



**Akala v Kenya Commercial Bank Limited (Cause 1569 of 2018)
[2025] KEELRC 1724 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1724 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1569 OF 2018
CN BAARI, J
JUNE 12, 2025**

BETWEEN

ROY SYLVESTER AKALA CLAIMANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

JUDGMENT

Introduction

1. For determination is the Claimant's Statement of Claim dated 29th November, 2018 wherein, the Claimant seeks the following reliefs as against the Respondent:-
 - a. A declaration that the summary termination of the Claimant's employment was irregular, unfair, unlawful and/or wrongful or illegal and in breach of the *Employment Act*.
 - b. An order that the Respondent be directed to pay the Claimant damages for unfair summary dismissal from employment;
 - c. In the alternative, and without prejudice to the forgoing, the Respondent be ordered to reinstate the Claimant to his former position without any loss of benefits, allowances, salary and other legal dues.
 - d. An order for the immediate payment of Kshs.1,328,693/= being the total of the unpaid gross salary for the two (2) months the Claimant was on suspension.
 - e. An order for the Respondent to pay one months' gross salary in lieu of notice being Kshs.1,328,693/= together with interest.
 - f. An order for the Respondent to pay the Claimant for 28 days unpaid leave days.
 - g. Costs of the suit



- h. Interests on b, c, d, e & f at Court rates
 - i. An order that the Claimant pays interest on the staff loans advanced to the Claimant at the staff rate indicated on each loan facility.
2. The Respondent filed a Memorandum of Reply in response to the Statement of Claim dated 4th March, 2019 denying the Claimant's averments.
 3. The Claimant's case was heard on 28th March, 2023 and later on 27th October, 2023 wherein, the Claimant Mr. Roy Akala (CW1), testified in support of his case. He adopted his witness statement dated 27th June, 2019 and produced his consolidated list and bundle of documents dated 23rd March, 2023 as exhibits.
 4. The Respondent's case was subsequently heard on 15th March, 2024 and 4th December, 2024 wherein, the Respondent's witnesses Mr. Edward Kiplimo (RW1), the Head of Operations at Kigali Branch, Mr. Juma Amimo (RW2) and Mr. Robert Ngoje (RW3) testified on behalf of the Respondent. They adopted their respective witness statements and produced their list and bundle of documents dated 23rd January, 2024 in support of the Respondent's case.
 5. Submissions were received from both parties.

Claimant's case

6. It is the Claimant's case that he was employed on 10th June, 2011 by the Respondent as the Head of Shared Service Centre and later promoted to the position of Director, Back office and Customer Service.
7. The Claimant states that he was subsequently promoted to the post of Director Operations Management Job Level F (MFL) effective 1st January 2016, on new terms at a consolidated gross monthly salary of Kshs.1,228,451 which amount was increased through an annual increment to Kshs.1,328,693/=.
8. The Claimant states that he was diligent and hardworking throughout his employment and his performance rating for the years between 2015-2017 was high.
9. It is the Claimant's case that by a letter dated 12th September, 2018 and without good cause, he was suspended from work for an undefined period of time and on half pay on condition that he was to report to the Group Human Resource Director every Friday until the conclusion of the matter.
10. The Claimant avers that he was subsequently served with a notice to show cause letter dated 26th September, 2018 in relation to a Forensic Audit Report, and which he was required to respond to on/ or before 28th September, 2018, just 2 days from the date of the letter. The Claimant avers that he responded to the show cause letter as required.
11. Further, the Claimant asserts that he was invited to a disciplinary hearing scheduled for 12th October, 2018. He avers that he attended the hearing, but was not given a chance to explain the allegations, and instead, his written response was taken to be his only defence.
12. It is the Claimant's claim that he was not furnished with the Forensic Audit Report before the hearing or at all. The Claimant further avers that despite his response, the Respondent proceeded to summarily dismiss him from employment vide a termination letter dated 8th November, 2018.
13. The Claimant states that the termination of his employment did not meet the conditions for a summary dismissal as set out under Clause 8(b) of the employment contract. In addition, the Claimant



