



**Kenya Union of Commercial, Food and Allied Workers v National Hospital Insurance Fund (Cause 788 of 2012) [2025] KEELRC 155 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 155 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 788 OF 2012  
J RIKA, J  
JANUARY 31, 2025**

**BETWEEN**  
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED  
WORKERS ..... CLAIMANT**  
**AND**  
**NATIONAL HOSPITAL INSURANCE FUND ..... RESPONDENT**

**JUDGMENT**

Representation

Court Assistant: Bernard Kirui

Dickson Atela, Assistant General Secretary for the Claimant

Acorn Law Advocates for the Respondent

1. This Claim was filed in 2012, at the Industrial Court of Kenya.
2. It seems to have moved from one Judge to the other, against the backdrop of persistent transfer of the trial Judges. Proceedings had to be typed for incoming Judges, slowing down hearing and disposal of the dispute.
3. The issues in dispute are not complex, but routine issues revolving around unfair termination. The witnesses called by respective Parties are not many, and the dispute, with a proper follow-up by the Parties and the Registry, ought to have been finalized years ago.
4. It was possible for instance, to have the file forwarded to the initial trial Judge at Mombasa, when he was transferred in 2014. Both Parties are large organizations, with representation countrywide, and capable of litigating at any corner of the country, outside the city of Nairobi. Other pending files were forwarded to Mombasa and dealt with timeously.



5. There is no reason why a dispute on unfair termination, should last 13 years in the corridors of industrial justice.
6. The 1<sup>st</sup> Grievant, Sostine Wamalwa, gave evidence way back on 17<sup>th</sup> October 2012, 13 years ago.
7. It was not until 28<sup>th</sup> June 2024, that the last witness for the Respondent, Lucy Kande gave evidence, closing the hearing.
8. The Statement of Claim was filed on 9<sup>th</sup> May 2012. The Claim is brought by the Claimant Union, on behalf of its 3 members [Grievants], Peter Muthemba Kimani [1], Sostine Wamalwa [2], and Peter Nzioka [3].
9. The Grievants were employed by the Respondent State Corporation on various dates, in the position of clerical officer. The 1<sup>st</sup> Grievant later became an assistant auditor.
10. The 1<sup>st</sup> Grievant, employed on 1<sup>st</sup> August 1991, was dismissed on 16<sup>th</sup> September 2010. He was alleged to have failed to detect and report inconsistencies, in the Respondent's bank reconciliation, at his branch in Naivasha.
11. The 2<sup>nd</sup> Grievant, employed by the Respondent on 1<sup>st</sup> September 1992, was dismissed on 15<sup>th</sup> April 2011, on the allegation of fraud.
12. The 3<sup>rd</sup> Grievant, employed by the Respondent on 2<sup>nd</sup> May 1991, was dismissed on 15<sup>th</sup> March 2011, also on allegation of fraud. He and the 2<sup>nd</sup> Grievant, were stationed at the Respondent's Westlands branch, Nairobi.
13. 1<sup>st</sup> Grievant: It is pleaded that he was issued a letter to show cause, which he responded to, on 27<sup>th</sup> July 2010. He was not accorded a disciplinary hearing. The Claimant Union was not involved in the audit process to establish the 1<sup>st</sup> Grievant's culpability. The audit report was not disclosed in its entirety to the 1<sup>st</sup> Grievant. The Respondent failed to act on the 1<sup>st</sup> Grievant's recommendation, on how to prevent fraud. The account which was misappropriated was a petty cash account, managed by the area manager and accountant. The 2 were supposed to enter the transactions in the system, and forward the voucher to the 1<sup>st</sup> Grievant. They did not do so, and the 1<sup>st</sup> Grievant could not bear blame.
14. The system at the 1<sup>st</sup> Grievant's branch at Naivasha was manual, while other branches operated an online system. The physical books of account all tallied. The revenue department did not raise any red flags. The head office failed to detect fraudulent transactions, and blamed the 1<sup>st</sup> Grievant.
15. It is pleaded that the 1<sup>st</sup> Grievant was constructively, unfairly and unlawfully dismissed. Dismissal was contrary to Sections 41, 43 and 45 of the [Employment Act](#), and in breach of the right to fair labour practices, and rules of natural justice.
16. He was denied his right of appeal.
17. It is not clear from the Statement of Claim, how the concept of constructive dismissal was implicated, the decision to terminate the 1<sup>st</sup> Grievant's contract, having been explicit.
18. 2<sup>nd</sup> Grievant: He was issued a letter to show cause, dated 21<sup>st</sup> October 2010 [not 2012 as pleaded]. He responded on 1<sup>st</sup> November 2010. He was heard by the staff advisory committee, on 1<sup>st</sup> March 2011. He unsuccessfully appealed against the decision to dismiss him, on 5<sup>th</sup> May 2011.
19. It is pleaded that the 2<sup>nd</sup> Grievant too, was constructively, unfairly and unlawfully dismissed.



