



**Hongo v Kenya Post Office Savings Bank (Cause E080 of 2024)
[2025] KEELRC 1057 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1057 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E080 OF 2024**

JK GAKERI, J

APRIL 3, 2025

BETWEEN

MARTIN OMONDI HONGO CLAIMANT

AND

KENYA POST OFFICE SAVINGS BANK RESPONDENT

JUDGMENT

1. The claimant commenced this suit vide a Memorandum of Claim dated 26th September, 2024 alleging unlawful termination of employment.
2. It is the Claimant's case that he joined the respondent on 1st November, 1990 and served until 2nd May, 2023 and rose from Clerical Officer to Branch Manager at Bondo.
3. The claimant avers that on 19th October, 2022 a customer named Anit Harshha Patel, A/C Number 0795xxxxxxxx banked a company cheque No. xxxxxx of Kshs.623,000.00 and was paid the sum of Kshs.623,000.00 as he was an anchor customer and had been depositing cash through the bank to his NIC Bank for at least 3 years.
4. On the same day the acting Area Manager Western Region, one Carol Onyango visited the Bank and discovered the cash shortage of Kshs.623,000.00 and ordered the claimant to declare the shortage but it was eventually declared by Mr. Richard Kiprono on the supervisors advice.
5. That on 21st October, 2022 the supervisor demanded that the customer issues a cheque in the name of the bank and the same was done and the previous cheque cancelled.
6. That EOD reports on the cash position for 11th – 18th October were signed by the 3 officers concerned.
7. The claimant further avers that by letter dated 21st October, 2022 he was called upon to show cause and responded vide letter dated 24th October, 2022 and was interdicted vide letter dated 3rd November, 2022 and invited for a hearing vide letter dated 6th February, 2023, slated for 9th February, 2023, later



rescheduled to 16th March, 2023, attended in the company of John Chavene who was forbidden from speaking.

8. The claimant later attended a notification meeting on 25th April, 2023 and his employment was terminated vide letter dated 2nd May, 2023, appealed to the Managing Director but received no response despite personal visits.
9. The claimant finally, avers that the termination of employment was substantively and procedurally unfair as no proper investigations were conducted, the particulars given were insufficient, was not given the investigation report, charges were not given at the hearing and no prior notice had been given and did not cross-examine witnesses.

The claimant prays for:

- i. 12 months salary Kshs.1,591,680.00
- ii. 3 months salary in lieu of notice Kshs.397,920.00
- iii. Withheld ½ salary from November 2022 to April 2023 Kshs.397,320.00
- iv. Interest on (i), (ii) and (iii) above.
- v. Certificate of service.
- vi. Any other relief the court deems fit and just.
- vii. Costs of and incidental to the suit.

Respondent's case

10. In response to the Memorandum of Claim the respondent admits that hearing took place on 16th March, 2023.
11. It also admitted that claimant was employed in 1990, issuance of notice to show cause and response by the claimant.
12. The respondent denied that the interdiction was unfair, malicious or irregular and the alleged particulars but admits that the claimant appealed the termination of employment.
13. It denied that the termination of the claimant's employment was unfair but admits that the claimant's salary was Kshs.132,640.00 per month as at the time of separation.
14. According to the respondent, the claimant is not entitled to any of the reliefs sought and prays for dismissal of the case with costs.

Claimant's evidence

15. On cross-examination, the claimant confirmed that there was a shortage in the bank of Kshs.623,000.00 and attended the hearing on invitation but had had no evidence to prove that he complained about insufficient time to prepare for the meeting. He admitted having received a warning letter in 2020, on account of lateness.
That he received an outcome of the appeal but the process was unfair.
16. On re-examination, the claimant testified that M/s Caroline Onyango issued the Notice to Show Cause and tellers who had received notices to show cause on the issue received warning letters and only the claimant's employment was terminated.



