



REPUBLIC OF KENYA



**King'ori & another v Bandari Savings & Credit Co-operative Society Limited (Cause 531 of 2017 & 387 of 2018 (Consolidated)) [2025] KEELRC 267 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 267 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 531 OF 2017 & 387 OF 2018 (CONSOLIDATED)**

**AK NZEI, J  
JANUARY 31, 2025**

**BETWEEN**

**PETER NJUGUNA KING'ORI ..... 1<sup>ST</sup> CLAIMANT**

**JOSEPH MURUNGA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**BANDARI SAVINGS & CREDIT CO-OPERATIVE SOCIETY  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This Judgment is on a consolidated suit, the consolidated suits being Mombasa Employment and Labour Relations Court Cause Nos. 531 of 2017 and 387 of 2018. Both suits are against Bandari Savings & Credit Co-operative Society Limited (hereinafter referred to as the Respondent). The Claimant in Cause No. 531 of 2017 is Peter Njuguna King'ori (herein after referred to as the 1<sup>st</sup> Claimant), while the Claimant in Cause No. 387 of 2018 is Joseph Murunga (herein after referred to as the 2<sup>nd</sup> Claimant). The two suits were consolidated vide a Consent Order made on 30<sup>th</sup> October, 2018 (Ndolo, J.).
2. The 1<sup>st</sup> Claimant sued the Respondent vide a Memorandum of Claim dated 29<sup>th</sup> June, 2017 and filed in this court on even date. An amended memorandum of claim was subsequently filed on 6<sup>th</sup> December, 2017. The 1<sup>st</sup> Claimant sought the following reliefs against the Respondent:-
  - a. A declaration that termination of his employment was unfair and unlawful.
  - b. One month pay in lieu of notice ..... Kshs.203,577.60.
  - c. Unpaid 32 months' salary under the contract of service ..... Kshs.5,874,483.20.
  - d. An equivalent of 12 months' salary for unlawful termination ..... Kshs.8,280,992/=.



- e. Costs of the suit and interest
3. The 1<sup>st</sup> Claimant pleaded:-
- a. that he (the 1<sup>st</sup> Claimant) was, at all material times, an employee of the Respondent, having been employed on 16<sup>th</sup> September, 2016 at a starting salary of Kshs.203,577.60.
  - b. that on 19<sup>th</sup> January, 2017, the 1<sup>st</sup> Claimant's employment was unprocedurally, unlawfully and unjustifiably terminated.
  - c. that termination of the 1<sup>st</sup> Claimant was devoid of justice and equity in that there were no valid grounds for the termination, the 1<sup>st</sup> Claimant was not given a fair hearing prior to the termination, was not given prior or proper notice or payment in lieu thereof, and was not paid any terminal dues upon termination.
  - d. that the Respondent violated the provisions of the Employment Act 2007, Labour Institutions Act 2007, the right to fair labour practices as enshrined in Article 41(1) of the Constitution of Kenya and the rules of natural justice.
4. Documents filed by the 1<sup>st</sup> Claimant alongside his memorandum of claim included copies of his employment letter (dated 30<sup>th</sup> August, 2016), his National Identification card, suspension letter (dated 4<sup>th</sup> January, 2017), termination letter (dated 19<sup>th</sup> January, 2017), demand letter (dated 17<sup>th</sup> May, 2017) and a payslip (for November 2016). Also filed was the 1<sup>st</sup> Claimant's affidavit in verification of the claim and a written witness statement.
5. The Respondent entered appearance (on the 1<sup>st</sup> Claimant's suit) on 6<sup>th</sup> June, 2018 and subsequently filed Response on 19<sup>th</sup> June, 2018 and pleaded:-
- a. that the 1<sup>st</sup> Claimant was engaged by the Respondent, with the job description of an Operations Manager, with effect from 16<sup>th</sup> September, 2016 and with a starting salary of Kshs.150,000/=, exclusive of house allowance and attendant emoluments.
  - b. that it was a term of the contract that the 1<sup>st</sup> Claimant would, at all times of his engagement with the Respondent, abide by the obtaining rules and regulations in line with his work.
  - c. that the Claimant was on 4<sup>th</sup> January, 2017 suspended for breaching the Respondent's Sacco rules and regulations. That charges against the 1<sup>st</sup> Claimant were unequivocally set out in the suspension letter of the said date.
  - d. that the Respondent conducted thorough investigations into the 1<sup>st</sup> Claimant's misconduct, and that the 1<sup>st</sup> Claimant having failed to aptly explain himself by way of response to the charges against him, the Respondent formally dismissed him in accordance with the law.
  - e. that the 1<sup>st</sup> Claimant abused his position and breached the Respondent's rules and regulations by engaging in insider trading and lending to Board and Staff.
  - f. that the 1<sup>st</sup> Claimant caused, connived, colluded and/or facilitated issuance of a Kshs.2,000,000/= Biashara Loan to M/s Ngina Stores, a business owned by Rita Mongina Monda who was the 1<sup>st</sup> Claimant's wife, without declaring a conflict of interest, and went ahead to transfer the loan after approval for payment.
  - g. that the loan to Ngina Stores was granted against the Respondent's loaning policy which requires that a member saves for six (6) months before they can be eligible for a loan, and



