving the documents from Benedict Odhiambo.
15. He confirmed that the Claimant was well trained to detect fraud in branch but he had no proof of trainings in court. That the anomalies could be detected at first glance. That he was not aware if the report was shared with the Claimant during the disciplinary hearing.
16. RW1 confirmed that there was no loss because the fraudulent account was not opened and the cheque was not honoured. That the Claimant shared a customer's account details with third parties. That he accessed the account without customers' consent or any other authority contrary to the Bank's policy.
17. He stated that they carried out independent investigations on the fraudulent cheques. That the Claimant had contact with Steve who showed him a copy of a cheque and asked the Claimant to confirm details and signature held at the bank. That it was the same cheque rejected at Nakuru branch.



- The amount in the fraudulent cheque was the same as the one presented at Nakuru Branch. That the cheque was not shared with the Claimant.
18. In re-examination RW1 stated that the CCTV showed someone carrying an envelope entering the bank and he gave the documents to the Claimant who looked at them and returned them to the person. That the Claimant was trained on account opening procedures. That he was supposed to verify the authenticity of the documents.
 19. He clarified that the Claimant did not have sight of the required original documents. The Claimant did not do any site visit to assess the potential customer's business. That no loss was suffered. The Branch Manager detected the fraudulent documents and they flagged the account for debiting.
 20. He confirmed that it was not allowed for staff to randomly view a customer's accounts. That it could only be done with customer's consent.
 21. The second Respondent witness was Yvonne Murichu the Chief Manager HR of the Respondent RW2 herein. She adopted her witness statement sworn on 4th December, 2019 and the Respondent's documents filed with the response as her evidence in chief. In cross-examination RW2 stated that they relied on investigation report. That the evidence of sharing information to 3rd party was not before the court and the Claimant was not given the logs before the disciplinary hearing. That the fraud was reported by the branch manager and investigations conducted.
 22. She stated that the Claimant was not given the investigation report on the incident. She was not sure if an audit was conducted on other employees who accessed the account. That there were protocols for accessing customer's account. The person opening the account had to be in the banking hall. That they did not file documents showing the directors did not authorize the account opening.
 23. She confirmed that no reason was given for not giving the Claimant the investigation report. That she was not aware of any independent investigations on Dickens and Benedict. That the Claimant forwarded the documents to branch manager who was the one to give final authority.
 24. RW2 confirmed that it was part of HR policy to allow employees to be accompanied by a fellow employee at the hearing.
 25. In re-examination RW2 clarified that there was procedure for accessing a customer's account. The person opening the account had to be present and the staff must vet the documents before presenting them to branch manager.
 26. She stated that the Claimant did not ask to be accompanied and she was refused. That the Claimant signed off that a witness was not applicable.

Claimant's Submissions

27. The Claimant through his advocates Onyony & Company Advocates filed written submissions dated 18th November, 2025 and on the issue of whether the Claimant was unfairly, wrongfully and unlawfully terminated from employment counsel relied on among others the case of Pius Machafu lsindu v Lavington Security Guards Limited [2017] KECA 225 (KLR) on requirement for both substantive and procedural fairness before termination.
28. It was submitted that based on the determination in the above case and the provision of law, the Claimant herein was unfairly and wrongfully terminated as hereunder; first the disciplinary hearing that the Claimant was subjected to violated Section 41 (1) of the *Employment Act*, on the right



