Elijah v Kenya Airways Plc (Cause 151 of 2019)
[2025] KEELRC 2347 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2347 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 151 OF 2019

JW KELI, J

JULY 30, 2025

BETWEEN

ITEGI GITHINJI ELIJAH ..... CLAIMANT

AND

KENYA AIRWAYS PLC ..... RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated the 7th of March 2019, the claimant sued the respondent and sought the following Orders:-

    a) Special damages amounting to Kshs. 4,928,000.00.

    b) General damages for unfair termination of employment.

    c) Costs of the claim.

    d) Interest on (a) and (b) above at Court rates from the date of filing suit until payment in full.

2. The claimant in support of the claim filed his list of witnesses, witness statement, and list of documents with the bundle of documents attached, all dated the 7th of March 2019.

3. The Respondent entered appearance through the law firm of Triple OK Law, LLP Advocates and filed a statement of response dated 22nd May 2019. In support of the response, the respondent filed a witness statement of Moses Ombokh dated 4th December 2023, and a list and bundle of documents dated 21st February 2020.

4. To counter the Respondent's statement of response as aforesaid, the claimant filed a reply to the statement of response dated 19th September 2019.

Hearing and evidence

5. The claimant's case was heard on the 25th February 2025 when the claimant testified on oath, adopted as his evidence in chief, his witness statement dated 7th March 2019, produced his documents under list dated 7th March 2019 as C-Exhibits 1-10 and was cross-examined by counsel for the respondent, Kiche. The respondent's case was heard on the same date where RW1, Moses Ombokh, testified on oath, adopted as his evidence in chief, his witness statement dated 4th December 2023, and produced the Respondent's documents under the list dated 21st February 2020 as R-exhibits 1-2. He was cross-examined by counsel for the claimant, Ambani.

The Claimant's case in summary

6. The Claimant's case is that he entered into a contract of employment with the Respondent vide an appointment letter dated 21st June 2015, for the position of Supervisor, Treasury and Controls at a negotiated monthly salary of Kshs. 246,400/-. The claimant states that on 7th March 2016, he was suspended from his duties to pave the way for an investigation into allegations made against him. However, he was not supplied with full particulars of the allegations under investigation. Subsequently, on the 25th of April 2016, the claimant was issued with a notice to show cause purportedly containing the results of the investigation against him, and requiring him to show cause by noon on 27th April 2016. The claimant protested against the period given to respond as insufficient to respond to the various allegations. He also protested that he was not served with the documents and materials in support of the accusations against him. Nonetheless, the claimant was invited for a panel hearing through a letter dated April 29, 2016, which hearing was scheduled for May 3, 2016. The claimant, again, wrote to the Respondent on the 30th of April 2016 informing them that the notice was too short and that he was not supplied with the documents needed to prepare for the hearing. He requested to be provided with the said documents. The Respondent did not heed his request, thus neither postponed the panel hearing as planned, nor supplied the claimant with the requested records. He states that he was unable to prepare for the hearing. The panel hearing took place in the claimant's absence, and he was summarily dismissed through a letter dated May 3, 2016. On the 12th of May 2016, the claimant wrote to the managing director and the Group Human Resource Director of the Respondent, appealing against the decision to dismiss me summarily.

7. The claimant avers that he was unlawfully and unfairly summarily dismissed on trumped-up and unsubstantiated allegations. The Respondent, therefore, did not have grounds for summarily dismissing him from employment. He complains that he was not given a proper chance to be heard before his dismissal since he was not supplied with the documents that the respondent relied on to reach the adverse decision against him, contrary to his right to information. He was also not given any statutory or contractual notice of dismissal, contrary to his contract of service that made provision for three (3) months' termination notice, nor did he receive payment instead of notice. The claimant faults the respondent for the flawed procedure that they followed before his dismissal from employment, for lacking a valid reason for his termination from employment, and for failing to act according to the dictates of justice and equity, and the *Employment Act* 2007.

8. The claimant's claim is for salary outstanding as at 3rd May 2016, 3 months' pay in lieu of notice, gratuity for 6 years of service, unpaid leave, and an equivalent of 12 months' salary as general damages for unfair dismissal.

Respondent's case in brief

9. The Respondent's case is that it offered the claimant employment as a Supervisor, Treasury and Controls by a letter dated the 26th of May, 2010, at a consolidated gross monthly salary of Kshs. 200,000, which included all utilities. The claimant accepted the offer on the 7th of June, 2010. Some of the terms of the contract of employment were that the claimant was required to keep working hours as fixed by the respondent and to adhere to its Staff Rules and Regulations and practices as amended from time to time (Clause 6). It was clear that, subject to the terms and conditions of the Employment Contract and such directives as may be given to the claimant from time to time by his manager, the key tasks of the claimant's position as set out in the role description and performance targets as well as the staff rules, formed part of the Employment Contract. They included too.

    i. Ensure effective internal controls within the treasury and accurate, complete, and timely accounting of treasury transactions and compliance with company policies, regulations and procedures to detect and prevent errors and fraud from occurring.

    ii. Ensure reconciliations for all the multi-currency bank accounts are done on a daily basis reviewed and all variances resolved promptly to not only check on completeness of records but also as a control tool;

    iii. Ensure that General Ledger accounts reconciliations are prepared at least on a monthly basis reviewed and all reconciling items resolved promptly to ensure completeness of records and check on errors;

    iv. Review and ensure all the inter-stations, interbank funds transfer transactions are accounted for accurately, completely, and promptly and any outstanding items at month end followed up with the station and resolved to ensure timely and accurate accounting;

    v. Ensure all funds invested as deposits are accounted for and all interest earned, and withholding tax thereon accounted for promptly and accurately to ensure compliance of IAS;

    vi. Ensure sales returns, cash and direct receipts are accurately the balanced and posted to prevent errors and fraud from occurring;

    vii. Review all journals including but not limited to hedge accounting journals, interest expense and income accruals for accuracy before they are posted to the General Ledger to ensure completeness, accuracy, and reliability of records;

    viii. Implement Treasury controls according to the Treasury policy and procedures Manual to detect errors and fraud before they occur and ensure prompt corrective measures are taken should they occur.