visitation to the business by the Respondent's Risk Department for appropriate report on the subject business.

- h. that the 1<sup>st</sup> Claimant's conduct was criminal and/or criminal in nature and that the Respondent rightly invoked the provisions of Section 44(g) of the Employment Act 2007 in formally dismissing him. That termination of the Claimant's employment was lawful.
  - i. that the contract was hardly executed, and that even if the Claimant was unfairly, unjustly or unlawfully terminated, which the Respondent denied, then it should be decreed that the same was a mere probationary contract at the instance of termination.
  - j. that compensation for unfair, unlawful or unprocedural termination cannot be made in favour of a party whose conduct is manifestly fraudulent, guilty of nefarious disposition, and blatantly engaging in corrupt practices in the guise of performing his contracted duties, and would defeat common decency and public good.
6. The Respondent also filed a witness statement of one Joseph Bee dated 25<sup>th</sup> June, 2018 and an evenly dated list of documents listing 11 documents. The listed documents included the employment letter dated 30<sup>th</sup> August, 2016, member listing balance dated 22<sup>nd</sup> August, 2017, summary dismissal letter dated 19<sup>th</sup> January, 2017, suspension letter dated 4<sup>th</sup> January, 2017, letter delivery book, business appraisal report on Ngina Stores dated 21<sup>st</sup> December, 2016, Loan account of Ngina Stores dated 31<sup>st</sup> December, 2016, Notice of Probationary period extension dated 15<sup>th</sup> December, 2016, and a payslip for November 2016.
7. The 2<sup>nd</sup> Claimant sued the Respondent vide a memorandum of claim dated 26<sup>th</sup> April, 2018 and filed in this Court on 7<sup>th</sup> June, 2018. The 2<sup>nd</sup> Claimant sought the following reliefs:-
- a. A declaration that termination of the 2<sup>nd</sup> Claimant's employment was unfair and unlawful.
  - b. One month salary in lieu of notice ..... Kshs.225,000/=.
  - c. Unpaid 32 months' salary under the contract ..... Kshs.7,200,000/=.
  - d. An equivalent of 12 months' salary for unlawful termination of employment (Kshs.225,000 x 12) ..... Kshs.2,700,000/=.
  - e. Costs of the suit and interest.
8. The 2<sup>nd</sup> Claimant pleaded:-
- a. that he was, at all material times, an employee of the Respondent, having been employed on 16<sup>th</sup> September, 2016 with a starting net salary of Kshs.225,000/=.
  - b. that on 19<sup>th</sup> January, 2017, the 2<sup>nd</sup> Claimant's employment was terminated without due procedure. That the termination was devoid of any lawful or justifiable grounds.
  - c. that the termination was unfair as the 2<sup>nd</sup> Claimant was not given any valid reason for his termination, was not given any notice prior to termination and his terminal benefits were not paid upon termination.
  - d. that the Respondent's manifestly unfair actions were a violation of the mandatory provisions of the Employment Act and fair labour practices as enshrined in Article 41 of the Constitution of Kenya 2010 and the rules of natural justice.