17. He testified that the officer who incurs the shortage declares it in the system and a cashier did so. Yet it was supposed to be him and a shortage must be declared within 48 hours.
18. That the offence was not grave as the bank had the cheque for the amount and the same clears in 3-4 days time.
19. That the hearing took 1¹/₂ hours and was unfair because they were not allowed to speak or participate or clarify anything.
20. CWII, Mr. John Chavene confirmed on cross-examination that his duties included bank reconciliation, approve cheques, vouchers, verify RTGS, all matters relating to finance.
21. That he was gagged at the hearing after stating that he was representing the claimant as an advocate, but the claimant responded to the questions asked.
22. On re-examination, the witness testified that there was no loss of funds at the Bondo Branch as the cheque cleared. That he accompanied the claimant to the hearing and had accompanied other colleagues but he was gagged in this case.
23. That the disciplinary process was not very fair as the questions asked were aimed at crucifying the claimant.

Respondents evidence

24. RWI, M/s Caroline Onyango confirmed that she was based in Kisumu but during the hearing she was in Nairobi and had signed the witness statement as C.O. RWI testified that she had a long and short signature.
25. The witness testified that the shortage occurred on 19th October, 2022 and the cheque given was in the customer's name as it ought to and deposited in his account and takes 6 days to clear under bank procedures, CBK Guidelines as the respondent is not a commercial Bank.
26. The witness admitted that she directed that the shortage be declared as the amount of cash could tally with the system and instructed the Branch Manager to do so, who in turn instructed a teller to do so, yet the claimant was the custodian of the cash.
27. The witness confirmed that the respondent did not offer overdraft facilities to customers and in this case it was an irregularity as the cheque would take 6 days to clear.
28. That the cheque was cancelled as it ought to have been in the respondent's name. Otherwise, the money would have been into the customer's account and the bank could only access it if the customer withdrew it and deposited it in the account of the bank and the transaction was therefore irregular as the cheque should have been deposited in the branch account.
29. That previous reports had no shortage as it occurred on 19th October, 2022 and had been declared. That the tellers on duty on 19th October, 2022 also received notices to show cause but only the claimant's response was found to be unsatisfactory. The tellers were not dismissed from employment.
30. On re-examination RWI testified that what the claimant did was unprocedural whether the customer was an anchor customer or not and cheques take 6 days to clear as the respondent was a Savings Bank not commercial and the Branch Manager was supposed to declare the shortage as it was a vault shortage and the money was not within the reach of the bank as a cheque is not legal tender.



31. That disciplinary matters at the respondent are handled at the level of area Manager and the Bondo Branch had one Manager, the claimant.
32. RWII, Josephine Moraa confirmed that she participated in the hearing on 16th March, 2022 as a member of the committee and signed the minutes on 6th April, 2023 and the chairperson signed the minutes on 11th April, 2023 and there was no session on 6th March, 2023.
33. It was RWII's testimony that the Secretary to the Committee took the minutes to members to sign in their various offices.
34. That the committee received the disciplinary cases and evaluated them and the committee makes recommendations to the Managing Director on how the matter ought to be disposed of and the committee recommended termination of the claimant's employment.
35. That the respondent's code of conduct provided for warnings depending on the severity of the case and the claimant was not given a warning as the tellers.
36. On cross-examination RWI testified that she signed the witness statement, and the minutes on record were a reflection of what transpired at the hearing and were signed by members at different times and the committee recommended termination of employment.
37. That the claimant was the accounting Officer of the branch and there was a shortage and signed the letter "for the Managing Director" and the claimant's misconduct warranted dismissal.
38. That CWII was prevented from testifying as he was bound by the Bank Code.
39. RWIII, Mr. Richard Musyoki confirmed that he was the chair of the Disciplinary Committee. He testified that a statement of charges was given vide letter dated 3rd November, 2022 which references another letter but provisions of the code were not quoted verbatim but the offence was and the claimant was afforded a chance to state his case and attended with a colleague.
40. That the Head of Security presented the case and the claimant was accorded a chance to cross-examine witnesses but he was not given a copy of the investigation report.
41. That the investigation found that the claimant had committed an offence contrary to the bank's code, namely misappropriation or embezzlement though the report found that the bank had not lost any money but the committee recommended termination of employment on the basis of misappropriation and embezzlement of funds.
42. On re-examination RWIII testified that the claimant was given a statement of the charges and opportunity to cross-examine witness and the investigation report was read out to him at the hearing.
43. Finally, the witness testified that the claimant's employment was terminated because he flouted bank procedures by paying out cash to a customer in exchange for a cheque and took money from the vault occasioning a shortage.
44. RWIV, Mr. George Onyango confirmed, on cross-examination that he attended the claimant's disciplinary hearing on 16th March, 2023 as a member, and signed the minutes on 6th March, 2023 using his short version signature.
45. The witness confirmed that he was incharge of investigations and investigated the claimant's case and recorded witness statements and accessed the transaction summaries and the sum of Kshs.623,000.00 was lost. When shown the relevant minute that no money was lost, the witness testified that the cash was lost initially.