- of hearing before termination since the reasons were not communicated and the employee was not informed of the right to have another employee or union representative during hearing.
29. Counsel submitted that the Claimant's termination not only failed the substantive test but also the procedural test. The Claimant was terminated on account of alleged shortcomings contained in the Show Cause letter dated 9th May 2018. It was alleged that he had shared customer information with a third party. The Respondent did not prove the said claims against the Claimant and that the respondent's witnesses were not able to conclusively prove that the Claimant had shared customer information with a third party. The Claimant's position was that he never shared any customer information with a third party as alleged.
 30. Counsel further submitted that the Claimant was also accused of attempting to open a fraudulent account contrary to the laid down procedures. The Claimant however maintained that he followed the proper procedure and even brought to the attention of the Branch Manager the account opening forms as per guidelines. That he was not aware that the account opening forms were fraudulent and that the persons attempting to open the account were fraudsters.
 31. It was submitted that the Claimant was never made aware of the results of the investigation that took place leading to him being called for a disciplinary hearing. He was thus not able to sufficiently defend himself against the allegations levelled against him. Counsel relied on section 43 of the *Employment Act* on proof of reasons for termination and failure which leads to a finding of unfair termination. That the Respondent had not proved the reasons for termination as well as procedural test.
 32. It was submitted that the letter dated 25th May 2018 did not indicate the charges that the Claimant would be defending at the disciplinary hearing. The Claimant had been suspended pending investigations. The letter did not disclose anything relating to the outcome of the investigations that gave rise to the disciplinary hearing.
 33. Further the Claimant herein was not informed of his right to have another employee or a representative at the disciplinary hearing. This was confirmed by the Claimant marking "N/A" on the form he signed after the disciplinary hearing dated 8th June 2018 which showed that the section was not applicable to him. That such a hearing was held to be irregular in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR).
 34. Further, the Claimant was not given the Investigation Report prior to the disciplinary hearing and even during the said hearing to enable him mount his defence. Counsel relied on the case of *Freddy Kipkorir Lang'at v Co-operative University of Kenya* [2021] KEELRC 101 (KLR) on the need for documentation to prepare for defence.
 35. Counsel relied on section 47(5) of the *Employment Act* on respective burden of proof. The Claimant discharged the burden of proving that the termination was unfair while the Respondent had not justified the grounds of termination.
 36. On the issue of whether the Claimant was entitled to reliefs sought counsel submitted that the claimant was entitled to maximum compensation for unfair and unlawful termination in the sum of Kshs. 808,992. He relied on section 49(1) (c) of the *Employment Act* and urged that this court considers the circumstances that led to Claimant's termination and find that they were unfounded. In addition, there was nothing on record to show that the Claimant ever faced any disciplinary actions while in employment apart from this one leading to the termination of his service and that he was diligent, hardworking with a seamless work record evidenced not only by his contract renewal but also by his upward salary review.



37. That with all the circumstances considered, granting maximum compensation would serve justice to the Claimant who has no other source of income having worked for the Respondent in his entire peak career period.
38. On the claim for payment of one-month salary in lieu notice it was submitted that the Claimant's Contract dated 6th November 2014 provided under Clause 7 that in the event of termination, either party should give one month's notice or pay in lieu thereof. The Respondent terminated the Claimant's employment without notice and as such he was entitled to one month's pay in lieu of notice. That the Claimant herein ought be paid the sum of Kshs. 67,416 (being basic pay 33,708+ house allowance 33, 708).
39. On the claim of underpayments to the tune of Kshs. 2, 352, 322 counsel submitted that the Claimant pleaded that all through his employment with the Respondent, he was paid below the industry standards according to the CBA by the Kenya Bankers Association and the Banking Insurance Finance as enumerated in the pleadings hence entitled to the underpayments.
40. On the claim for unutilised leave days it was submitted that as per the CBA, the Claimant was entitled to 28 leave days annually. The Respondent however only granted him 21 days, contrary to the provisions of the CBA. In total therefore, the Claimant had a total of 34 days which when converted to money comes to Kshs. 119,332.

Respondent's Submissions

41. The Respondent's Advocates Oraro & Company Advocates filed its submissions dated 30th January, 2026 and on the issue of whether the termination of the Claimant's employment was unfair and unlawful counsel submitted on the need for both substantive and procedural fairness before termination. On substantive justification counsel relied on section 43(1) of the *Employment Act* on proof of reasons for termination and section 47(5) of the Act on respective burden of proof. It was submitted that in determining whether a termination was unfair and as provided for under Section 47(5) of the Act, the burden of proof was on the Claimant. On the other hand, the Respondent's duty pursuant to Section 43 and 45 of the Act was to show a valid reason or reasons for termination of employment. Counsel relied on the case of Cooperative Bank of Kenya Limited vs Banking Insurance & Finance Union (2017) eKLR, on this assertion.
42. It was submitted that the Claimant was involved in two (2) serious incidents which resulted in disciplinary action being taken against him and his subsequent termination from employment:
 - (a) Unauthorised access to a customer account and sharing customer information with a third party; and
 - (b) The fraudulent attempted opening of a corporate account.
43. Counsel submitted that whereas the Claimant did not dispute that these two (2) incidents happened, he alleged that the Respondent's witnesses were not able to conclusively prove that the Claimant had shared customer information with a third party and that he was not aware that the account opening forms were fraudulent and that the persons opening the account were fraudsters.
44. That during his cross-examination, the Claimant conceded that;
 - a) he was not presented with the original documents required for account opening prior to him certifying the copies;