- claims that the dismissal failed the test of justice and fairness as no clear and unambiguous or specific allegations were made against him, and the Forensic Audit Report was not shared with him.
14. It is the Claimant's position that he was invited to a mockery disciplinary hearing where he was not allowed to participate in the proceedings and/or ventilate his case, thus was denied full pay while on suspension and which he contends amounted to unfair labour practices.
 15. The Claimant states that the Respondent declined to pay him his outstanding salary since the month of September, 2018 being the gross sums of Kshs. 664,346.50/= which resulted in him being unable to service his staff loan, and which the Respondent threatened to convert the interest to commercial rate.
 16. On cross-examination, the Claimant stated that upon his termination, he was paid an amount of Kshs. 3,473,157.95/- termed as net dues consisting of his consolidated withheld salary, salary in lieu of notice and leave.
 17. He further states that upon his dismissal he appealed to the Group CEO, but filed this Claim before his appeal had been finalized.
 18. The Claimant prays that his claim be allowed.

The Respondent's Case

19. The Respondent states that the Claimant was its employee and highlighted his duties and responsibilities as established under the employment contract.
20. The Respondent avers that the Claimant at the time of his performance review fraudulently represented to the Respondent that there were no outstanding claims with respect to the card operations which were under his supervision. It avers further that the Claimant made other false representations before the Respondent's Executive Committee regarding the card operations.
21. It is the Respondent's case that during the course of its annual routine audit made on 31st March, 2018, various issues were highlighted in respect of a suspense account number KES XXXXXXXXXXXXXXXX Master card POS as well as fraudulent transactions amounting to Kshs.1.47m made on suspense account number KES.XXXXXXXXXXXXXX. The Respondent states that at the time, the Claimant was in charge of the Respondent's card operations.
22. It is the Respondent's case that following the grave issues highlighted by the internal audit, the Respondent commissioned a forensic team to conduct an in-depth forensic audit in relation to the card operations under the Claimant's supervision and management, and requested the Claimant to prepare a report explaining the un-reconciled items.
23. The Respondent states that the initial findings of the Forensic audit Report revealed that fraudulent dealings and losses were incurred under the supervision of the Claimant in an elaborate scheme where claims were not made within the set timelines.
24. The Respondent avers that the forensic audit further confirmed that overdue items were presented as being current through an elaborate process where the system was manipulated to present overdue card transaction claims as current claims in a process referred to as "greening" or "refreshing."
25. The Respondent states that it blamed the Claimant for the lapses captured in the audit report which led to it incurring losses running into hundreds of millions of shillings. It states that as a consequence, the Claimant was placed on suspension with half pay pending final outcome of the forensic investigations.



26. It further avers that upon finalization of the forensic investigations, the Claimant was served with a notice to show cause letter dated 26th September, 2018 to answer to the claims of losses incurred as a result of the card operations under his supervision.
27. The Respondent avers that due procedure was followed during the Claimant's termination, and that he was served with the relevant sections of the forensic audit report that identified the lapses in the card operations.
28. The Respondent claims that the Claimant was granted an opportunity to respond to the claims which he did vide his response to the show cause letter, and during the panel disciplinary hearing.
29. The Respondent states that the Claimant was paid all his dues being salary, benefits and allowances until his date of termination to a total of Kshs. 3,473,157.95/=.
30. On cross-examination, RW1 stated that the forensic audit report mentioned the names of James Maina and Omollo as the persons responsible for reconciled items, and that the losses were attributed to one Samuel Kirika and not the Claimant.
31. RW2 told court that the Claimant was not interviewed during the forensic investigations and did not know whether the Claimant was furnished with the Forensic report.
32. RW2 further stated that the forensic report did not specifically attribute the losses to the Claimant, and no adverse recommendations were made against him and nor was action recommended against him in the report.
33. RW3 told court during cross examination, that the Claimant did not sign the minutes of the disciplinary hearing. He further confirmed that the Claimant's name did not feature in the Forensic audit Report.
34. RW3 further told Court that he could not confirm whether the Claimant was advised to attend the hearing accompanied by a representative. He confirmed that the Claimant was not accompanied at the hearing.
35. It is RW3's further evidence that the Claimant's appeal was not responded to. He confirmed that the Claimant wrote an email recommending the restructuring of card operations.