9. Documents filed alongside the 2<sup>nd</sup> Claimant's Memorandum of Claim included the 2<sup>nd</sup> Claimant's affidavit in verification of the claim, the 2<sup>nd</sup> Claimant's written witness statement and list of documents dated 26<sup>th</sup> April, 2018, listing 5 documents. The listed documents included an employment letter (dated 30<sup>th</sup> August, 2016), a suspension letter (dated 4<sup>th</sup> January, 2017), a summary dismissal letter (dated 19<sup>th</sup> January, 2017), and a demand letter (dated 7<sup>th</sup> June, 2017).
10. The Respondent defended the suit vide a Statement of Response dated 12<sup>th</sup> July, 2018. The Respondent pleaded:-
- a. that the 2<sup>nd</sup> Claimant was engaged by the Respondent effective from 15<sup>th</sup> September, 2016 with the job description of an Operations Manager and earning an initial salary of Kshs.180,000/= per month; exclusive of house allowance and attendant emoluments.
  - b. that it was a pertinent term of the contract that the 2<sup>nd</sup> Claimant would at all times of his engagement with the Respondent abide by the Respondent's obtaining rules and regulation in the line of his work.
  - c. that the 2<sup>nd</sup> Claimant was on 4<sup>th</sup> January, 2017 suspended for breaching the Respondent's Sacco rules and regulations. The particulars of charges against the 2<sup>nd</sup> Claimant were unequivocally set out in the suspension letter of the said date.
  - d. that the Respondent conducted thorough investigations into the 2<sup>nd</sup> Claimant's misconduct, and that the 2<sup>nd</sup> Claimant having failed to aptly explain himself by way of response to the charges against him, the Respondent formally dismissed him in accordance with the law.
  - e. that the 2<sup>nd</sup> Claimant abused his position and breached the Respondent's rules and regulations as set out in his contract by engaging in insider trading and lending to Board and Staff.
  - f. that the 2<sup>nd</sup> Claimant caused, connived, colluded and/or facilitated the issuance of a Biashara Loan of Kshs.2,000,000/= to Ngina Stores, a business owned by Rita Mongina Monda who was the wife of a staff member, without declaring a conflict of interest, and went ahead to transfer the loan after approval for payment.
  - g. that the loan to Ngina Stores was granted against the Respondent's loaning policy which required that a member saves for six (6) months before they can be eligible for a loan, and visitation to the business by the Respondent's Risk Department for appropriate report on the subject business (applicant).
  - h. that the 2<sup>nd</sup> Claimant's conduct was criminal and/or criminal in nature, and that the Respondent rightly invoked the provisions of Section 44(g) of the *Employment Act* 2007 in formally dismissing him. That termination of the 2<sup>nd</sup> Claimant's employment was lawful.
  - i. that the contract was hardly executed, and that even if the 2<sup>nd</sup> Claimant was unfairly, unjustly or unfairly terminated, which the Respondent denied, it should be decreed that the same was a mere probationary contract at the instance of the termination.
  - j. that compensation for unfair termination cannot be made in favour of a party whose conduct is manifestly fraudulent, is guilty of nefarious disposition, and blatantly engaged in corrupt practices in the guise of performing his contract duties [as this] would defeat common decency and common good.
11. The Respondent also filed a witness statement of Joseph Bee dated 12<sup>th</sup> July, 2018 and an evenly dated list of documents, listing 9 documents. The listed and filed documents included an employment