10. The Respondent admits that on or about the 7th of March, 2016 it suspended the claimant from duty for a period of sixty (60) days on full salary to allow for further investigations into allegations regarding repatriation of the Respondent's funds from various stations. The Respondent subsequently issued the claimant with a Show Cause letter dated the 25th of April, 2016and informed him that investigations had been conducted and had revealed that:

    a) On several occasions, the claimant had forged several bank statements relating to the respondent's receiving account held with Citibank Kenya (039) with an intention to misrepresent financial information and on 16th June 2015,the Claimant modified Citibank Kenya bank statements for account number 100597039 for the months of January, February and March 2015.

b) The claimant initiated several Forex (FX) transactions with Dubai Bank for the sale of either South African rand or United Arab Emirates Dirham, where the respondent did not receive the equivalent amount of Kenya shillings in its receiving account held with Citibank Nairobi (039). The investigations revealed that the claimant initiated 11 AED transactions that totalled AED 23,900,075.00, which led to the Respondent losing Kshs . 176,245,123.00 mainly due to an unfavourable exchange rate for the respondent. This was contrary to the Claimant's job description and scope of duties that involved back office and online sales, but not funds management.

c) The claimant, as the supervisor in charge of the back office and online sales, failed to report any shortfalls or anomalies with FX transactions traded with Dubai Bank to his immediate supervisor. On 30th May 2014, a swift transfer from Dubai Bank of Kshs. 37,000,000.00 was not received by the Respondent, being part of the proceeds for the sale of AED 4,000,000.00;

d) On several occasions, the claimant received money from Dubai Bank, being part of the proceeds that were not remitted to the Respondent from the FX deals with Dubai Bank and that between January and June 2014, the Claimant had received a total of Kshs. 14,500,000.00 from Dubai Bank, being part of the proceeds that were not remitted to the Respondent from Dubai Bank;

e) On 13th April, 25th May and 27th May, 2015, the claimant's registered spouse as per the respondent's human resource records, one Grace Wamuyu Mathege, received money from Dubai Bank amounting to Kshs. 8,500,000.00, which were part of the proceeds that were not remitted to the Respondent from the FX deals with Dubai Bank.

11. As a result of all the above, the respondent directed the claimant to show cause why disciplinary action should not be taken against him for;

i. Performing his duties negligently and improperly;

ii. Fraudulently receiving money meant for the Respondent through various transactions;

iii. Failure to account for monies received on behalf of the respondent;

iv. Breaching the Code of Business Conduct and Ethics Chapter 3.4.4.1 and 4.4;

v. Wilfully neglecting the interests of the Respondent.

12. The respondent admits that it directed the claimant to send his written and signed response to the Show Cause Letter to the Head of Finance by the 27th of April,2016, which he did. After reviewing the claimant's response to the Show Cause letter, the Respondent found the same to be unsatisfactory; hence, by letter dated the 29th of April, 2016, it invited the claimant to appear before a disciplinary panel on 3rd May, 2016, at 2:00 p.m. to personally answer for the allegations contained in the Show Cause letter. The claimant was informed that a serving employee of the respondent could accompany him and that he could bring any witness who was also a serving employee of the respondent to the hearing. The respondent further permitted the claimant to bring any documentary evidence to support his explanation during the disciplinary hearing. The respondent informed the claimant that if he failed to attend the disciplinary hearing without the permission of the Head of Finance or an acceptable explanation, the respondent would proceed to take appropriate action. By a letter dated 30th April, 2016, the claimant wrote to the respondent seeking access and disclosure of the following: his work laptop, witness statements, and copies of the Board minutes and resolutions of the Board meeting held on 18th August, 2014. On the 2nd of May, 2016 the respondent sent an email to the claimant

and informed him that the disciplinary hearing would proceed as scheduled and that he would have an opportunity to seek an adjournment at the panel hearing if necessary. Regarding the information the claimant had requested, the respondent informed him that the same would be tabled at the hearing and that the claimant would be given an opportunity to interrogate the said information.

13. On the 3rd of May, 2016 at 12:45 pm the claimant responded to the respondent's email and stated that he would not attend the disciplinary hearing for the reason that the respondent refused to adjourn the meeting and had not disclosed the information he had requested. It is the Respondent's position that despite the Respondent giving the Claimant adequate notice of the disciplinary panel hearing and assuring him that the information requested would be tabled at the disciplinary hearing and that he would be given an opportunity to interrogate the said information, the Claimant failed, refused and/or neglected to attend the disciplinary panel hearing. The disciplinary panel met on the 3rd of May, 2016 notwithstanding the claimant's absence and considered the evidence against the claimant. They recommended that severe disciplinary action be taken against the Claimant.

14. In line with this recommendation, the respondent summarily dismissed the claimant from employment with effect from the 3rd of May, 2016 for gross misconduct pursuant to clause 7.13.1 of the Human Resource Policy Manual. It advised the claimant through the summary dismissal letter that he was allowed to appeal the decision to the Group Human Resource Director and Managing Director. On the 4th of May, 2016 the claimant wrote an email to the respondent indicating that he was dissatisfied with the unlawful dismissal and was desirous of appealing to the Group Human Resource Director and Managing Director against the same. He requested to be furnished with minutes of the disciplinary panel held on the 3rd of May, 2016. On the 12th of May, 2016 the claimant appealed against the decision summarily dismissing him. He was invited for an appeal hearing scheduled for the 9th of September,2016, and was that the respondent had prepared all the documentation containing the information he requested concerning the case. The respondent requested the claimant to indicate when he would collect the letter together with the bundle of documents in preparation for the hearing.

15. The Respondent insists that it was entitled under section 44 (1) of the *Employment Act* 2007 as well as clause 21 (b) of the Employment Contract to summarily dismiss the Claimant without notice for gross misconduct. The reasons for summarily dismissing the Claimant were valid and fair and the claimant was dismissed in accordance with fair procedure.

16. The Respondent states that the claimant was a member of both the Provident Fund and National Social Security Fund (NSSF) hence is not entitled to service pay. An employee who had been summarily dismissed such as the Claimant herein was only entitled to salary accrued together with leave earned but not taken up to the date of dismissal. This was paid to the claimant.