46. The witness confirmed that he did not avail a copy of the investigation report to the claimant because he did not ask for it nor the transaction summaries as he had access to them.
47. The witness further testified that he did not provide witness statements to the claimant although the witness gave adverse evidence against the claimant nor were they present at the hearing.
48. The witness confirmed that as this was a vault shortage the claimant was the one who was supposed to declare it but one Richard a teller did and explained the circumstances in which he did so. That as the claimant was proceeding on leave and the incoming Manager Mr. Gideon Omondi declined to do so, the claimant instructed Mr. Richard to do so.
49. That the shortage came to light after the area Manager discovered it and instructed that it be declared.
50. It was RWIV's testimony that the teller who declared the shortage, Mr. Richard did so irregularly and was issued with a warning letter.
51. On re-examination, RWIV testified that the respondent lost money on account of the claimant's conduct. He further testified that the investigation report was read out to the claimant.
52. That a shortage is declared by the person who incurs it and the claimant should have done so but shifted responsibility to Richard.

Claimant's submissions

53. By 27th March, 2025 the claimant's counsel had not filed submissions.

Respondent's submissions

54. Concerning validity of the reason for termination of the claimant's employment, counsel for the respondent relied on the provisions of Section 41, 43, 44(4)(g) and 47(5) of the [Employment Act](#) to submit that the respondent had justifiable grounds to terminate the claimant's employment.
55. Reliance was also placed on the decisions in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR to urge that there was a substantive justification, as was the decision in *Evans K Madi Misango V Barclays Bank of Kenya* [2015] eKLR which relied on the principles of reasonable responses test in the *Hallsbury's Laws of England* (4th Edition Vol (16) at page 482 to submit that the shortage of operational cash of Kshs.623,000.00 was detected on 19th October, 2022 during a surprise inspection of the Bondo Branch by the Area Manager (M/s Caroline Onyango) and Mr. Patel was to return the money on the same day.
That Mr. Sum declared the shortage yet it was a vault shortage.
56. Counsel submitted that the claimant acted in an irregular and unprocedural manner by assisting a customer with the banks money, a serious offence and the disciplinary committee found the claimant culpable and his conduct amounted to gross misconduct.
57. On due process in the termination of employment, counsel submitted that the respondent conduct the process fairly as it issued a notice to show cause, the claimant was interdicted in November 2022, invited for a disciplinary hearing and attended with a colleague, one Mr. John Chavene who was allowed to speak at the hearing.
58. That a member of the committee recused himself at the instance of the claimant. Counsel submitted that the claimant was given the opportunity to read and confirm whether the minutes were accurate and appealed the dismissal from employment.