letter dated 30<sup>th</sup> August, 2016, a suspension letter dated 4<sup>th</sup> January, 2017, a summary dismissal letter dated 19<sup>th</sup> January, 2017, a letter delivery book, loan restructuring dated 22<sup>nd</sup> December, 2016 and 23<sup>rd</sup> December, 2016 from the Respondent, loan account for Ngina Stores dated 31<sup>st</sup> December, 2016, notice of probationary period extension dated 15<sup>th</sup> December, 2016 redeployment letter dated 21<sup>st</sup> November, 2016 and payment of duty allowance dated 19<sup>th</sup> October, 2016.

12. Trial commenced on 20<sup>th</sup> February, 2019 before Ndolo, J, when the 1<sup>st</sup> and 2<sup>nd</sup> Claimants testified and closed their respective cases.
13. The 1<sup>st</sup> Claimant adopted his filed witness statement as his testimony, and further testified:-
  - a. that he was employed by the Respondent as an Operations Manager, back office, on 16<sup>th</sup> September, 2016 at a basic monthly salary of Kshs.150,000/= and a gross salary of Kshs.270,000/=. That the employment letter was dated 30<sup>th</sup> August, 2016.
  - b. that the employment was on 3 years renewable contract, with 3 months probationary period. That the 1<sup>st</sup> Claimant was not served with any letter extending the probationary period.
  - c. that on 3<sup>rd</sup> January, 2017 at around 7.00 pm, the 1<sup>st</sup> Claimant was arrested from a hotel without being given reasons for the arrest; and that on 4<sup>th</sup> January, 2017, while in police custody, the 1<sup>st</sup> Claimant was served with a suspension letter which stated that he had been suspended pending investigations. That the reason for arrest was irregular loan disbursement.
  - d. that prior to the suspension, the 1<sup>st</sup> Claimant had not been confronted with the said allegations, had not been summoned to appear before the board, and had not been issued with a show cause, had not been given an opportunity to be heard and had not been summoned to participate in any investigations.
  - e. that the 1<sup>st</sup> Claimant was dismissed on 19<sup>th</sup> January, 2017, and the summary dismissal letter was sent to him by email.
  - f. that the 1<sup>st</sup> Claimant was not paid his salary for January 2017, and had completed his probation by the time of dismissal.
  - g. that the 1<sup>st</sup> Claimant never saw any document barring inside trading in the Respondent Sacco, and had not been confronted with particulars of any breach of Sacco rules.
  - h. that the 1<sup>st</sup> Claimant had worked for the Respondent for 4 months.
  - i. that the delivery book filed (produced) by the Respondent showed delivery of a suspension letter, but not delivery of a probation extension letter.
14. The 1<sup>st</sup> Claimant was not cross-examined on his evidence as there is shown to have been no court attendance on the part of the Respondent when the 1<sup>st</sup> Claimant testified; though the hearing date (20<sup>th</sup> February, 2019) is shown to have been given by the Court on 30<sup>th</sup> October, 2018 in the presence of counsel for both parties.
15. The 2<sup>nd</sup> Claimant also testified on the said date (20<sup>th</sup> February, 2019) in the absence of the Respondent and/or its counsel. He was, therefore, not cross-examined, as well. The 2<sup>nd</sup> Claimant adopted his filed witness statement as his testimony. He further testified:-
  - a. that he had been employed by the Respondent as a General Manager (Operations) on 16<sup>th</sup> September, 2016 vide an employment letter dated 30<sup>th</sup> August, 2016, earning a monthly salary of Kshs.320,000/=.