Determination

17. The parties filed written submissions.

Issues for determination

18. The claimant filed the following issues for determination –

    a) Whether the Respondent's summary dismissal was lawful and in accordance with the law;

    b) Whether the Respondent followed fair procedures as required by the *Employment Act*, 2007;

    c) Whether the Claimant is entitled to reliefs sought

19. The respondent submitted on the same issues and thus the court found the parties were in agreement the issues for determination to be :-

    a. Whether the termination of the claimant's services was lawful and fair

    b. Whether the claimant was entitled to reliefs sought

Whether the termination of the claimant's services was lawful and fair

Claimant's submissions

20. Section 44(1) of the *Employment Act* is categorical that: "Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which any statutory provision or contractual term entitles the employee."It is the Claimant's submission that, in this case of termination by way of summary dismissal, the Respondent did not comply with the dictates of the relevant provisions of the *Employment Act*, 2007. According to the *Employment Act* 2007, termination of an employee's contract of employment is unfair if the employer fails to prove that it was grounded on valid and fair reasons and a fair procedure was followed.

21. Section 45 (2) of the *Employment Act* provides that: "(2) A termination of employment by an employer is unfair if the employer fails to prove-

    a) that the reason for the termination is valid;

    (b) that the reason for the termination is a fair reason -

        (i) related to the employee's conduct, capacity or compatibility; or

        (ii) based on the operational requirements of the employer; and

    (c) that the employment was terminated in accordance with fair Procedure". Accordingly, in Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR the court emphasized that: "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. ...."

22. Section 43 of the *Employment Act*, 2007 states that: "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45(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."

23. Section 44(4) of the Act on actions that amount to gross misconduct states that:

    "..... an employee wilfully neglects to perform any work which it was his duty to perform, or
    (c) if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly....." In Ngila v Kenya Breweries Ltd (Employment and Labour Relations Cause E775 of 2022) [2025] KEELRC 455 (KLR) it was held that: "Section 41 of *Employment Act* 2007 states as follows:41.(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. The Respondent claims the Claimant committed gross misconduct related to forgery, misappropriation, and unauthorised transactions. However, the Respondent has not provided concrete evidence in Court to prove these allegations. The mere assertion, without documentary proof or testimony, does not meet the standard required for summary dismissal discussed herein. The Respondent's denial of the Claimant's defences and refusal to disclose evidence further undermines the validity of the grounds. B. Whether the Respondent followed fair procedures as required by the *Employment Act*, 2007.

24. Section 41 of the *Employment Act* 2007 states that: "(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 provision 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."

25. In Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR it was held that: "63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness. 64. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. 65.Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. 66.Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

26. To fully comprehend the genesis of the claim and the complaints of procedural impropriety, this Honourable Court needs to scrutinize the correspondence between 25th April, 2016 and 3rd May 2016 and the chronology of events during that period. a) The Claimant was suspended on 3rd March, 2016, to allow for investigations by auditors. For the period between 7th March 2016 and 3rd May, 2016 he was not working. b) On 25th April, 2016 at 4.40pm the Claimant received a Show Cause letter outlining the results of the investigations. He is required without any work place resources to respond to the show cause by no later than 12 noon, 27th April, 2016. c) The Claimant Responds and in the first paragraph of his response he states that:- "I received the letter on 25th April, 2016 at 4.30p.m. I note that I am supposed to respond by 12 noon on 27th April, 2016. This period is obviously not sufficient and reasonable to enable me respond to the various allegations, the factual basis of which have not been furnished to me." Despite his reservation the Claimant responded to the show cause letter. d) On Friday 29th April, 2016, the Respondent issues an invitation to the Claimant to attend a hearing before the disciplinary panel for 3rd May, 2016 at 2.00pm. e) Between the 29th April 2016 and 3rd May, 2016 there was a long weekend as Sunday 1st May, 2016 was a holiday and therefore meant that Monday, 2nd April, 2016 was not a working day. f) The Claimant in his letter of 30th April, 2016(appearing at page

20-21 of his bundle) clearly articulated his grievances.;- i. In paragraph 1 he indicated that the notice given was too short. ii. In paragraph 2 he complains of not being given clear and better particulars of the charges against him to enable him fully prepare for the hearing. iii. In paragraph 3 he decries the failue to be given documents, statements, materials and evidence and requests for them. iv. Finally he reminds the employer of his constitutional right to fair labour practices. g) The Claimant followed up his letter with an email of 3rd May 2016 at 12.45pm outlining his predicament but nonetheless he was summarily dismissed.

27. The Claimant was suspended on 7th March 2016 and later issued with a show cause letter dated 25th April 2016. The Claimant responded to this show cause letter, and the Respondent proceeded to dismiss him on 3rd May 2016 without conducting a disciplinary hearing or giving the Claimant an opportunity to be heard in person or to respond fully to the allegations. Procedural fairness under section 41 requires more than just informing the employee of the hearing, it also requires that the employee is given a chance to attend, respond, and be heard. The Respondent's argument that the Claimant refused to attend the disciplinary hearing does not necessarily exonerate it from breaching procedural fairness if other safeguards were not observed.

28. As outlined above it was clear that the Claimant was ready to appear before the disciplinary panel however he was not accorded sufficient time and resources to enable him prepare and attend the hearing. The process was hurried in such a manner that it implied that no matter what request the Claimant made the period for the process was cast in stone and its conclusion predetermined that the Claimant should be dismissed. In Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR, the Court underscored that in determining whether a decision by the employer to terminate is just and equitable the adjudicating authority is enjoined to, inter alia, scrutinize the procedure adopted by the employer in reaching the decision. This position was fully adopted by the Court of Appeal in the case of National Bank of Kenya vs. Samuel Nguru Mutonya [2019] eKLR. The Claimant therefore invites this Honourable Court to find that the Respondent did not comply with the lawful procedure in dismissing him. In Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR the court succinctly elaborated on the law governing termination and/or dismissal of an employee as follows: "32. The industrial Court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the strict provisions of the law and to avoid making the same invalid... 33. Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing ... 34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee.... 36. Under subsection 43 (2) of the *Employment Act*, 2007, 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. However, these reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee."