20. There was no valid report, directly implicating the 2<sup>nd</sup> Grievant with fraud. He was not provided all the relevant documents pertaining to the allegations of fraud, even after he put out a demand to the Respondent. The allegations did not fall within the 2<sup>nd</sup> Grievant's docket. He was not responsible for postings and updating on the system. The Respondent failed to produce the audit report, audit trail and original banking slips, to support the allegations against the 2<sup>nd</sup> Grievant. He was not issued the investigations report. His response to the letter to show cause, was not properly considered.
21. 3<sup>rd</sup> Grievant: Although there was an express decision made to dismiss the 3<sup>rd</sup> Grievant, its pleaded that he too, was constructively dismissed. He responded to the letter to show cause, on 1<sup>st</sup> November 2010 [again the year is erroneously pleaded as 2012]. He appeared before the staff advisory committee for hearing on 1<sup>st</sup> March 2011. He unsuccessfully, appealed against the decision to summarily dismiss him, on 29<sup>th</sup> April 2011.
22. The Claimant complains that the response by the 3<sup>rd</sup> Grievant was not given full consideration. Although there were 30 allegations against the 3<sup>rd</sup> Grievant, only 3 were put to him, at the disciplinary hearing. The dismissal letter was back-dated irregularly.
23. The Claimant states that the 3<sup>rd</sup> Grievant was denied a hearing on appeal. The allegations made against him, did not fall within his docket.
24. It is pleaded on the part of the 3<sup>rd</sup> Grievant that he was constructively dismissed. It is also pleaded that he was expressly, unfairly and unlawfully dismissed, contrary to Sections 41, 43 and 45 of the [Employment Act, 2007](#).
25. Prayers: The Claimant prays on behalf of the Grievants, for the following orders: -
  - a. Reinstatement without loss of benefits, seniority and privileges.
  - b. In the alternative to [a] the 1<sup>st</sup> Grievant be deemed to have been retired normally, without loss of benefits.
  - c. In the alternative to [a] the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants be paid-
    - i. 12 months' salary in compensation for unfair termination.
    - ii. Leave, salary for days worked, and other due benefits.
    - iii. Costs of attending conciliation meetings.
    - iv. Cost of the Claim.
26. The Respondent filed its Statement of Response on 17<sup>th</sup> July 2012. Its position is that the 1<sup>st</sup> Grievant worked for the Respondent at Naivasha branch, as the internal auditor. It was his duty to detect and report inconsistencies in bank reconciliation.
27. Loss of revenue was reported at the branch. The 1<sup>st</sup> Grievant was interdicted to pave way for investigation, on 9<sup>th</sup> June 2010. Audit was carried out on 31<sup>st</sup> May 2010 and 2<sup>nd</sup> June 2010. It disclosed irregularities, leading to loss of Kshs. 7,993,600.
28. He was issued a letter to show cause, dated 19<sup>th</sup> July 2010, with details of the charges. He replied on 27<sup>th</sup> July 2010. The Respondent heard his explanation and concluded that he was negligent. A decision was taken to terminate his contract.
29. The 1<sup>st</sup> Grievant appealed against the decision to dismiss him, through his letters dated 22<sup>nd</sup> September 2020 and 17<sup>th</sup> November 2010. He was invited for appeal hearing through a letter dated 20<sup>th</sup> January