The Claimant's Submissions

36. The Claimant relied on the holding in the cases of Regent Management Limited v Wilberforce Ojiambo Oundo [2018] KECA 883 (KLR) and Kenya Commercial Bank Limited v Thomas Nyangi Mwita [2019] KECA 337 (KLR) to submit that the fact that he was not interviewed by the forensic audit team during the preparation of the report, he was denied an opportunity to make his representation to the audit team, before the report was compiled and submitted to the Respondent thus rendering the procedure unfair.
37. It is the Claimant's submission that the failure of the Respondent to supply him with a copy of the audit report when it served him with a show cause letter, or before, during, or after the disciplinary hearing, rendered the procedure flawed and led to his unfair termination.
38. The Claimant submits that the Respondent failed to inform him of his right to be accompanied by an employee of his choice in the disciplinary hearing contrary to the provisions of Section 41 of the *Employment Act*. The Claimant cited the case of Daniel Ouma Okuku v Kenya Plantation & Agricultural Workers Union & another [2019] KECA 202 (KLR) for the holding that the failure to advise an employee to be accompanied by an employee was unprocedural and unfair.



39. The Claimant submits that his termination was unfair on the ground that the Respondent did not accord him an opportunity to answer to the allegations raised during the hearing. It is his submission that the Respondent's disciplinary committee simply introduced itself, read out the case summary, and proceeded to refer to the Claimant's written response to the show cause letter.
40. The Claimant submits that the forensic audit report which was the basis of the entire disciplinary proceedings, did not find him culpable of any wrong doing nor did it recommend that any action be taken against him, and there was thus no justifiable cause to terminate his employment.
41. It is the Claimant's submission that he has proved the claim on a balance of probability demonstrating that his termination was both procedurally and substantively unfair. It is also the Claimant's submission that his career was unfairly and unjustly terminated and given his advanced age and reputational damage, it is impossible for him to secure comparable employment.
42. In sum, it is the Claimant's submission that the Respondent failed to adhere to the mandatory procedural requirements under the *Employment Act* which rendered his termination unfair, and that he is entitled to the reliefs sought under the claim herein.

The Respondent's Submissions

43. The Respondent submits that the termination of the Claimant's employment was not only fair, but also complied with the provisions of the *Employment Act*, Chapter 226 of the Laws of Kenya.
44. It is the Respondent's submission that the Claimant was given an opportunity to respond to the claims levelled against him which he elaborately did in his response to the notice to show cause by a letter dated 27th September 2018.
45. The Respondent submits that the Claimant was duly provided with the relevant sections of the forensic audit report that identified the lapses in the card operations that were under his supervision and management.
46. It is the Respondent's further submission that the Claimant was invited to a disciplinary hearing on 12th October 2018 during which, he was provided with an opportunity to respond to the claims levelled against him, but he chose to rely on his written response.
47. The Respondent submits that it was upon considering all the evidence provided that the Claimant's employment was terminated.
48. The Respondent submits that the grounds for the termination of the Claimant's contract were lack of oversight over the Operations Unit and his failure to develop and implement proper mechanisms to prevent operational loss as required under his job description.
49. The Respondent submits that the Claimant was given a chance to appeal against the termination of his contract, but he chose not to exercise that right.
50. The Respondent submits that the Claimant was paid his terminal dues in full upon termination.
51. The Respondent urges the Court to dismiss the Claimant's claim with costs.

Analysis and Determination

52. Upon careful consideration of the pleadings, the evidence adduced, witnesses' testimonies and the parties' submissions, the following issues crystallize for determination:-
 - i. Whether the Claimant's termination was fair, lawful and justified; and



- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination was fair, lawful and justified