- b. that he was employed on a 3 years' renewable contract, but he worked upto 19<sup>th</sup> January, 2017 when he was summary dismissed. That he had been suspended on 4<sup>th</sup> January, 2017 vide a letter delivered to him at the police cells as he had been arrested on 3<sup>rd</sup> January, 2017 after work and detained.
  - c. that he (the 2<sup>nd</sup> Claimant) had, prior to the suspension, never been summoned to appear before the [Respondent's board] over the issues raised in the suspension letter, had never been given a show cause letter, had never been involved in any investigations or issued with an investigation letter, and was therefore unlawfully dismissed.
  - d. that the 2<sup>nd</sup> Claimant was never served with an extension of probation, and was not made aware that his probation had been extended. That the only letter delivered to him, and by a delivery book, was the suspension letter. That the Respondent's letters were delivered by delivery book.
  - e. that the 2<sup>nd</sup> Claimant worked for the Respondent for 4 months, and that in September/October 2016, he acted as the Respondent's Chief Executive Officer and was not paid acting allowance.
  - f. that he was not served with a letter dated 31<sup>st</sup> December, 2016.
16. It is worthy noting that by a Consent Order dated 24<sup>th</sup> April, 2019, the Respondent's case in Cause No. 531 of 2017 was re-opened to allow the Respondent to call witnesses. In Cause No. 387 of 2018, a Consent Order was on 11<sup>th</sup> March, 2020 recorded setting aside an ex-parte Judgment that had been delivered on 19<sup>th</sup> September, 2019 in favour of the 2<sup>nd</sup> Claimant, and granting the Respondent leave to present its evidence. It is not clear from the record how a separate Judgment had issued on one of the already consolidated suits. Be that as it may.
17. The Respondent's attempt to file and/or introduce further lists of (evidential) documents long after closure of the Claimants' case was opposed by the Claimants, and the irregularly filed further documents were struck off and expunged from the Court's record vide this Court's Ruling delivered on 6<sup>th</sup> November, 2023.
18. The Respondent's case opened before me on 8<sup>th</sup> May, 2024. The Respondent's witness, Joseph Otieno Bee (RW-1) adopted his witness statement. In Cause No. 531 of 2017, RW-1 adopted his witness statement dated 25<sup>th</sup> June, 2018 as his testimony, and produced in evidence the 11 documents listed on the Respondent's evenly dated list of documents (and referred to in paragraph 6 of this Judgment. In Cause No. 387 of 2018, RW-1 adopted his filed witness statement dated 12<sup>th</sup> July, 2018 as his testimony, and produced in evidence the documents referred to in paragraph 11 of this Judgment.
19. RW-1 further testified that the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were employed on the same date vide employment letters dated 30<sup>th</sup> August, 2016. That the 1<sup>st</sup> Claimant reported on 21<sup>st</sup> September, 2016 while the 2<sup>nd</sup> Claimant reported on 16<sup>th</sup> September, 2016. That the letters of offer stated their salaries and terms of offer.
20. RW-1 further testified:-
- a. that the two Claimants were suspended vide letters dated 4<sup>th</sup> January, 2017 and were subsequently terminated vide letters issued on 19<sup>th</sup> January, 2017.
  - b. that vide a letter dated 15<sup>th</sup> December, 2016 and produced in evidence in the 1<sup>st</sup> Claimant's case, the two Claimants' probationary period was extended, and that at the time of termination, the



Claimants were still on probation. That the Claimants were not entitled to 30 days' notice, but to 7 days' notice.