2011. Hearing was scheduled for 3<sup>rd</sup> February 2011. The 1<sup>st</sup> Grievant did not turn up. Hearing was rescheduled to 2<sup>nd</sup> November 2011. The appeal was duly heard. The committee recommended that the appeal is heard, alongside other appeals, by a management committee. The Claimant pre-empted hearing by filing this Claim.
30. The system at Naivasha was online, not manual. The 1<sup>st</sup> Grievant himself wrote a letter dated 3<sup>rd</sup> April 2008, confirming that the system was online. The books of account at his branch, did not tally. Termination was based on valid reason, and was fairly executed.
  31. With regard to the 2<sup>nd</sup> Grievant, 91 fraudulent entries were noted at his Westlands branch in Nairobi. He was interdicted, and issued a letter to show cause, dated 21<sup>st</sup> October 2010. He replied on 1<sup>st</sup> November 2010.
  32. He was invited for disciplinary hearing before the staff advisory committee, and heard on 1<sup>st</sup> March 2011. His representations were fully considered, and a decision taken to dismiss him on account of gross misconduct, which included: falsification of records; failing to detect and report discrepancies; failing to bank cash payments; understating cash collections; showing cash collections as cheque collections; failure to detect cheques from certain Employers had not been updated; doctoring or showing reduced collections; making 91 fraudulent entries; and causing loss of Kshs. 452,260 to the Respondent.
  33. The 2<sup>nd</sup> Grievant appealed against the decision to dismiss him, on 5<sup>th</sup> May 2011. He was heard on appeal, on 2<sup>nd</sup> November 2011. The disciplinary committee resolved to summarily dismiss the 2<sup>nd</sup> Grievant. He appealed further to the management staff committee. Hearing was thwarted by the Claimant's decision to institute the Claim herein.
  34. The 3<sup>rd</sup> Grievant was also stationed at Westlands. 30 fraudulent entries were attributed to him. He was interdicted, and issued a letter to show cause, dated 21<sup>st</sup> October 2010. He replied on 1<sup>st</sup> November 2010. He was heard by the staff advisory committee on 1<sup>st</sup> March 2011. A decision was made to dismiss him, which was communicated to him, through the letter dated 15<sup>th</sup> April 2011.
  35. Particulars of gross misconduct against the 3<sup>rd</sup> Grievant, are mostly word for word similar, to those relating to the 2<sup>nd</sup> Grievant, stated at paragraph 31 above. The only difference is in the number of fraudulent entries and loss, attributed to the respective Grievants.
  36. The 3<sup>rd</sup> Grievant appealed against the decision to dismiss him. His appeal was heard on 2<sup>nd</sup> November 2011, and a resolution made by the committee, to summarily dismiss him. He appealed further to the management committee. The Respondent states, as in respect of the other Grievants, that the appeal to the management committee was thwarted by the Claimant, through its institution of this Claim. Termination was fair and lawful.
  37. Common to all the Grievants, the Respondent states that the Grievants' contracts were terminated fairly and lawfully, in accordance with the *Employment Act*, and the CBA between the Parties. The Respondent attended all conciliation meetings. The Claimant opted not to exhaust the appeals filed before the management committee, but instead chose to file the Claim. The Claimant also ignored a letter from the Ministry of Labour, offering to have conciliation redone by a new Conciliator.
  38. The Respondent states that the Grievants are not entitled to reinstatement, normal retirement, or monetary claims. It is proposed by the Respondent to have the Claim dismissed with costs.
  39. The Grievants gave evidence in July 2012, May 2013, October 2016, February 2017, and December 2018. Senior administration officer, Kimulwon Chesaina, a former internal auditor, gave evidence for



the Respondent on 5<sup>th</sup> December 2018. Respondent's manager treasury and investments, Bernard Nyaga gave evidence on 3<sup>rd</sup> October 2023. The last witness, human resource assistant manager, Lucy Kande, gave evidence on 3<sup>rd</sup> October 2023, 15<sup>th</sup> February 2024, 8<sup>th</sup> March 2024, and 28<sup>th</sup> June 2024, closing the hearing, over a decade since the hearing commenced.