53. The Claimant contends that his employment was unfairly terminated on the premise that due process was not followed. It is his position that his termination was based on a forensic audit report that he was never supplied with before his suspension and during the disciplinary hearing. He contends further, that the forensic report did not find him culpable and his name did not come up in the report nor did the report recommend that he be subjected to disciplinary action.
54. The Claimant maintains that he was neither interviewed by the auditors nor asked to make a report. It is his assertion that he was placed on suspension on half pay and later issued with a show cause letter that allowed him only two days to prepare his response.
55. In determining whether an employee was unfairly dismissed, the Court's duty is to interrogate adherence by the employer with both the tenets of procedural fairness and the satisfaction of the substantive justification test.
56. On the procedural fairness test, Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on the grounds of misconduct, poor performance or physical incapacity, the employer must grant the employee an opportunity to make representations in the presence of a colleague or representative of a trade union if the employee is unionized.
57. In *Postal Corporation of Kenya -vs- Andrew K. Tanui* [2019] eKLR, the Court of Appeal had this to say on procedural fairness:-
- “Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.
- The court stated that four elements must be discernible for the procedure to pass muster:-
- a. an explanation of the grounds of termination in a language understood by the employee;
 - b. the reason for which the employer is considering termination;
 - c. entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made; and
 - d. hearing and considering any representation by the employee and the person chosen by the employee.”
58. It is noteworthy that the said provisions of Section 41 of the *Employment Act* are couched in mandatory terms, and failure by an employer to comply, renders the termination flawed, hence unfair.
59. It is not disputed that the Claimant was suspended from work and subsequently issued with a notice to show cause letter dated 26th September, 2018. The letter required that the Claimant responds to the allegations on or before the 28th September, 2018. The Claimant's evidence is that he responded to the show cause letter within the stipulated timelines.
60. Parties are also in agreement that the Claimant was invited to a disciplinary hearing and which hearing was conducted on 12th October, 2018. The Claimant contends that he was not given a chance to explain



himself against the allegations, and instead, the Respondent quickly adopted his written response as his sole defence against the allegations levelled.

61. The Respondent's witnesses admitted that the Claimant was not furnished with the Forensic Audit Report, and nor was he informed of his right to have a representative present during the hearing in accordance with Section 41 of the *Employment Act*, 2007.
62. The Claimant further maintained that the termination of his contract was unfair on the premise that no clear and unambiguous or specific allegations were made against him, and that he was invited to a mockery disciplinary hearing where he was not allowed to participate in the proceedings and/or ventilate his case.
63. On its part, the Respondent states that due process was followed during the Claimant's termination having been served with the relevant excerpts of the forensic audit report that identified the lapses in the card operations.
64. The Respondent further contends that the Claimant was accorded an opportunity to respond to the charges made against him, and which he did vide his response to the show cause letter and during the panel disciplinary hearing.
65. The termination of the Claimant's contract was based solely on the outcome of the Forensic Audit Report. The Respondent's witnesses confirmed to this court that indeed, as the Claimant correctly submitted, he was not supplied with the complete Forensic Audit Report, but only excerpts of the same.
66. In my view, while the Respondent issued the Claimant with a notice to show cause and convened a disciplinary hearing, there is merit in the Claimant's claim that the forensic audit report—being the central basis of the allegations, was not fully disclosed or supplied to him prior to the disciplinary hearing to enable him sufficiently prepare his defence.
67. In my opinion the selective disclosure of adverse material undermines an employee's right to be heard meaningfully. It is not enough to extract sections from an investigation report. The full and complete documents must be duly served upon an employee in good time to enable the employee sufficiently prepare. A disciplinary process is not a matter of ticking boxes, it must be shown to have been intended to hear the employee's position on the charges levelled against him/her.
68. It is also not denied that the Claimant was never informed of his right to be represented/accompanied by a fellow employee or union representative during the disciplinary hearing. In the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated and the employee is entitled to have a representative present.
69. In light of the foregoing, I find that the termination of the Claimant's contract was fundamentally flawed, and grossly fell short of the dictates of Section 41 of the *Employment Act*, 2007.
70. The termination is procedurally unfair and so I hold.
71. The second limb in determining the fairness of a termination/dismissal, is whether the employer met the substantive fairness test espoused under Sections 43, 45(2) and 47(5) of the *Employment Act*. These provisions place the burden on the employer to prove that the reasons for termination are fair, valid and justified.
72. The Respondent's position is that the initial findings of the Forensic Audit Report revealed that fraudulent dealings and losses were incurred by the Respondent under the supervision of the Claimant



in an elaborate scheme where claims were not made within the set timelines. The Respondent further contends that through the forensic audit, it was confirmed that overdue items were presented as being current through an elaborate process where the system was manipulated to present overdue card transaction claims as current claims in a process referred to as “greening” or “refreshing.”