29. On the basis of the foregoing, it is evident that the procedure followed by the Respondent in the Claimant's summary dismissal was unfair and unlawful for various reasons. The law is clear that dismissal without a proper disciplinary hearing especially when the employee is willing to attend

and respond is deemed unfair. The Respondent's failure to hold a hearing or to consider the Claimant's explanations violates the principles of procedural fairness discussed herein. Furthermore, the Respondent's claim that they permitted the Claimant to seek an adjournment and assured him the evidence would be available does not substantiate that a proper hearing was conducted. Failure to hold a disciplinary hearing or properly consider the Claimant's explanations renders the dismissal procedurally unfair.

Respondent's submissions

30. The Respondent adhered to the substantive requirements under Section 43 and 44 of the Act. Under Section 43 of the Act, an employer has the duty to prove the reason for terminating the employee. It states that: "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (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." Lord Denning established the test for reasonableness of the basis for terminating an employee in the case of British Leyland UK Ltd v Swift (1981) I.R.L.R 91. He averred that: "The correct test is; was it reasonable for the employers to dismiss him" If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him."

31. It is not in dispute that the Claimant was offered employment in the role of Treasury Supervisor Accounts & Controls and his job purpose included ensuring effective internal controls within Treasury and accurate, complete and timely accounting of Treasury transactions. (see page 6 of the RB). His principal accountabilities included to ensure completeness of records and reconciliations and to ensure that all the interbank funds and transfer transactions are accounted for accurately, completely and promptly and any outstanding items at month end followed up with the station and resolved to ensure full timely and correct accounting. (see page 7 of the RB) In the Notice to Show Cause letter dated 25th April 2016, the Respondent specified the allegations against the Claimant as follows: a. Performing his duties negligently and improperly. b. Fraudulently receiving money meant for KQ through various transactions. c. Failure to account for monies received on behalf of the Company going against the Code of Business Conduct and Ethics Chapter 3.4,4.1 and 4.4 d. Willfully neglecting the interests of the company.

32. On or about early 2016 and as part of routine company processes in conducting regular audits, it became apparent that there were some discrepancies in reporting and that this issue needed to be resolved through the conducting of further investigations. The Respondent suspended the Claimant vide a letter dated 7th March 2016 and commenced investigations into the allegations regarding repatriation of the Respondent's funds from various stations. Following a comprehensive investigation by the Respondent's auditors, it was discovered that the Claimant was involved in the following: a. On several occasions, the Claimant had forged several bank statements relating to the Respondent's receiving account held with Citibank Kenya (039) with an intention to misrepresent financial information and in particular on 16th June 2015, the Claimant modified Citibank Kenya statements for account number 100597039 for the months of January, February and March 2015; b. The Claimant initiated several Forex (FX) transactions with Dubai Bank for the sale of either

South African rand or United Arab Emirates Dirham where the Respondent did not receive the equivalent amount of Kenya shillings in its receiving account held with Citi Bank Nairobi (039). The investigations revealed that the Claimant initiated 11 AED transactions that totaled to AED 23,900,075.00 which transaction led to the Respondent losing Kshs. 176,245,123.00, mainly due to unfavorable exchange rate to the Respondent. This was contrary to the Claimant's job description and scope of duties that involved back office and online sales but not funds management. The Claimant, as the supervisor in charge of back office and online sales, failed to report any shortfalls or anomalies with FX transactions traded with Dubai Bank to his immediate Supervisor. On 30th May 2014, a swift transfer from Dubai Bank of Kshs. 37,000,000.00 was not received by the Respondent being part of the proceeds for the sale of AED 4,000,000.00; d. On several occasions, the Claimant received money from Dubai Bank being part of the proceeds that were not remitted to the Respondent from the FX deals with Dubai Bank and that between January and June 2015, the Claimant had received a total of Kshs. 14,500,000.00 from Dubai Bank being part of the proceeds that were not remitted to the Respondent from Dubai Bank; e. On 13th April, 25th May, and 27th May 2015, the Claimant's registered spouse as per the Respondent's Human Resource records, one Grace Wamuyu Mathenge received money from Dubai Bank amounting to Kshs. 8,500,000.00 which monies was part of the proceeds that was not remitted to the Respondent from the FX deals with Dubai Bank.

33. As further demonstrated by the RB between pages 45 – 91, the Claimant initiated at least 5 different forex transactions without any authorization from the Respondent. This evidence was provided through a letter dated 25th April 2016 from Dubai Bank addressed to the Respondent. It specifically outlined, "details relating to forex transactions initiated and or communicated by Itegi Githinji (the Claimant) on Kenya Airways (the Respondent) account held by Dubai Bank". The respondent invited the court to note that the job description of the Claimant which appears between pages 6 to 10 of the RB does not include the initiation of forex transactions. For avoidance of doubt, the job description of the Claimant included the following: a. Ensure effective internal controls within the treasury and accurate, complete, and timely accounting of treasury transactions and compliance with company policies, regulations and procedures to detect and prevent errors and fraud from occurring. b. Ensure reconciliations for all the multi- currency bank accounts falling are done on a daily basis reviewed and all variances resolved promptly to not only check the completeness of records but also as a control tool; c. Ensure that General Ledger accounts reconciliations are prepared at least on a monthly basis, reviewed and all reconciling items resolved promptly to ensure completeness of records and check on errors; d. Review and ensure all the inter-stations, interbank funds transfer transactions are accounted for accurately, completely, and promptly and any outstanding items at month end followed up with the station and resolved to ensure timely and accurate accounting; e. Ensure all funds invested as deposits are accounted for and all interest earned, and withholding tax thereon accounted for promptly and accurately to ensure compliance of IAS; f. Ensure sales returns, cash and direct receipts are accurately balanced and posted to prevent errors and fraud from occurring; g. Review all journals including but not limited to hedge accounting journals, interest expense and income accruals for accuracy before they are posted to the General Ledger to ensure completeness, accuracy, and reliability of records; h. Implement Treasury controls according to the Treasury policy and procedures Manual to detect errors and fraud before they occur and ensure prompt corrective measures are taken should they occur.