40. The Claim was last mentioned on 4<sup>th</sup> November 2024, when the Parties confirmed filing and exchange of their Submissions.
41. The Grievants restated their respective positions, as pleaded by the Claimant. These positions are summarized by the Court above, and it is not necessary to rehash those pleadings.
42. On cross-examination, the 1<sup>st</sup> Grievant Peter Kimani, told the Court that he had been given his job description by the Respondent. He was to audit payment vouchers. The vouchers would first be approved by the branch manager. His branch at Naivasha would collect revenue and pay out claims. Between 2007 and 2010, there was no online banking. Cheques from contributions, were received by the accountant, and banked in revenue account. The 1<sup>st</sup> Grievant would look at the collections, to see if targets were met. He had no access to bank statements. The collections were entered in the system. The 1<sup>st</sup> Grievant would know about the collections made, from the system. He had reported that the system was working well. Cheque payment was manual, and the 1<sup>st</sup> Grievant had much more responsibility, than just checking that cash vouchers. Maintenance of the cashbook, was the accountant's responsibility. He nonetheless had the responsibility to make enquiries from the accountant. He was aware that the accountant and the manager at the branch, were interdicted and dismissed over the same allegations made against the 1<sup>st</sup> Grievant.
43. The 2<sup>nd</sup> Grievant Sostine Wamalwa, told the Court that the complaint, on misappropriation of funds, came from auditors, at the head office. It was his role to receive contributions and bank. He would also receive cheques. Reconciliation was at the end of the day. It would show the total received. The 2<sup>nd</sup> Grievant generated FO17, attached receipts and forwarded to his supervisor. He would bank the collections the following day. There was a problem reported relating to cash and cheque collections at the branch. The 2<sup>nd</sup> Grievant was alleged to have updated cash to read as cheque payments. He stated that his supervisor, Simon Kubio, made the changes. He did not witness Kubio making any changes, before he made this accusation against Kubio. The 2<sup>nd</sup> Grievant's password was personal, and unknown to Kubio. Changes could only be made with the knowledge of the head office. The 2<sup>nd</sup> Grievant denied that he altered cash for cheque payments. A sample of the transactions handled by the 2<sup>nd</sup> Grievant, is contained at page 52 of the Respondent's bundle of documents.
44. He receipted cash payment of Kshs. 5,820 from Black Diamond Limited on 11<sup>th</sup> March 2010. He received cheque number 227145 for the sum of Kshs. 382,160 dated 9<sup>th</sup> December 2009. It is the same number cited in the system, captured at page 59 of the Respondent's bundle. The amount however is reduced to Kshs, 371,980. Page 46 of the Respondent's supplementary documents, show that the 2<sup>nd</sup> Grievant made additional entries. "I do not recall what I added. I do not know the nature of updating," he told the Court. Other discrepancies with multiple customers, were noted.
45. The 3<sup>rd</sup> Grievant's overall evidence, was similar to the 2<sup>nd</sup> Grievant's. He would receive cash or cheque, for statutory payments from various Employers. He would issue receipts, generated from the system. He would reconcile the amounts and capture amounts in F017. The contributor's name did not appear on the F017. He did not post lesser amounts than he received.
46. He was removed from the cash office. He was shown documents indicating discrepancies. He was shown receipts held by customers. The entries in the system were different, from what the customers paid. There were anomalies.