59. On reliefs, counsel submitted that the claimant was not entitled to any and cited the sentiments of the Court of Appeal in *CMC Aviation Ltd V Mohammed Noor* [2015] eKLR on the 12 months salary award, to urge that the claimant had not availed evidence to warrant maximum compensation.
60. Counsel further submitted that the claimant was not entitled to the Kshs.397,320.00 unpaid during interdiction and was paid one (1) month's salary in lieu of notice but was entitled to a certificate of service.

Analysis and determination

61. It is not in dispute that the claimant was employed by the respondent on 1st November, 1990 and remained in active service until 2nd May, 2023 when his employment was terminated following the events of 19th October, 2022 when the claimant gave one Anit Patel the sum of Kshs.623,000.00 in exchange for a cheque of a similar amount in the customer's name and the shortage occasioned by the amount paid out was discovered by the Area Manager, one M/s Caroline Onyango after counting the cash.
62. The claimant's evidence as to who was directed to declare the shortage is contradictory. The witness statement states that the supervisor ordered him to declare the shortage but at paragraph 16 he states that the supervisor ordered Mr. Richard Sum to do so.
63. During the hearing, RWI testified that she directed the claimant to declare the shortage but the claimant directed one Richard, a teller to do so.
64. RWII on the other hand testified on the circumstances in which the declaration of shortage took place and having investigated the matter sounded more credible. The witness introduced a 3rd officer Mr. Gideon Omondi, the incoming Manager, as the claimant was proceeding on leave who declined to declare the shortage.
65. The truth is that the shortage was declared by a teller irregularly as he is not the one who incurred it and for his conduct received a warning letter.
66. In the notice to show cause whose contents the claimant did not contest, the supervisor states that the claimant informed her that the alleged customer visited the bank on 11th October, 2019 and before that the claimant had given a different story on the events of 11th October, 2022. It is also clear that the customer was given the cash without the cheque, which was only forwarded at the supervisor's instigation.
67. Neither the notice to show cause nor the claimant's response dated 24th October, 2022 mention the date of 19th October, 2022. Based on the evidence it is unclear as to when the customer visited the bank and notably, the claimant was accused of dishonesty.
68. What is not in contest is that the shortage heralded the claimant's separation with the respondent 6 months later.
69. Similarly, the claimant admitted having received and responded to the notice to show cause, invited to and attended a disciplinary hearing, received a letter of a termination of employment, appealed to the Managing Director and received a response, a year later, after a complaint was raised with the Commission on Administrative Justice.
70. Although the claimant appears to admit that what he did was irregular since the respondent is not a Commercial Bank to issue overdraft facilities, he contests the fact that his employment was terminated yet he could have been warned analogous to the tellers at his Branch.



71. He also contends that he was supposed to have received two warnings before summary dismissal. According to the claimant he could only be dismissed after the 3rd misconduct.
72. He also faults the procedure used by the respondent in various respects.
The issues for determination are:
- i. Whether termination of the claimant's employment was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.
73. The law governing termination of employment is well settled by the provisions of the [Employment Act](#) and case law.
74. The provisions of the [Employment Act](#) are clear that for a termination of employment to pass muster, the employer is required to prove that it had a valid and fair reason to do so and the reason related to the employees conduct, capacity or compatibility or the operational requirements of the employer and that the termination of employment was conducted in accordance with a fair procedure.
75. Courts of law on the other hand have been consistent that for a termination of employment to pass the fairness test it must be shown that there was both a substantive justification (reason(s)) and procedural fairness.
76. The sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR are often cited as they aptly capture the essence of the provisions of the [Employment Act](#) on termination of employment.
77. Did the respondent have a substantive justification to terminate the claimant's employment?
78. From the evidence on record, it is evident as to what the claimant did on 11th October, 2022 or 19th October, 2022, both dates appear in the documents filed by the parties.
79. Although the notice to show cause accused the claimant of not declaring a shortage, though the EOD reports were signed by all three persons which was an irregularity as well as lack of integrity, dishonesty and abuse of office, the claimant only responded to the irregularity. He denied the allegation that the branch had been having charges, although he did not correct the date cited by the Acting Area Manager, the Supervisor, which would appear to suggest that indeed the customer received the cash on 11th October, 2022 and gave nothing in return but a promise to return the cash by close of business but had not done so by 19th October, 2022 when the supervisor made a surprise visit and discovered the shortage and directed its declaration.
80. Similarly, the disciplinary committee found that the claimant had lied and faulted the bank procedures on cheque deposits and zero rating and paid a customer cash before the customer deposited the cheque.
81. The committee found the claimant guilty of misconduct and recommended termination of employment although aware that the bank had not lost any money as per the investigation report.
82. The recommendation was approved by the Managing Director for implementation.
83. Finally, the termination letter dated 2nd May, 2025 stated that the claimant's employment was terminated for operational irregularity contrary to procedures of the bank.
84. From the evidence on record, it is discernible that the claimant gave out the respondent's money to a customer without any form of security but for the client's promise to deposit the same later and there