34. The Fact-Finding Interview conducted by the Respondent's Auditors with the Respondent's Treasury Accountant at the material time on 8th March 2016 at page 57 of the RB confirmed that the Claimant was not authorised to initiate or conduct forex business on the Respondent's behalf. The former Treasury Accountant clarified that only he and the Treasury Manager were authorised by the Respondent to deal in forex transactions. He was therefore alarmed when it came to his attention that the Claimant was conducting unauthorized forex transactions on behalf of the Respondent.

Owing to the Claimant's unauthorized transactions in forex and financial misrepresentations, the Respondent suffered a loss of at least Kshs. 199,245,123.00. According to the FCA Handbook - Financial Crime: A Guide for Firms, one of the ways to prevent financial crimes is through four-eyes procedures. They are defined as: "Procedures that require the oversight of two people, to lessen the risk of fraudulent behaviour, financial mismanagement or incompetence going unchecked." Indeed, the Respondent has sought to implement a system of checks and balances by employing separate officers for front office functions (by initiating forex transactions) and back-office functions (by monitoring transactions to prevent the occurrence of fraud). It is evident and we invite this court to note that by virtue of his job description at page 7 of the RB, the Claimant's role was mostly to monitor, review and reconcile accounts to prevent the occurrence of fraud. The action of initiating transactions was therefore manifestly against the treasury protocols. Flowing from the above, it is evident that the Claimant's conduct ran afoul of Clause 7.13.1 of the HR Manual which inter alia prohibited the following: a. Neglecting to perform one's duties or performing them carelessly and improperly. b. Willfully neglecting the interests of the company. c. Failing to account for monies received on behalf of the company. Section 44 of the Act provides the grounds upon which an employee may be summarily dismissed from employment. These grounds amount to gross misconduct, allowing an employer to dismiss an employee without notice or with less notice than required: a. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly his employer. b. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

35. Following the chain of emails from the Claimant initiating the forex transactions, the Respondent had reason to believe that the Claimant willfully breached the terms of his employment by acting without the requisite authority. Furthermore, as evidenced by page 57 of the RB, the Claimant failed to alert the Respondent concerning the transactions he was carrying out, lending credence to the fact that the Claimant knowingly went against the Respondent's policies. The case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR elucidated on the test for substantive fairness in holding thus: "In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. 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 as him/her regarding the termination." The Court of Appeal also had the occasion to expound on the standard of proof in employment matters as per the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR. It stated thus: "The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services."

36. The respondent submitted that the Claimant was summarily dismissed on grounds of gross misconduct, which included negligence of his duties and willful misappropriation of the Respondent's monies. These are grounds that the Respondent reasonably believed to exist at the time of the Claimant's termination from employment, justifying his subsequent summary dismissal. The Respondent fulfilled the procedural conditions under Section 41 of the *Employment Act* 25. Under the *Employment Act* ("the Act"), the Respondent (as the employer) has the burden of satisfying that

the termination of the Claimant's employment was procedurally and substantively fair. This stance was echoed in the case of Sidika v Judicial Service Commission [2024] KEELRC 13348 (KLR) which stated that: "To determine whether or not a dismissal is fair, the role of the court is to consider whether the employer/Respondent, adhered to the twin question of procedure and the substantive fairness tests espoused in Sections 41, 43, 45 and 47 of the *Employment Act* 2007."

37. The elements of procedural fairness are enshrined in Section 41(1) of the Act. Firstly, it directs an employer to provide a notification, often expressed in a letter to show cause, detailing the reasons for the intention to terminate the employee. It states as follows: "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." Following the notice to show cause, Section 41(2) of the Act mandates an employer to provide the employee with an opportunity to present a defence in a disciplinary hearing: "Notwithstanding any other provision 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." The Court of Appeal distilled the minimum procedural requirements under Section 41 in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR). It stated that: "Four elements must thus be discernible for the procedure to pass muster: - i. an explanation of the grounds of termination in a language understood by the employee; ii. the reason for which the employer is considering termination; iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; iv. hearing and considering any representations made by the employee and the person chosen by the employee."

38. According to Rule 7.13.2 of the Respondent's Human Resources Policy Manual ("HR Manual"), the Respondent was authorized to dismiss an employee on account of inter alia: i. Neglect to perform one's duties or performing them carelessly and improperly. ii. Willfully neglecting the interests of the Company. iii. If the employee fails to account for monies received on behalf of the Company. Upon such dismissal, the respective employee was only entitled to: i. Salary and applicable allowances up to the date of dismissal. ii. Payment of accrued leave days. iii. Provident fund contributions in accordance with the Rules of the Scheme 31. It is not contested that the Claimant was employed by the Respondent through a Contract of Employment dated 26th May 2010, and signed on 7th June 2010. About 6 years later, the Claimant was suspended from duty on 7th March 2016 to allow for investigations into his conduct. His suspension was effected in accordance with Rule 78(2) of the Staff Rules and Regulations. The Respondent granted him full pay during his suspension as both parties awaited the outcome of the investigations. Thereafter, the Respondent presented the Claimant with a Notice to Show Cause Letter dated 25th April 2016. It concisely outlined the allegations against the Claimant. On or about 27th April 2016, the Claimant responded to the Notice to Show Cause letter by denying the allegations contained therein. Having found his response to be unsatisfactory, the Respondent invited the Claimant to a disciplinary hearing scheduled for the 3rd of May 2016 in line with Rule 17.3.1 of the HR Manual. This rule provides that: "It (the Hearing) will also be held where, after response to a show cause letter, it is realized that severe disciplinary action may be taken against the Staff." The Respondent dutifully reminded the Claimant of his right to procure the attendance of a fellow employee during the hearing in consonance with Section 41(1) of the Act. Moreover, the Respondent clearly informed the Claimant that in the event he failed to attend the disciplinary hearing without permission of the Head of Finance or without an acceptable explanation, the Respondent