47. All the Grievants confirmed that they were issued letters to show cause; all except the 1<sup>st</sup> Grievant, agreed that they were heard before the staff advisory committee; and all lodged appeals unsuccessfully.
48. Kimulwon Chesaina adopted as her evidence-in-chief, her witness statement and documents filed by the Respondent. The witness statement reflects the contents in the Respondent's pleadings.
49. She told the Court on cross-examination, that she carried out audit at Naivasha branch. The 1<sup>st</sup> Grievant was an assistant auditor at the Branch. She looked at the documents but did not recall interviewing the 1<sup>st</sup> Grievant. The bank reconciliation section was responsible for tracking deposits and withdrawals. She did not recall the section raising any red flags. She did not know if other officers at Naivasha were disciplined. She investigated the accountant as well. She had all the records, and there was no need to interview the 1<sup>st</sup> Grievant. He was not a signatory to the branch account.
50. Bernard Nyaga, assistant manager internal audit at the time, audited Westlands branch. He prepared a report dated 1<sup>st</sup> October 2010. His report touched on the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants.
51. On cross-examination, he told the Court that he examined every transaction where cash, was alleged to have been misappropriated. Cashiers received both cash and cheques from customers. Accountant would count and compare what was received by the cashier, and compare with Financial Order 17 [FO17]. If it did not tally, the accountant would return the document to the cashier. Anomalies were supposed to be corrected by the supervisor. The receipts issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants read like cheque, not cash receipts. No anomaly was raised with the branch manager however. Kubio was the accountant. He verified collections. Several Employees at the branch handled cash. Page 46 of the Respondent's documents, shows payment made by an Employer, Securex Limited. The amount captured in the system was Kshs. 412,000, instead of the correct amount paid by Securex, of Kshs. 422,910. There was a variance of Kshs. 10,480. The transaction was handled by the 2<sup>nd</sup> Grievant. The 2<sup>nd</sup> Grievant was involved in similar fraud regarding a company called Butanoik Investment Limited. The figures were manipulated. The Grievants manipulated the records, changing cash payments to cheques, leading to loss of revenue to the Respondent. FO17 was not helpful, because there was manipulation from the outset.
52. The last witness Lucy Kande, relied on her witness statement and documents filed by the Respondent in her evidence-in-chief, affirming that the Grievants' contracts were all terminated fairly, on account of valid reasons.
53. Cross-examined, she told the Court that there was no record of the 1<sup>st</sup> Grievant's initial hearing. He was however heard on appeal, and granted an opportunity for a second appeal. The 1<sup>st</sup> Grievant's designation as an assistant auditor, did not mean that he was assisting another officer. It was just a designation. At conciliation, it was agreed that the Respondent would supply the Claimant with all the relevant documents. There is no evidence that the Claimant was supplied the relevant documents.
54. One Jillo Mungatana, was the Naivasha branch accountant. He was shown to have made certain withdrawals from the branch account, even before the 1<sup>st</sup> Grievant joined the branch. The Grievants were trained to handle transactions. They were represented by the Shop Steward, Shadrack Nakitare, at the various levels of hearing. Nakitare did not sign the minutes. Kande told the Court she was not an auditor, and would not be able to answer certain questions put to her, regarding the actual audits.
55. The issues are whether the Grievants' contracts were terminated fairly, and on account of valid reasons; and whether they merit the prayers sought.



### **The Court Finds: -**

56. The 1<sup>st</sup> Grievant was employed by the Respondent on 1<sup>st</sup> August 1999, and dismissed on 16<sup>th</sup> September 2010. He worked at Naivasha branch, at the time of dismissal, in the position of assistant auditor.
57. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were clerical officers, stationed at the Respondent's Westlands branch. The 2<sup>nd</sup> Grievant was employed in 1992, and was dismissed on 15<sup>th</sup> April 2011. The 3<sup>rd</sup> Grievant was employed on 2<sup>nd</sup> May 1991. He was dismissed on 15<sup>th</sup> March 2011.
58. Procedure: There were allegations of fraud against the Grievants. Their respective branches were audited. They were issued letters to show cause, why disciplinary action should not be taken against them, on account of fraudulent entries, disclosed through audit. They all responded.
59. There is no evidence that the 1<sup>st</sup> Grievant was granted a disciplinary hearing from the outset, after he responded to the letter to show cause.
60. There is no record of such a hearing. Lucy Kande told the Court on cross-examination, with respect to the 1<sup>st</sup> Grievant, that "there is no record of initial hearing."
61. This position by Kande, is supported by the Respondent's Statement of Response, at paragraphs 5 - 8. The Respondent pleads that the 1<sup>st</sup> Grievant was interdicted on 9<sup>th</sup> June 2010. Audit was carried out at Naivasha branch, on 31<sup>st</sup> May 2010 and 2<sup>nd</sup> June 2010. The 1<sup>st</sup> Grievant was issued a letter to show cause dated 19<sup>th</sup> July 2010. He replied on 27<sup>th</sup> July 2010. At paragraph 8, the Respondent states that it terminated the 1<sup>st</sup> Grievant's contract on 16<sup>th</sup> September 2010.
62. There was no invitation to disciplinary hearing, and no disciplinary hearing, after the 1<sup>st</sup> Grievant responded, to the letter to show cause, on 19<sup>th</sup> July 2010.
63. The subsequent appeals, by the 1<sup>st</sup> Grievant, did not cure the lack of an initial disciplinary hearing. It did not matter, that the Respondent alleged to have granted the 1<sup>st</sup> Grievant the opportunity to appeal twice. An appeal is premised on the presence of an initial process and outcome.
64. The auditing carried out on 31<sup>st</sup> May 2010 and 2<sup>nd</sup> June 2016, was done in the absence of the 1<sup>st</sup> Grievant. Chesaina, who carried out the exercise told the Court that she did not interview the 1<sup>st</sup> Grievant. Her report which was relied on in apportioning blame to the 1<sup>st</sup> Grievant, was without the 1<sup>st</sup> Grievant's input.
65. An investigation cannot objectively be undertaken, without the involvement of the person at the heart of the investigation.
66. Procedure with regard to the 1<sup>st</sup> Grievant was flawed. He was only asked to show cause why, he should not be disciplined, and after he responded, was not heard. He was not interviewed by the auditor, who audited his branch at Naivasha.
67. The 2<sup>nd</sup> and 3<sup>rd</sup> Grievants were interdicted, asked to show cause, and responded to the letters to show cause. They were invited for disciplinary hearing. They were heard in the company of their Union Shop Steward. Decision was made in either case by the staff advisory committee, to dismiss the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants. They were allowed to pursue an appeal before the staff management committee. The first appeals were heard, with the Grievants represented by Dickens Atela. They filed further appeals, but did not pursue them to the end, preferring instead, to lodge the Claim herein.
68. The 2 Grievants were accorded an opportunity to be heard.