is a possibility that the alleged customer visited the bank before 19th October, 2022 as the claimant did not contest the dates used by the supervisor in her letter dated 21st October, 2022, two (2) days later to read 19th October, 2022.

85. Simply, the claimant gave a customer the banks money in contravention of its procedures as it is not a commercial bank which typically offer overdrafts facilities. He undeniably took a huge risk which would have passed but for the surprise visit by the supervisor.
86. The respondent remained without its money for several days, before the cheque cleared which may be construed as misappropriation of its funds for those days.
87. During the hearing, the claimant admitted that the issue had not arisen in the other branches he had served.
88. Was the offence sufficiently grave to justify termination of employment?
89. While the claimant argues that it did not and in any case the tellers involved were not dismissed from employment. The respondent maintained it was serious enough.

Under clause 6.2.4 of the Respondent's Code of Conduct,

“Major or serious offences are those which substantially interfere with the smooth running of the bank and which are likely to lead to severe disciplinary action including dismissal...”

90. Under the Code, the supervisor is empowered to assess the seriousness of the offence and the extent to which it violates the rules of the bank (Clause 6.2.2).
91. In this case, the claimant's supervisor assessed the claimant's offence as serious as evidenced by the notice to show cause dated 21st October, 2022.
92. It is unclear to the court why the claimant could not have disclosed the shortage even before the supervisor counted the cash to confirm the cash position of the branch, if the alleged customer had indeed visited the Branch that morning.
93. The issue of dishonesty would not have been mentioned by the supervisor or the disciplinary committee.
94. Strangely, the claimant accepted the customer's cheque No. 000665 of Kshs.623,000.00 drawn in the name of the customer, which means that the money would be paid in the customer's account and the customer would have to withdraw and deposit the same in the bank account and the cheque had to be replaced on 21st October, 2022.
95. The claimant's response to the notice to show cause is silent on when the cheque was cleared and cash returned to the bank.
96. The disciplinary committee found the claimant culpable because the shortage was a vault shortage and he was thus responsible as the Branch Manager and he was supposed to declare it but instructed a teller to do so.
97. Both the notice to show cause and the claimant's response are consistent that the supervisor ordered or directed that the shortage be declared. The letters make reference as to whom was directed to do so.
98. The disciplinary committee found that being the Branch Manager and Accounting Officer of the branch, the claimant was responsible for the operations of the branch including the shortage and did not allege it was occasioned by the tellers.



99. Needless to emphasize, the claimant's conduct exposed the bank to loss for several days though no money was ultimately lost.

100. Would a reasonable employer terminate the employment of such an employee?

Section 43(2) of the *Employment Act* provides that

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

101. Judicial authority is consistent that Section 43(2) of the *Employment Act* requires the employer to demonstrate that it genuinely believed that there were reasonable ground to terminate the employee's employment.

102. In *Galgalo Jarso Jillo V Agrucultural Finance Corporation* [2021] eKLR B. O. Manani J. stated:

"...In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision..."

103. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR the Court of Appeal expressed the view that:

"...The standard of proof is on a balance of probabilities 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. That is a party subjective test."

104. Similarly, the court made reference to the guidelines in *Halsburys Laws of England*, 4th Edition Vol.16 (1B) paragraph 642, the concept or principle of band of reasonable responses test adopted by Lord Denning in *British Leyland (UK) Ltd V Swift* [1981] I.R.L.R 91 inter alia.

"...The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial injury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair".

The court is in agreement with the foregoing sentiments.

105. Guided by the evidence on record and the foregoing statutory and judicial authorities, the court is satisfied that the respondent has demonstrated on a balance of probabilities that it had a substantial justification to terminate the claimant's employment on account that if a bank was to wait until loss occurred to adjudge an employee guilty of gross misconduct or serious offence, it would be too risky for it. In this case, the claimant exposed the respondent to risk of loss of Kshs.623,000.00 for several days, which is substantial and without security.



Procedure

106. As held by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR, the elaborate procedure in Section 41 of the *Employment Act* is mandatory and any dismissal or termination of employment in violation of the provisions of the act is procedurally flawed and irregular and thus unfair within the meaning of Section 45 of the *Employment act*.
107. See the sentiments of Mbaru J in *Jane Samba Mukula V Ol Tukai Lodge* [2013] eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (Supra).
108. The claimant faulted the disciplinary process on the grounds that it was not fair in that no statement of charges was issued at the hearing and had no prior notice of the charges, was not given a chance to cross-examine witnesses and the committee was hostile to the colleague, Mr. John Chavene.
109. The tenets or precepts of Section 41 of the *Employment Act* has been enumerated in a catena of decisions, including *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR and include reasons for which termination of employment is being considered or the charges, explanation of the reasons to the employee in a language understood by the employee in the presence of a colleague of the employee's choice or shop floor representative, the employee and the representative are entitled to make representation and the committee or panel must hear and consider the representations made.
110. Although the notice to show cause required the claimant to respond to specific allegations, the invitation to the hearing dated 6th February, 2023 and 7th March, 2023 did not set out the allegations.
111. Equally, the minutes of the hearing on 16th March, 2023 have no indication that the charges were read out to the claimant at the hearing which is a legal requirement.
112. Although the claimant alleged that they were not allowed to speak at the hearing, the minutes reveal that the claimant responded to many questions posed by the members of the panel and in his final submissions thanked the bank for the opportunity to present his case.
113. Similarly, Mr. John Chavene, who testified that he was gagged for having stated that he appeared as the claimant's advocate asked four questions relating to the accusations against the claimant.
He did not deny the contents of the minutes.
114. Significantly, the claimant's interdiction on 3rd November, 2022 was to facilitate investigations which was conducted and witnesses interviewed, statements recorded and a report prepared.
115. Both RWII, RWIII and IV confirmed, on cross-examination that the claimant was not given a copy of the investigation Report.
116. RWIII, Mr. Benard Musyoki, testified, on re-examination that the investigation report was read out to the claimant at the hearing yet the minutes have not such record or indication of the Report having been read out.
117. Finally, RWIV Mr. George Onyango confirmed that the claimant was not given witness statements of the witness and they were not availed for cross-examination.
118. From the minutes of the hearing, it is discernible that the committee had and considered the contents of the investigation report.
119. It is trite law that the right to fair hearing encompasses the duty of the accuser to furnish the accused person with all the evidence and documents the accuser proposes to rely on during the hearing. This