would proceed to take appropriate action. To the Respondent's consternation, the Claimant refused and or neglected to attend the disciplinary hearing on 3rd May 2016. Instead, the Claimant sent an email to the Respondent one hour prior to the hearing informing the Respondent that he would be absent from the hearing. This was despite the Claimant having the option of adjourning the hearing in accordance with Clause 17.3.3.3 of the HR Manual. The Respondent reiterated that the panel hearing would continue as scheduled. After analyzing the available evidence, the panel recommended that severe disciplinary action be taken against the Claimant. Subsequently, in a letter dated 3rd May 2016, the Respondent summarily dismissed the Claimant from employment on grounds of gross misconduct. The Respondent also informed the Claimant of his right to appeal the decision of the panel to the Managing Director and the Group Human Resource Director. Vide a letter dated 12th May 2016, the Claimant presented his appeal. The Respondent scheduled the date for the hearing of the appeal for 16th September 2016. However, the Claimant neither confirmed nor communicated his attendance of the appeal hearing to the Respondent. In the case of Philip Kimosop v Kingdom Bank Limited (2022) eKLR, the Court held that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing, constituted fair procedure. The Court emphasized that all these steps taken by the Respondent prior to terminating the Claimant's employment qualified as following due procedure as contemplated by Section 41 of the *Employment Act*. Similarly, we urge the Court to find that the termination of the Claimant's employment was procedurally fair because the Respondent fulfilled all the requirements of procedural propriety under Section 41 of the Act. It would be remiss of the Respondent not to mention that the Claimant curtailed his own right to fair hearing by failing to attend the disciplinary hearing that was scheduled by the Respondent. In asserting that the employee has a duty to follow the internal grievance procedures stipulated by their employer, this Court avowed as follows in the case of Duncan Ndegwa Muriuki v Lasit Limited [2018] KEELRC 137 (KLR): "22. In the case of Jackson Butiya v Eastern Produce Cause 335 of 2011 in which the court held; An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say ''I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law. The procedural fairness requirements set out under Section 41 of the *Employment Act*, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided." In view of the foregoing authority, the Claimant's willful failure to attend the disciplinary hearing did not affect the procedural propriety of the hearing. The Claimant cannot allege that the procedure of terminating his employment was flawed while he neglected to attend the said proceedings. The Claimant's request for documents was immaterial to the procedural propriety of the disciplinary hearing. Prior to the scheduled hearing, the Claimant responded to the invitation to the hearing on 30th April 2016 requesting for the evidence to be relied upon by the Respondent in substantiating the allegations. He argued that failure to provide the requested documentation would interfere with his rights to information and fair hearing. The Respondent informed the Claimant on 3rd May 2016 that all the relevant documentation would be provided at the hearing. In any event, the allegations against the Claimant were exhaustively listed in the Notice to Show Cause. In the case of Wilson Mutabari Mworia v Barclays BIn the case of Wilson Mutabari Mworia v Barclays Bank of Kenya Limited [2021] KEELRC 541 (KLR), this Court held that failure to provide an investigation report was not prejudicial to the employee. This was because the Notice to Show Cause had comprehensively detailed the charges against the employee, allowing him an adequate opportunity

to defend himself even in the absence of the documentary evidence. The Court specifically declared as follows at paragraph 74 and 76 of the judgement: "74. To my mind, what is important in determining the fairness of a disciplinary process is the sufficiency and detail of the charge against an employee. Hence, the test should be whether an employee has been sufficiently informed of the allegations he or she is facing. 76. In the circumstances, the claimant was not in any way prejudiced by the absence of the investigation report as the allegations spelt out, were sufficient and comprehensive enough to enable him defend himself adequately." In the same way, the Claimant was not prejudiced in defending himself. He still had an adequate opportunity to mount a defence following the Notice to Show Cause that sufficiently detailed the charges levelled against him by the Respondent. The Respondent submits that did not infringe the Claimant's rights to information and fair hearing.

Decision

39. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—

    (a) that the reason for the termination is valid

    (b) that the reason for the termination is a fair reason—

        (i) related to the employees conduct, capacity or compatibility; or

        (ii) based on the operational requirements of the employer; and

    (c) that the employment was terminated in accordance with fair procedure." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

40. Section 43 provides for proof of reasons for termination as follows:- '43. Proof of reason for termination

    (1) 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

    (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."

41. The Claimant's case was that he was unlawfully dismissed from service on the 3rd May 2016(page 24 of response). The letter of dismissal disclosed the reason for the termination as follows:- 'RE: Summary Dismissal

> We refer to show cause letter under reference DM/0008419/PF dated 25 deg April 2016, your response thereto received on 27th April 2016 and the subsequent panel hearing in the matter on 3 May 2016. It is also observed that despite having been given adequate notice of the panel hearing, and further to the subsequent email communication dated 2 May 2016 advising you to attend the hearing as planned, you failed to do so. Nevertheless, the panel sat in your absence and Management proceeded to review the evidence presented in support of the charges leveled against you in detailed in the show cause letter.

We wish to advise you that after considering all the facts in the matter as well as the evidence adduced during the panel hearing, all the charges leveled against you in the show cause letter have been confirmed.

Your conduct, as stated in the show cause letter, amounts to gross misconduct in line with the provisions of Section 44 4) (c) and (g) of the *Employment Act*, 2007, and Clause 7.13.1 (i), (iv), (vi) and (vi)."

42. The show cause letter was dated 25th April 2016 and stated the outcome of the investigation and the charges for the claimant to show cause as follows:- '5. Investigations have also revealed that on 13 April 2015, 25 May 2015 and 27th May 2015. your registered spouse according to the Company s HR records, one Grace Wamuyu Mathenge, received money from Dubai bank amounting to a total of KES 8,500,000.00. This money was part of the proceeds that were not remitted to KQ from the FX deals with Dubai Bank.

In view of the above, you are therefore required to Show Cause why disciplinary action should not be taken against you for:

i. Performing your duties negligently and improperly.

ii. Fraudulently receiving money meant for KQ through various transactions as evidenced above.

iii. Failure to account for monies received on behalf of the Company

iv Going against the Code of Business Conduct and Ethics Chapter 3.4.4.1 and 4.4 Willfully neglecting the interests of the company

Your written and signed response should reach the undersigned no later than 12 noon on 27th April 2016. Should you fail to respond to the letter within this time frame without permission from the undersigned or other acceptable justification. appropriate action in accordance with the Staff Rules and Regulations and the Labour Laws will be taken.'"