- b) the person who gave him the account opening forms was neither a director of the company nor did he have any official authorisation from the bank;
 - c) he did not interview the directors of the company in question;
 - d) he did not conduct a site visit on 3rd March 2018 as he had indicated on the account opening form;
 - e) he did not complete the Know Your Customer (KYC) process;
 - f) He was approached by a third-party stranger and asked to check on the details of a customer account;
 - g) he accessed the customer account through the bank system without any express instructions from the customer; and
 - h) a customer's information held at the bank is confidential.
45. It was submitted that what amounts to fair or unfair termination is determined based on all the circumstances of each case. This was stated by the Court Appeal when considering the import of section 45 of the *Employment Act*, in *Kenfreight (EA) Limited vs Benson K Nguti* (2016) eKLR.
46. This test whether a reasonable employer could have decided to dismiss on those facts has been adopted and applied by our courts. Counsel relied on the case of *Judicial Service Commission v Gladys Boss Shollei & Another* (2014) eKLR, on the reasonable employer test. Applying this test, it was submitted that no reasonable employer in the banking sector, where trust, integrity, and confidentiality are paramount, would have retained an employee who accesses customer accounts without authority and attempted to facilitate the fraudulent account opening in contravention with the Bank's Policies and Procedures.
47. Counsel submitted that based on the above sentiments, the Respondent had lawful and justifiable reasons to terminate the Claimant's employment on the basis of the allegations set out in the show cause letter.
48. On Procedural Fairness counsel relied on section 41 of the *Employment Act* which provides for notification and hearing before termination. Counsel relied on the case of *Amos Kitavi Kivite v Kenya Revenue Authority* (2020) eKLR, on the need for fair procedure and section 41 being coached in mandatory terms.
49. It was submitted that prior to the termination of the Claimant on grounds of misconduct, the Respondent issued the Claimant with a show cause letter on 9th May 2018 requiring him to show case as to why disciplinary action should not be taken against him for the two (2) incidents discussed above. The Claimant responded to the show cause letter on 11th May 2018.
50. That the Claimant's response to the show cause letter was found to be unsatisfactory as it did not adequately address the issues raised in the letter. The Respondent being dissatisfied with the Claimant's response to the show cause letter, by way of a letter dated 25th May 2018, invited the Claimant to a disciplinary hearing which took place on 8th June 2018 and was attended by the Claimant. That upon consideration of the Claimant's responses to the charges against him as captured in both the response dated 25th May 2018 and the oral responses furnished by the Claimant at the disciplinary hearing, the Respondent found that the Claimant's explanation was unsatisfactory and unacceptable. The Claimant was therefore terminated vide a letter dated 4th July 2018 and in accordance with the Respondent's terms and conditions of employment.