- c. that the Claimants' had committed an offence by fraudulently giving a loan and were given a show cause letter, to which they never responded. That the Claimants committed an offence of giving an insider loan against the Respondent's policy as the right procedure was not followed, which offence warranted summary dismissal.
  - d. that the loanee was the 1<sup>st</sup> Claimant's wife and the Kshs.2,000,000/= irregularly given to her exceeded the stated limit. That the loanee had only deposited Kshs.300,000/=, and the Respondent's policy was that loans could not exceed 3 times the account deposit.
  - e. that after the (loan) money was deposited into the loanee's account, the Claimants transferred it to another member's account and then to another member's account, from where it was withdrawn.
  - f. that the Claimants cannot claim compensation, and cannot claim the entire contract sum as they were terminated while still on probation.
21. Cross-examined, RW-1 (the Respondent's Chief Executive Officer) testified that he had not filed in court a letter under the Respondent's seal authorising him to testify, as that was not necessary. He further testified:-
- a. that the Claimants had been employed on 3 years' contracts, subject to successful completion of 3 months' probation. That the probation period was set to end in December 2016.
  - b. that at the time of termination, the 1<sup>st</sup> Claimant was earning Kshs.270,500/= in salary, inclusive of allowances, while the 2<sup>nd</sup> Claimant was earning Kshs.320,000/= per month, inclusive of allowances.
  - c. that the letter of extension of contract dated 15<sup>th</sup> December, 2016 had not been signed by the Claimants, and had no indication on it as to how it was served on the Claimants. That although the letter referred to a Board's Meeting held on 14<sup>th</sup> December, 2016, no minutes of the said meeting had been produced in court.
  - d. that the Respondent had not indicated in its pleadings or in RW-1's witness statement(s) that the Claimants had been terminated during probation.
  - e. that the suspension letters were delivered to the Claimants while they were under police arrest, and that they had not been notified to attend a Board Meeting. That the suspension letters were dated 4<sup>th</sup> January, 2017, and referred to a Board Meeting held on 4<sup>th</sup> January, 2017.
  - f. that the Claimants had been suspended pending investigations, but no further communication was made to them regarding the investigations.
  - g. that RW-1 did not know whether criminal proceedings had been concluded as at the time summary dismissal letters were issued to the Claimants.
  - h. that the suspension letters did not make reference to a letter dated 31<sup>st</sup> December, 2016.
  - i. that the Claimants were not invited to the Board Meeting held on 8<sup>th</sup> January, 2017, and which was referred to in the summary dismissal letters. That by the time the summary dismissal letters were being delivered, the decision to terminate them had already been made by the Board.



- j. that the Respondent had not produced in evidence any document on proprietorship of Ngina Stores linking Rita Mongina to the stores' proprietorship. That no evidence had been produced showing any relationship between the Claimants and either Ngina Stores or Rita Mongina.
  - k. that the Respondent had not produced any policy document regarding giving of loan facilities.
  - l. that the Respondent had not produced in court the loan application form giving details of the applicant, the next of kin and other particulars.
  - m. that no evidence had been presented to show that the loan in issue was not serviced, or that the Respondent lost funds. That the Respondent (RW-1) did not know the outcome of the Criminal Proceedings (against the Claimants).
22. Re-examined, RW-1 testified that the Sacco Societies Act as amended in 2008 stated the powers and responsibilities of the Chief Executive Officer of a Sacco, and that the authority for him to testify was drawn from that law. That investigations conducted by the Respondent revealed that Rita Mongina was the wife of a staff and that this fact was stated in the summary dismissal letter of the 2<sup>nd</sup> Claimant. That the 1<sup>st</sup> Claimant had not denied that Rita Mongina was his wife. That both the suspension letters and the summary dismissal letters issued to the Claimants raised the same issues.
23. RW-1 further testified that vide a letter dated 31<sup>st</sup> December, 2016, the Claimants were given an opportunity to explain themselves and when they failed to do so, they were suspended and then dismissed. That the Sacco laws and the Employment Act allow a sacco to summarily dismiss an employee.
24. Having considered the pleadings filed and evidence presented by both parties, issues that fall for determination, in my view, are as follows:-
- a. Whether the 1<sup>st</sup> and the 2<sup>nd</sup> Claimants were on probation when their employment was terminated by the Respondent on 19<sup>th</sup> January, 2017.
  - b. Whether termination of the Claimants' employment was unfair.
  - c. Whether the Claimants are entitled to the reliefs sought.
25. On the first issue, the Claimants' letters of appointment dated 30<sup>th</sup> August, 2016 had the following identical clause:-
- “This is a 3 year renewable contract position with a probation period of 3 months subject to satisfactory performance and approved post probation appraisal report.
- Your starting date will be 16<sup>th</sup> September, 2016 . . .”
26. Section 42(2) of the Employment Act 2007 provides as follows:-
- “A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”
27. The Claimants' 3 months' probationary period, having commenced on 16<sup>th</sup> September, 2016, lapsed on 16<sup>th</sup> December, 2016. The Respondent is not shown to have consulted with, or contacted the Claimants over any necessity to extend their contractual probationary period of 3 months prior to its lapse, or at any time. Indeed, the Claimants are not shown to have agreed to extension of their probationary period.