43. The claimant faulted the process followed in the termination based on not having been provided the investigation report and other documents he had asked for, and for short notice of the process. The claimant responded to the show cause (undated), raised concerns about the short period and the lack of supply of documents to rely on. The claimant further replied to the allegations in the show cause on merit. The respondent, vide letter dated 29th April 2016, informed the claimant that it was not satisfied with his response and invited him for a panel hearing on 3rd May 2026 at 2:00 pm. The claimant was informed of the right to call a serving employee as a witness. The claimant, vide letter dated 30th April 2016, responded and stated that the notice was insufficient to prepare and lacked supporting documents to enable him to respond. The respondent proceeded with the hearing as scheduled and produced minutes of 3rd May 2016 where the panel recommended severe disciplinary action against the claimant and a criminal case to recover the stolen money. (page 22 of the response). The disciplinary action appeared to the court to be a summary dismissal letter. The claimant appealed on the decision. The Respondent produced an email to effect that the claimant was invited for a hearing on the appeal on 9th September 2016 and informed where to collect the documents he had asked for. During cross-examination, the claimant confirmed he received the summary dismissal letter on the same date he had been invited for a panel hearing. When asked to confirm that the reason for dismissal was that, under his contract, he was not authorized to do forex transactions for the respondent, the claimant answered that the contract stated other duties by immediate supervisor from time to time. He said under clause 6 the manager assigned the roles. He told the court that forex trading was part of the

additional role given by the supervisor. He told the court the mode of instruction was email and oral. When asked about evidence to that effect, he answered that he was denied his laptop, which had the emails. He told the court that ordinarily, the department in charge of forex was the treasury, and there were 2 supervisors. The claimant confirmed to the court that at page 6 of the respondent's documents was his job role. The claimant refused to confirm that his role did not include a forex transaction. He also denied confirming the key performance areas on page 7 of the respondent's organisational structure documents. The claimant confirmed he was required to implement treasury controls, detect errors and fraud. When asked if he was aware of the respondent having suffered losses due to the forex transactions, he told the court they were insignificant losses. He told the court he detected the losses. The claimant told the court he flagged the detected losses for audit. He had no evidence before the court to support the claim that he reported the losses or errors detected to the respondent. He confirmed that one of the accusations was that he initiated forex for Dubai Bank beyond his job description. He confirmed in response to show cause that the company was making substantial losses from forex transactions and had no evidence of having reported the losses.

44. The claimant further denied having transacted with Dubai bank. He confirmed that the forex transaction he initiated was related to Dubai Bank. He confirmed that he initiated a forex transaction and stated that it was not committal. He stated that Dubai bank was his bank. He said that if he received money from Dubai Bank, it was not related to the respondent. He was familiar with the email on page 81 of the response document where he wrote to indicate to Dubai Bank, that KQ was selling Zar 11 million. He confirmed this was a forex transaction. He said this was the initiation he was talking about.

45. The claimant admitted in the invitation to a hearing that he could be accompanied by colleagues. He admitted he was informed he would be provided with documentation at the hearing. He failed to attend due to a lack of information and witnesses. He asked for adjournment via email, as that was the mode of communication. During the re-examination, the claimant told the court that the forex transaction was part of the treasury. The monies received from Dubai bank did not belong to KQ. That he was issued with notice on 29th, April which was followed by a long holiday and appear on 3rd may hence unable to approach colleagues to accompany him to the hearing and that being on suspension the staff were unwilling to be associated with him, that on email of 2nd May he was just informed the documents would be tabled and not that the documents would be given to him. That his email of 3rd May 12.45 was before the hearing and he was asking for fair hearing and reasonable time. The claimant said if he detected any error he would refer it to audit and there was no audit attributing any error to him.

46. The respondent's witness was Moses Omboki. During cross-examination he confirmed that the claimant was required to comply with the directions of the manager. He did not have the investigation report in court and nor did he minutes of 3rd May (panel hearing) indicate the investigation report was before the panel. RW1 told the court the claimant was not a signatory of KQ and would not be involved in any money received under the transaction. RW1 told the court the claimant was negligent in his duties. RW1 confirmed that the claimant in the email on forex communicated the transaction and indicated another person would deal. There was no evidence of receipt of the money by the claimant. He had no evidence that monies belonging to the respondent received by the claimant. He had no evidence of willful negligence by the claimant.

47. On the procedure RW1 told the court the time for response was adequate. He confirmed that the claimant wrote on 30th asking for adjournment of the hearing and was not accommodated. The witness said all days are working days for KQ. On re-examination RW1 told the court that the claimant having failed to attend the panel hearing it was not necessary to table the documents and the company had a

right to proceed. That from the documents in court it was not the role of the claimant to initiate forex transaction and in the event he did so that was irregular.

48. Section 45 of the *Employment Act* states- '45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure. "The test for validity of the reasons is that of a reasonable employer. The test was sated by Lord Denning in British Leyland (U. K.) Ltd v B. J. Swift [1980] EWCA Civ J1017-8 –'The first question that arises is whether the industrial tribunal applied the wrong test. We have had a considerable argument about it. They said: "... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate". I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have rejected him, then the dismissal was unfair. But if a reasonable employer might reasonably have rejected him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was pretty reasonable to ignore him, then the dismissal must be upheld as fair: even though some other employers may not have rejected him. "The charges as per the show cause letter included the forex transaction. The claimant during the hearing did not deny having received money from Dubai Bank and said the money did not belong to KQ. There was an accusation of having received 14.4M from Dubai Bank. There was also an allegation of a company registered under his spouse, which was alleged to have received Ks. 8.5m. The claimant admitted in response that the respondent had made losses in Forex, which he alleged was an insignificant loss. The claimant downplayed his role in the forex transaction, stating he had merely initiated the transaction. The respondent in its documentation produced the job role of the claimant, which included preventing fraud. The respondent noted the role of the claimant did not include forex trade (page 7 of response). The claimant did not produce a contrary document. There was evidence before the court (at page 81 of the response) of the claimant's action of having made an offer to Dubai Bank for the sale of Zar 11 million. He said his role was only to initiate transactions. At page 80, Dubai Bank confirmed to the claimant that they would purchase the ZAR and asked for settlement accounts. The court finds that the claimant was not only initiating the forex transaction but was present and active throughout. The court finds it is valid to dismiss an employee for misconduct and based on operational requirements of the employer (section 45 supra). The court had no reason to doubt that the respondent had reasonable grounds to suspect the claimant was involved in a forex transaction to defraud it based on the foregoing. The employer on reasonable suspicion of fraud

or theft by employee would be entitled to dismiss the employee under section 44 (4) of the *Employment act* to wit:- 'g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.'' The court upholds the reasons for termination as lawful