- enables the accused person to know the evidence he or she has to confront and how to respond or controvert it.
120. In this case the disciplinary committee had the investigation report but the claimant did not.
121. The response that the contents of the report were read out to the claimant at the hearing cannot avail the respondent, as it by its conduct impeded the claimant's right to a fair hearing as the report would have facilitated preparation for the hearing and/or determine whether or not to call witness or demand certain persons be summoned as witnesses for cross-examination.
122. The essence of avilment of documents to an employee facing disciplinary action has been addressed by the Court of Appeal in several cases.
123. In *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR the Court stated:
- “In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation...
- At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the respondent, and if so, in what language. The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting...”
124. In *OI Pejeta Ranching Co. Ltd V David Wanjau Muhoro* [2017] eKLR the court held: -
- The respondent before the re-scheduled disciplinary 'hearing' requested the appellant to furnish him with a copy of the audit report so as to sufficiently prepare for his defence as is envisaged by the principles of fair hearing. Fairness in the circumstances would inform that the respondent be supplied with the allegations against him in sufficient detail to adequately prepare for a defence...
- That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair”.
125. See also *Regent Management Ltd V Wilberforce Ojiambo Oundo* [2018] KECA 883 (KLR), where the respondent had requested for documents to enable him prepare for the hearing but they were not availed.
126. Relatedly, although the claimant filed an appeal within the duration prescribed by the Code of Conduct, the response on record is dated 19th June, 2024 and appear to have been actuated by the complaint the claimant lodged with the Commission on Administrative Justice.
127. The letter dated 19th June, 2024, signed for the Managing Director makes no reference to the Board of Directors of the respondent having sat to consider the appeal. It merely the rehashes the history of the case and what had transpired.
128. There is no evidence to show that the Board of Directors, the appellate body considered the claimant's appeal.
- Under Section 45(4) of the [Employment Act](#)
- (4) A termination of employment shall be unfair for the purposes of this Part where—



- (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Employment and Labour Relations Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) the existence of any previous warning letters issued to the employee.
129. From the evidence on record, it is decipherable that the respondent neither availed the charges vide the letter(s) of invitation to the disciplinary hearing nor have them read out at the hearing in the presence of Mr. John Chavene.
130. Relatedly, the respondent adduced no evidence of having considered the claimant’s appeal and the letter on record is dated more than one year and one month after the termination of employment and did not issue a certificate of service or avail a copy of the investigation report to the claimant to enable him prepare for his defence.
131. The minutes of the disciplinary hearing committee dated 16th March, 2023 reveal that officers involved in such conduct as the claimant were dismissed from employment. The claimant had a previous warning and signed the attendance register during the interdiction as directed.
132. In sum, the court is satisfied that the procedure adopted by the respondent fell short of a just and equitable one.
133. It is the finding of the court that the termination of the claimant’s employment was procedurally flawed and therefore unfair.

Appropriate Reliefs

- i. 12 months salary Kshs.1,591,680.00

Having held as above, the claimant is entitled to compensation for the unfair termination of employment by the respondent.

In determining the quantum of compensation, the court has considered that the claimant was an employee of the respondent for about 33 years which is undoubtedly a long time, the claimant appealed the decision but did not express his wish to remain in employment, and substantially contributed to the termination of his employment.

The respondent paid his pension.



In the circumstances the court is satisfied that the equivalent of 5 months salary is fair Kshs.663,200.00

- ii. Three months salary in lieu of notice

The claimant was paid one (1) month's salary in lieu of notice.

Having found that the respondent had substantive justification to terminate the claimant's employment, the claim for salary in lieu of notice is unsustainable by dint of Section 44(1) of the Employment Act and it is declined.

- iii. Withheld salary November 2022 to April, 2023

Having found that the respondent had a reason (s) to terminate the claimant's employment in the manner it did, the claim for the ½ salary retained during interdiction is unsustainable and it is declined.

- iv. Certificate of service

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

134. The upshot of the foregoing is that Judgment is entered in favour of the claimant against the respondent in the following terms:

- a. Equivalent of five (5) months gross salary, Kshs.663,200.00
- b. Certificate of service.
- c. Costs of this suit.
- d. Interest on (a) above at court rates from date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF APRIL, 2025.

DR. JACOB GAKERI

JUDGE

order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