28. The Respondent's letter dated 15<sup>th</sup> December, 2016, produced in evidence by the Respondent and purported to have notified the 2<sup>nd</sup> Claimant of the extension of his probationary period by six months, is not shown to have been received by the 2<sup>nd</sup> Claimant at any given time. The 2<sup>nd</sup> Claimant denied having received the letter. The letter has no mention of the 2<sup>nd</sup> Claimant having agreed to the purported extension, and the Claimants are not shown to have attended the Respondent's Board Meeting alleged to have been held on 14<sup>th</sup> December, 2016. No minutes of the alleged Board Meeting were produced in evidence by the Respondent. Any purported extension of an employee's probationary period by an employer "without the agreement of the employee" contravenes the aforesaid provision of the Employment Act, and is unlawful, null and void. It is my finding that the Claimants' probationary period was never extended.
29. It was a common ground that the Claimants were summarily dismissed by the Respondent vide summary dismissal letters dated 19<sup>th</sup> January, 2017, over one month from 16<sup>th</sup> December, 2016 when their probationary period lapsed. I find and hold that the 1<sup>st</sup> and the 2<sup>nd</sup> Claimants were not on probation as on 19<sup>th</sup> January, 2017 when they were summarily dismissed by the Respondent. The provisions of Section 41 of the Employment Act ought to have been complied with in terminating their employment.
30. For record purposes, I do state that an employer who finds an employee's performance unsatisfactory at the lapse of the employee's probationary period has the right and liberty to terminate the probationary contract of employment pursuant to Section 42(4) of the Employment Act. If, however, the employer of such an employee decides and/or elects to further test the employee's ability to perform his or her contractual duties, then such an employer must engage the employee on the issue and get the employee to agree to the extension pursuant to Section 42(2) of the Employment Act.
31. On the second issue, it is to be noted that the Claimants worked for the Respondent for 4 months and 3 days. Section 45(3) of the Employment Act provides as follows:-
- “(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”
32. Although the Claimants had not been continuously employed by the Respondent for at least thirteen months at the time of their termination, I am persuaded by the High Court's decision in the case of Samuel G. Momanyi – vs – Attorney General & Another (2012) eKLR, where the Court (Lenaola, J- as he then was) held as follows:-
- “(b) It is hereby declared that Section 45(3) of the Employment Act 2007 is inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said Section purports to deny the petitioner the rights and freedoms enshrined in the said Articles of the Constitution.
- (b) Consequently, an order is hereby issued declaring Section 45(3) of the Employment Act 2007 invalid by reason of its violation of the rights and fundamental freedoms in the Bill of Rights of the Petitioner, rights and freedoms.”