Procedural fairness

49. It was not in dispute that the claimant was suspended, issued with a notice to show cause with details of the allegations and asked to respond. He replied to the allegations. He was invited for a hearing and informed of his right to be accompanied by a fellow employee. The time of the hearing was also specified. He appealed and was allowed to appear and peruse the documents as asked. The claimant claims procedural unfairness on the basis that the notice hearing was short, he was not issued with an investigation report, and that he asked for an adjournment, which was denied.

50. At the hearing RW1 said the notice was adequate. Section 41 of the *Employment Act* provides for procedural fairness as follows:- '41. Notification and hearing before termination on the grounds of misconduct

    (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 The language the employee understands, and 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 of present during this explanation.

    (2) Notwithstanding any other provision 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.''

51. The notice for the panel hearing was dated 29th April 2016 for hearing on 3rd May 2016. The claimant responded vide letter dated 30th April 2016 under caution of ''without prejudice.'' The word without prejudice is used for confidentiality between advocates and clients. Why would the claimant qualify a letter with his employer? Anyway, I hold that the words had no special meaning. He stated that the notice did not afford him reasonable opportunity to prepare and make representations to the panel. The 30th of July and the next day were a weekend, and the following Monday was a holiday. He said the time was not enough for him to contact and procure the attendance of all potential witnesses who could testify in his defence. He asked for disclosure of several documents (Doc 4 of the claim). The Court of Appeal distilled the minimum procedural requirements under Section 41 in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR). It stated that: "Four elements must thus be discernible for the procedure to pass muster:- i. an explanation of the grounds of termination in a language understood by the employee; ii. The reason for which the employer is considering termination, iii. entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made; iv. hearing and considering any representations made by the employee and the person chosen by the employee." In the case of Wilson Mutabari Mworia v Barclays BIn the case of Wilson Mutabari Mworia v Barclays Bank of Kenya Limited [2021] KEELRC 541 (KLR), this Court held that failure to provide an investigation report was not prejudicial to the employee. This was because the Notice to Show Cause had comprehensively detailed the charges against the employee, allowing him an adequate opportunity to defend himself even in the absence of the documentary evidence. The Court specifically declared as

follows at paragraph 74 and 76 of the judgement: "74. To my mind, what is important in determining the fairness of a disciplinary process is the sufficiency and detail of the charge against an employee. Hence, the test should be whether an employee has been sufficiently informed of the allegations they are facing. 76. In the circumstances, the claimant was not in any way prejudiced by the absence of the investigation report as the allegations spelt out, were sufficient and comprehensive enough to enable him defend himself adequately." In Duncan Ndegwa Muriuki v Lasit Limited [2018] KEELRC 137 (KLR): "22. In the case of Jackson Butiya v Eastern Produce Cause 335 of 2011 in which the court held; An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say ''I refused to talk with those people and therefore I was not heard, order them to pay me.'' It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law. The procedural fairness requirements set out under Section 41 of the *Employment Act*, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided." In Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR, it was held that: "63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness. 64.The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. 65.Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. 66.Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction." What is sufficient notice? The claimant was issued with notice of 29th April for hearing on 3rd May 2016. He stated that there was a long weekend in between with 1st may being labour day. The claimant did not explain to the court how this affected his ability to look for fellow employees to accompany him to the hearing in this error of mobile phones. He did not demonstrate any effort to do so. The court finds the excuse of short notice not to participate in the internal mechanisms of the employer was not justified. The court finds that fair hearing is deemed as granted on a party being given opportunity to present own case. Applying the foregoing the court finds that the respondent complied with the requirement of section 41 of the *Employment Act*. The court upheld the above decisions to apply in the instant case.

Whether the claimant was entitled to reliefs sought

52. Claim for unpaid Salary – during cross-examination the claimant confirmed his P9 form reflected salary of Kshs. 23,845.16. He told the court that he was asking for the entire salary for May as he kept engaging the claimant. He confirmed receipt of the dismissal letter on 3rd May. The court finds no basis for the claim. On dismissal, the claimant could not seek payment after that date. The court established he was paid for the 3 days worked in May.

53. The claim for notice pay was not due, having been summarily dismissed after procedure.

54. Claim for Gratuity – At cross-examination, the claimant had no proof of a gratuity claim. He said his advocate advised him. The advice is held as misleading. Gratuity, being not a benefit under contract, can only be at the discretion of the employer. In other words it is gratuitous and not a right.

55. Claim for unutilized Leave – the claimant sought leave for all pending days. He said in the employment contract that he was entitled to annual leave of 25 days. That this claim for leave was for 2015 and 2016. The Claimant submitted that his claim was for leave for 1 year. The Respondent did not dispute this and neither did they produce evidence that the Claimant had taken his leave. The Claimant claims Kshs. 246,400 under this head. The respondent submitted that –' In response to the prayer for unpaid leave, the Respondent submits that the Claimant was not entitled to the same because he did not have any accrued leave days." The court perused the witness statement of RW1, and found he did not address the issue of untaken leave, but said the claimant was entitled to leave earned but not taken. The dues paid were for 3 days worked in May only. The respondent, having not produced the record of employment to counter the claim for leave by the claimant, the same is awarded as sought.

56. In conclusion, the court holds that the termination was lawful and fair. The court found that the claim for untaken leave was successful. Judgment is entered for the claimant against the respondent as follows:-

    a. Payment of untaken leave in lieu of Kshs. 246,400 with interest at the court rate from the date of filing the suit.

    b. The claimant is granted ½ costs in the claim.

57. A stay of 30 days is granted.

58. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant: Ambani

Respondent: Ole Ntome h/b Kiche