69. There is one aspect of the disciplinary process, common to all the Grievants, which rendered procedure unfair.
70. Kande told the Court that the Parties agreed at conciliation, that the Claimant, through its representative Dickens Atela, would be supplied all records, including audit reports. Kande confirmed that there was no evidence that the documents were supplied as agreed. The letters to show cause did not contain any documents. The documents were not supplied to the Grievants or to their representative, at the disciplinary hearing or even on appeal. They told the Court that they saw the investigation report for the first time, before the Court.
71. Failure by the Respondent to supply the investigation report to the Grievants, was in fundamental departure, from the basic standards of procedural fairness.
72. The Court is satisfied that the 1<sup>st</sup> Grievant was denied an initial disciplinary hearing. All the Grievants were denied relevant evidential material by the Respondent, to enable them adequately respond to the letters to show cause, the disciplinary charges, and to adequately state their respective positions on conciliation and appeal.
73. Procedure did not meet the full requirements of fairness, under Sections 41 and 45 of the [Employment Act](#).
74. Validity of reasons: The 1<sup>st</sup> Grievant was an audit assistant. Although described as an assistant, he was not junior to any other auditor at his branch. His role was to regularly audit the systems at his branch, and report any irregularities or risks, to his superiors.
75. He does not contest that there were irregularities which led to revenue loss at the branch. He reported that the system was working well. While he agreed that it was his duty as an assistant auditor to make enquiries, he appeared to shift all blame on the accountant, when irregularities were detected. He did not reject or countermand any payment. He stated that he did not have access to the branch's bank statements. He was told by the accountant that the statements were at the head office.
76. The Respondent was correct in finding the 1<sup>st</sup> Grievant to have performed his role negligently. What auditing was he performing without the bank statements and why did he accept the explanation from the accountant? It was his role to audit, flag out and escalate irregularities, and protect the Respondent, a public entity.
77. He failed and was dismissed for valid reason, under Sections 43, 44[4] and 45 of the [Employment Act](#).
78. The 2<sup>nd</sup> and 3<sup>rd</sup> Grievants were clerical officers at Westlands. They were both shown, through the evidence of the Respondent, to have been involved in manipulation of accounts.
79. Like their colleague at Naivasha, they attempted to shift blame to other officers, when fraud was detected at their doorsteps. They both blamed their supervisor Simon Kubio, for changing cash payments to read cheque payments. They received cheques, for certain amounts, which were reduced in the system. Black Diamond for instance, paid a cheque number 227,145 in the sum of Kshs. 382,160. The same cheque number was indicated in the system, with a reduced sum of Kshs. 371,980. There were other payments which were manipulated by the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants, leading to loss of revenue to the Respondent.
80. Their defence, that their superior Simon Kubio carried out the updating, was not convincing. They were both shown to have been at the centre of fraudulent transactions. They most probably acted in cahoots with Simon Kubio. They cannot escape liability. They were knowingly involved in fraudulent



transactions, depriving the Respondent of revenue, and by extension, hampering health services to the Kenyan Workers.