51. To that extent therefore, it was submitted that a fair procedure was followed and adhered to in accordance with the mandatory provisions of section 41 prior to the termination of the Claimant's employment.
52. On the issue of whether the Claimant was entitled to the reliefs sought in the Memorandum of Claim counsel submitted on maximum compensation for unfair and unlawful termination at Kshs. 808,9921- and relied on section 49(1) which governed the remedies for unfair termination while submitting the Claimant was not unfairly or unlawfully terminated and as such was not entitled to damages for unfair termination however, should the Court be inclined to find that the claimant was unfairly terminated, then the Court should be guided by the decisions in the award of damages and that 12 months' salary would be excess and would amount to unjust enrichment. Counsel relied on the case of Abraham Gumba vs. Kenya Medical Supplies Authority [2014]1EKLR (Cause Number 1073 of 2012).
53. It was further submitted that where a contract of employment is terminable by payment of salary in lieu of notice, then the Court will award the salary due in lieu of notice period. Reliance was placed on the case of CMC Aviation Limited vs. Mohammed Noor Civil Appeal No.199 of 2013.
54. Counsel submitted that similarly, in the case of Kenya Airways Limited vs. Aviation & Allied Workers Unio Kenya & 3 Others [2014] eKLR, the Court of Appeal in reversing the Employment and Labour Relations Court's twelve (12) months' pay compensation order and awarding six (6) months' pay as compensation stated the factors the Court should consider when awarding compensation.
55. Counsel relied on the case of Standard Group Limited v Jenny Luesby [2018] eKLR, where the court held that compensatory awards are not meant to be a punishment for the employer, but rather an attempt to offset the financial loss resulting from the wrongful act of the employer.
56. That the Claimant is not entitled to this prayers because there were valid reasons for her termination from employment. In addition to the above, the Claimant was paid all his terminal dues upon his termination.
57. On the claim of one-month salary in lieu of notice - Kshs. 67,416/- counsel submitted that the same was unsubstantiated since her Letter of Appointment dated 5th November 2014 at Clause 7 provide for immediate termination in cases of breach of the provision.
58. It was submitted in light of the foregoing, and having regard to the Claimant's proven misconduct which went to the root of the employment relationship, the Respondent lawfully exercised its contractual right to terminate the Claimant's employment without notice or payment in lieu thereof. The Claimant's claim for one (1) month's salary in lieu of notice was therefore without contractual or legal basis and ought to be dismissed in its entirety.
59. On the claim of underpayments - Kshs. 2,352,322 counsel submitted that the Claimant's claim for underpayment was premised on the allegation that he was not remunerated in accordance with the Collective Bargaining Agreement (CBA) entered into between the Kenya Bankers Association and the Banking Insurance Finance Union.
60. However, the Claimant was not employed in a unionisable position and was therefore a non-unionisable employee to whom the terms of the CBA did not apply. His remuneration was governed strictly by his contract of employment and the Respondent's internal remuneration policies. In addition, no union dues or agency fees were ever deducted from the Claimant's salary or remitted to the Union on his behalf, a prerequisite for entitlement to benefits under the CBA.



61. On the claim of unutilised leave days - Kshs. 119,332 counsel submitted that the Claimant again pegged on the CBA yet he was not a member of the Union.

Determination And Disposition

62. The court has reviewed and considered the pleadings, documents filed and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by counsel and is of the view that there are only two main issues to be determined in the claim, namely;
- i. Aa. aa. Whether the Claimant's termination of employment was unfair and unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.

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

63. It was the Claimant's case that the Respondent unfairly terminated his service on allegation of sharing customer account details to third party and attempting to open fraudulent corporate account. The Claimant claimed that he never shared client's account information to third party and he followed procedure in opening the alleged fraudulent account. That the Respondent did not prove the reason for termination. That the procedure followed was unfair as he was not given the charges to defend himself or opportunity to attend with a colleague or union official.
64. The Respondent on the other hand alleged that the Claimant was guilty of the charges of accessing the customer's account and sharing the same to third party as well as attempting to open a fraudulent corporate account. That it had justifiable reasons for termination and followed the right procedure while terminating the Claimant.
65. It was not in dispute that the Claimant was an employee of the Respondent who was first engaged on one-year contract from January, 2014 until he was employed on permanent basis with effect from January, 2015 vide the contract of employment dated 6th November, 2014.
66. The requirements for employers to terminate employee's employment contracts on fair and valid reasons is governed under section 43 of the *Employment Act* where the termination becomes unfair if there are no valid reasons for termination under section 45 of the Act. The reasons must be those the employer must have believed to exist which caused the termination of the employees' service. The test was whether any reasonable employer put in similar circumstances would consider termination as the most appropriate action to take. The burden of proof for the parties is as governed by section 47(5) of the *Employment Act* where the Claimant ought to illustrate a termination which was unfair occurred and the Respondent to justify the grounds for the termination.
67. The court is also guided by case law such as in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:
- “There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
68. In this case the charges were unauthorised access to a customer account and sharing customer information with a third party; and the attempted fraudulent opening of a corporate account. The