73. The Respondent blamed the Claimant for the lapses captured in the audit report which led it to incur losses running into hundreds of millions of shillings resulting in the Claimant’s suspension, disciplinary action and his subsequent termination.
74. The Respondent maintains that the Claimant having been promoted to the position of Director, Operations on 1st January 2016, he was responsible to ensure compliance with the existing operational procedure intended to minimize operational risk/losses, to creatively, resourcefully and imaginatively review procedures for efficiency and to minimize risks, and to ensure that in every transaction done at the Processing Centre, the Bank’s revenue is fully and correctly collected among others.
75. On his part, the Claimant contends that no clear and unambiguous or specific allegations were ever made against him and the Forensic Audit Report was not shared with him.
76. In *British American Tobacco (K) Ltd v Kenyan Union of Commercial Food and Allied Workers (Kucfaw)* [2019] eKLR which quoted with approval the decision in *Anthony Mulaki V Addax Kenya Limited*, Cause No. 822 of 2012 the Court held as follows:-

“In examining validity of reasons, the court was correctly directed by the Respondent to the case of *British Home Stores Ltd V Burchell* (1980) LC.R. 303 E.A.T. where it was held that for the court to uphold the decision by the employer as being fair, it must be shown that:-

- a. The employer must believe at the time of termination, that the employee is guilty of the allegations against him/her
- b. The employer had reasonable grounds upon which to sustain that belief; and
- c. The employer carried out as much investigation as reasonable in the circumstances the employer need only be satisfied on the balance of probability.”

77. I note from the evidence before Court that the Forensic Report that formed the basis of the termination of the Claimant’s contract did not recommend disciplinary action against the Claimant. The Respondent’s witnesses were unanimous that the report did not at all implicate the Claimant in any way whatsoever.
78. In my considered view, the Respondent has not sufficiently proved that the Claimant was guilty of the allegations it made against him, nor has it shown that it had reasonable, fair and justified grounds upon which to sustain that belief.
79. I therefore, find the termination of the Claimant’s employment both procedurally and substantively unfair and unlawful.

Whether the Claimant is entitled to the reliefs sought General damages for unfair termination

80. The Claimant seeks damages for wrongful termination. Having held that he was indeed unfairly terminated, and considering his length of service with the Respondent, and the opportunities available to him for securing comparable employment, I deem an award of Seven (7) months’ salary sufficient compensation for the unfair termination, and which is hereby awarded.



Order of reinstatement

81. The Claimant sought to be reinstated to his former position with the Respondent without loss of benefits, allowances, salary and other legal dues.
82. Under Section 49(4) (c) and (d) of the [Employment Act](#), an order for reinstatement can only be issued upon considering its practicability and existence of any exceptional circumstances. The [Employment and Labour Relations Court Act](#) further requires that reinstatement is only allowed where the employee has not been out of employment for more than 3 years.
83. The Claimant herein has been out of the service of the Respondent for close to 7 years, making this relief unavailable and the same fails on this account.

Payment for suspended months

84. The Claimant further seeks an order for the immediate payment of Kshs.1,328,693/= being the total of the unpaid gross salary for the two (2) months he was on suspension.
85. The record shows that the Claimant was paid his terminal dues on 8th December,2018 in the aggregate sum of Kshs.3,473,157.95/= which consisted of salary arrears for the months he served under suspension. The Claimant further confirmed receiving his dues during the hearing. This claim thus fails and is dismissed.

Notice pay

86. A cursory perusal of the record indicate that notice pay was settled as part of the final dues paid out to the Claimant on 8th December, 2018, and which payment the Claimant similarly admitted, hence the same equally fails.
87. In whole, the Claimant's claim succeeds and orders granted as follows:-
 - a. A declaration that the Claimant's termination is unfair.
 - b. An order that the Claimant be paid Seven (7) months' salary as compensation for the unfair termination at Kshs.9,300,851/- subject to statutory deductions.
 - c. The Respondent shall bear the costs of the suit and interest on (b) from the date of judgment until payment in full.
88. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Omondi present for the Claimant

Ms. Agutu h/b for Mr. Chacha Odera for the Respondent

Ms. Esther S- C/A