81. The Respondent established valid reasons, justifying termination of the 3 Grievants' contracts of employment. The requirements of substantive justification, under Sections 43, 44 [4] 45 and 47 [5] of the *Employment Act*, were satisfied.
82. Remedies: The repeated assertion by the Claimant, that the Grievants were constructively dismissed, has no foundation.
83. Nothing pleaded by the Claimant, or stated by the Grievants in their evidence, established or even remotely suggested, the presence of the concept of constructive dismissal.
84. The Court of Appeal, in *Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga* [2015] e-KLR, clearly defined the concept of constructive dismissal.
85. It includes resignation by an Employee, where the Employer has created a hostile working environment. The Employer is deemed to be unwilling to continue being bound by the terms and conditions of the contract of employment.
86. An Employee resigns, believing his contract to have been terminated through the intolerable conduct of the Employer.
87. It is not conceivable that an Employee who has received a letter of termination from his Employer, expressly stating that the Employer has terminated his contract, would characterize termination as constructive. There is nothing to be implied, in a termination decision which is express.
88. None of the Grievants resigned from the Respondent, owing to any hostile work environment, attributable to the Respondent. They all were expressly dismissed.
89. The remedy of reinstatement is neither reasonable nor practicable, and is legally barred.
90. The Grievants were involved in negligence and fraud, against a public entity. The Court would be acting unreasonably, by reinstating Employees who are adjudged to have been involved in negligence and fraud, which led to substantial financial loss against their Employer.
91. Termination took place 14 years ago, in the year 2011. The remedy of reinstatement has a statutory shelf life of 3 years, from the date termination takes effect. This is the law under Section 12 of the E&LRC Act. The remedy became stale, and inaccessible to the Grievants, in 2014, 11 years ago.
92. The remedy is also impracticable. The Grievants and their former Employer have moved on. The Grievants have not been sitting still, waiting to be reinstated. They did not disclose to the Court what work they have been involved in, for the past 14 years, but they must have moved on, and found other sources of income. The Respondent has since been succeeded by other universal health institutions, and the Claimants are not likely to fit in the new national health insurance structures.
93. The remedy of reinstatement is completely out of question.
94. The 1<sup>st</sup> Grievant did not persuade the Court that in the alternative, his dismissal should be commuted to normal retirement. He did not attempt to justify why the period out of employment -14 years- should be compensated on normal retirement, as though he never left. He was negligent and was summarily dismissed lawfully, for an employment offence under Section 44[4] of the *Employment Act*.
95. The 1<sup>st</sup> Grievant does not pursue compensation for unfair termination, as an alternative to reinstatement. The Court cannot grant to him compensation.



96. The 2<sup>nd</sup> and 3<sup>rd</sup> Grievants pursue compensation as an alternative remedy. The Court has pointed out the procedural flaws, in the termination process, with respect to all the Grievants.
97. The Court has also concluded that the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants acted fraudulently, leading to loss of public revenue. Their offence was not that they merely acted negligently; they were active players in an intricate and sustained web of fraud, leading to loss of public funds.
98. Compensation is awarded at the discretion of the Court. As the 2<sup>nd</sup> and 3<sup>rd</sup> Grievants were public officers, trusted with protections of public finances, and as they acted against public interest, it is not prudent to grant any form of monetary compensation in their favour.
99. It would be imprudent to grant an order, that they are paid monetary compensation from the same public purse, which they took away from.
100. The Claimant did not articulate the prayers for annual leave days. None of the Grievants established any number of annual leave days owed by the Respondent, at the time of termination. None was specifically pleaded. The prayer for annual leave pay is declined.
101. The prayer for costs of conciliation was similarly not articulated in the pleadings, evidence and submissions of the Claimant. There was no recommendation made by the conciliator concerning any costs incurred by the Parties, at the conciliation. The Claimant did not elaborate what costs were sustained on conciliation. The prayer is declined.
102. No order on the costs.
103. While termination was flawed on procedure, the Court has explained why, the most appropriate dispositive order, is dismissal of the Claim in its totality, with no order on the costs.

It is ordered: -

- a. The Claim is declined.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31<sup>ST</sup> DAY OF JANUARY 2025.**

**JAMES RIKA**

**JUDGE**