- Claimant confirmed during hearing that he did access the customer account details without authority and the customer details were supposed to be confidential. That he was not aware that he was not supposed to access the details.
69. On the issue of attempting to open a corporate account it was clear that the directors of the company which was already in existence did not appear in the banking hall, they did not authorize the said Benedict to transact on their behalf, the Claimant did not visit the site and he did not verify the documents as required.
70. It was also clear that the said account was flagged for debits and a cheque of Kshs 96,400/= was presented which is the same cheque the person showed to the Claimant. Even though the Respondent did not provide evidence of directors of the Company confirming this fact it was clear if the account was not flagged fraudulent activities could have taken place.
71. Even though no loss occurred the same was prevented before it happened. It was also curious why the Claimant was the one in contact with the fraudsters with the person who brought the forms insisting on being served by the Claimant. He confirmed that the client was referred by Dickens who they had interacted severally and he was like a friend.
72. Section 43 of the *Employment Act* states that for termination or dismissal from employment to be held valid, an employer must have genuinely believed the reasons existed which caused termination of the employee's service. Justice Professor Ojwang' in the case of Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009 as cited in Republic Vs National Police Service Commission Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR observed as follows:
- “ There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed”
73. The Court of Appeal in Civil Appeal No 66A of 2017, Kenya Revenue Authority v Reuwel Waitthaka Gitahi & 2 others [2019] eKLR held as follows on the standard of proof: -
- “ The trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services.”
74. From the above, it was clear the Respondent genuinely believed the Claimant to have accessed the customer account and shared the information with third party and attempted to open the corporate account fraudulently above. The court notes that any reasonable employer in the same position as the Respondent would have lost trust in the Claimant more so when it is a financial institution where trust and honesty was paramount.



75. The test is always whether a reasonable employer would terminate an employee based on the same facts as was held by Lord Denning in the often-cited case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 stated:
- ‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him’
76. The Claimant who never denied his involvement in the activities only stated that he did not know he was not supposed to access client’s account details yet he confirmed the same to be confidential. In addition, although the Respondent did not provide evidence of trainings of the Claimant, the Claimant who had worked for around 4 years with the Respondent ought to have been an experienced employee who protects the Respondent from such fraudulent activities. He was aware of the Respondent’s procedure manuals which were clear about customer’s details being kept confidential.
77. The Court is therefore inevitably driven to find and hold that the Respondent had valid and reasonable grounds to terminate the services of the Claimant as it did.
78. Regarding procedural fairness it is now an established principle that for termination to pass fairness test there should be both substantial and procedural fairness in a number of cases including in the case of *Janet Nyandiko vs Kenya Commercial Bank Limited* (2017) eKLR among others. Further Section 41 is the guiding law on the procedural fairness which must be adhered to by an employer. It was the Respondent’s case that the disciplinary process against the Claimant was procedural and fair.
79. The court notes that the Claimant was issued with a show cause letter of 9th May, 2018 which he responded to on 11th May, 2018. The response was found unsatisfactory and on 25th May, 2018 the Claimant was invited for a disciplinary hearing on 8th June, 2018. The Claimant attended the hearing and even though he stated that he was not informed of his right to attend the hearing with a colleague or union official the Respondent confirmed that its manual provided that he could attend with one and he did not attend with one and he was denied.
80. In addition, the attendance without a colleague cannot really invalidate a hearing between an employer and employee. So long as the employer tried to meet the required threshold for a hearing this court ought not be seen to conduct a near forensic investigation of internal processes of an employer.
81. The Claimant alleged that he was not given the investigation report. This court notes that even though the Respondent did not furnish the Claimant with an investigation report the charges were well stipulated in the show cause letter and he could defend himself properly. In addition, the Claimant never denied the occurrence of the charges he was charged with.
82. The court is therefore convinced that the Respondent followed the due process in terminating the Respondent’s employment even if the investigation report and the logs were not shared with the Claimant.
83. In the above regard the court further finds and holds that in terminating the Claimant’s service the Respondent followed a fair procedure and had valid reasons hence the termination was fair.



Whether the Claimant is entitled to reliefs sought.

84. Having established that the Claimant was fairly terminated the court proceeds to find that he was not entitled to compensation for unfair termination or the one month notice since he breached the provision of his contract which allowed for immediate termination.
85. On the claims of underpayment and unutilized leave which were based on the CBA the Claimant confirmed that he was not unionisable employee which can be discerned from his pay slips which showed no union membership deductions. This therefore meant that the CBA terms were not applicable to him but the existing terms in his employment contract. The Claimant was not entitled to these prayers.
86. In conclusion the Claimant's claim is hereby found without merit and is hereby dismissed with costs.
87. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF MARCH 2026

DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2026

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION.