33. I agree with the foregoing judicial pronouncement and finding, and on the basis thereon make a finding that although the Claimants had not worked for their employer/the Respondent for a period of not less than thirteen months immediately before the date of termination (19<sup>th</sup> January, 2017), they had “a right to complain that they had been unfairly terminated.
34. On whether the Claimants’ employment was unfairly terminated, it is worthy noting that termination of an employee’s employment may be procedurally or substantively unfair, or both. It was held as follows in the case of *Walter Ogal Anuro – vs – Teachers Service Commission* (2013) eKLR:-
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
35. The employer (the Respondent) in the present case did not present in evidence its loan policy document and/or rules and regulations governing application for loans, approval, granting and processing of loans to its members. The Respondent’s allegation of an irregular giving of a loan by the Claimants to one Rita Mongina Monda of Ngina Stores was not proved. No irregularity was demonstrated, in view of the foregoing. The Respondent did not, therefore, demonstrate the existence of a valid reason for terminating the Claimants’ employment pursuant to Section 45(2)(a) of the *Employment Act*. Termination of the Claimants’ employment was, therefore, substantively unfair.
36. I further make a finding that termination of the Claimants’ employment was procedurally unfair as the mandatory procedure set out in Section 41 of the *Employment Act* 2007 was not adhered to by the Respondent in terminating the Claimants’ employment. The Claimants were not given an opportunity to be heard before termination of their employment.
37. Section 41 of the *Employment Act* 2007 provides as follows:-
- “(1) Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination, and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
38. The import of Section 41(2) of the *Employment Act* 2007 is that an employee is entitled to be given an opportunity to be heard before termination of his employment or before being summarily dismissed.
39. The Court of Appeal stated as follows in the case of *Kenfreight (E.A) Limited – vs – Benson K. Nguti* (2016) eKLR:-
- “Apart from issuing a proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty bound to explain to an employee, in the presence of another



employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract.

In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken . . .”

40. The Court of Appeal further stated as follows in the Kenfreight (case (Supra):-

“ . . . It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, and that the reason related to the employee’s conduct, capacity, compatibility or is based on operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.”

41. In view of all the foregoing, I find and hold that termination of the 1<sup>st</sup> and the 2<sup>nd</sup> Claimants’ employment was substantively and procedurally unfair, and I so declare.

42. On the third issue, the Claimants, having been summarily dismissed, and unfairly so, were not shown to have been paid a one month salary in lieu of notice pursuant to Section 35(1)(c) of the Employment Act. The claim for one month salary in lieu of notice is merited, and is allowed.

43. The claim for unpaid salary for the unserved 32 months under the contracts of service cannot be allowed, as it is not one of the reliefs provided for in Section 49(1) of the Employment Act 2007. The same is declined.

44. The claim for compensation for unlawful and unfair termination of employment is merited, and I award each of the Claimants the equivalent of three (3) months’ salary being compensation for unfair termination of employment. It was a common ground that the 1<sup>st</sup> and the 2<sup>nd</sup> Claimants were earning Kshs.270,500/= and Kshs.320,000/= per month respectively. The Respondent (RW-1) testified as much. The 1<sup>st</sup> Claimant, however, pleaded in his amended Memorandum of Claim filed on 6<sup>th</sup> December, 2017 that he was earning a monthly salary of Kshs.203,577.60 while the 2<sup>nd</sup> Claimant pleaded that he was earning Kshs.255,000/= per month. Parties are always bound by their pleadings.

45. In sum, and having considered written submissions filed on behalf of the parties herein, Judgment is hereby entered for the Claimants against the Respondent as follows:

- a. 1<sup>st</sup> Claimant (Peter Njuguna King’ori)
  - i. One month salary in lieu of notice ..... Kshs.203,577.60.
  - ii. Compensation for unlawful and unfair termination of employment ..... Kshs.610,732.80.Total = Kshs.814,310.40/=
- b. 2<sup>nd</sup> Claimant (Joseph Murunga)
  - i. One month salary in lieu of notice ..... Kshs.225,000/=.
  - ii. Compensation for unlawful and unfair termination of employment ..... Kshs.675,000/=Total = Kshs.900,000/=

46. The awarded sums shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.



47. The claimants are awarded costs of the consolidated suit and interest on the awarded sums. Interest shall be calculated at court rates from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2025.**

**AGNES KITIKU NZEI\***

**JUDGE**

**Order**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Otieno for the Claimants

Mr. Akanga for the Respondent

