



**Kithinji v Jamii Co-operative Savings & Credit Society Ltd (Cause 707 of 2017) [2024] KEELRC 626 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 626 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 707 OF 2017  
K OCHARO, J  
MARCH 8, 2024**

**BETWEEN**

**JAMES KITHINJI ..... CLAIMANT**

**AND**

**JAMII CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD .... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant first came into the employment of the Respondent on or about the 27<sup>th</sup> of August 1990. After working for the latter for two and half decades, his employment was terminated not through retirement or mutual separation, but by the Respondent on account of an alleged gross misconduct. Holding that the dismissal was wrongful and unfair, the Claimant, a Memorandum of Claim dated 14<sup>th</sup> March 2017, sued the Respondent, seeking several reliefs against it.
2. The Respondent resisted the Claimant's claim through a statement of Defence dated 31<sup>st</sup> July 2017. In the statement, it vehemently denied the Claimant's claim and the remedies sought therefore.
3. At the hearing of the matter, two witnesses testified on behalf of the Claimant and one witness testified on behalf of the Respondent. Subsequently, this Court issued directions for the filing of submissions by the parties. The directions were obliged.

**Claimant's case**

4. At the hearing, the Claimant moved this Court to, adopt his witness statement dated 14<sup>th</sup> March 2017 as his evidence in chief, and, admit the documents filed under the list of documents of the even date as his documentary evidence. These, the Court did with the consent of the Respondent.



5. The Claimant stated that he was employed by the Respondent as a Clerical Officer under a letter of appointment dated 27<sup>th</sup> August 1990. Further, at the time of termination of his employment, he was earning a gross salary of Kshs. 78,094/-.
6. The Claimant further stated that on or about 2<sup>nd</sup> November 2015, the Respondent issued him with a show cause letter wherein it accused him of conspiracy. The details of the conspiracy were that the Claimant with Ms. Elizabeth Wambulwa, its member, and Danson Gitonga, a senior member of staff at the Respondent's, on 8<sup>th</sup> October 2015, entered into an arrangement in which Mr. Gitonga used his funds [KShs. 263,000] to offset an outstanding loan amount that Ms. Wambulwa, owed the Respondent. The loan sum was so offset, to pave the way for her qualification and application for a higher loan.
7. The Respondent contended in the show cause letter that by clearing the loan clearance on behalf of Elizabeth Wambulwa, the Claimant and Mr. Gitonga violated the Respondent's existing policies, and further accused the Claimant of being involved in the subject transaction and failing to advise Mr. Gitonga against clearing the facility sum for the lady and failure to report the matter to his immediate supervisor or any other senior officer for action.
8. A statement of account in respect of Danson Murungi Gitonga's account showing a withdrawal of Kshs. 263,000/- on 8<sup>th</sup> October 2015, and a funds deposit slip by Elizabeth Wambulwa for Kshs. 261,800/- were attached to the show cause letter. A statement showing how the amount deposited by Ms Wambulwa was credited to various accounts was also served on him. He responded to the show cause letter on the 3<sup>rd</sup> of November 2015.
9. The Claimant further testified that on 4<sup>th</sup> September 2015, the Respondent suspended him from employment. The suspension was expressed to be investigatory suspension. Further, it was to be without pay and allowances until further notice.
10. Subsequently, the Respondent constituted an investigation committee to interrogate the subject transaction. The investigations revealed that Danson Gitonga had agreed to lend money to Elizabeth Wambulwa to enable her to clear her outstanding liabilities with the Respondent and to enable her to apply and qualify for a higher loan, under the product, normal loan. The money was lent to the member, on the understanding that she was to repay him, upon receiving the loan proceeds.
11. It was stated that the investigations further revealed that Mr. Gitonga, withdrew the money from his account and left the same with the Claimant who was then on duty as a cashier, for passing on to her. Further, upon receiving the money, she duly offset the liabilities following Respondent's guidelines. As a result, there was no breach of any of the Respondent's policies. Only Danson Gitonga was guilty of a conflict of interest. However, the committee recommended Mr. Gitonga and the Claimant be subjected to a disciplinary process and sanction.
12. He testified that on 14<sup>th</sup> November 2015, the Respondent dismissed him from employment for the reason that he did not caution Mr. Gitonga against clearing the loan on behalf of the member or seek advice from his immediate supervisor on the transaction, before completing the deposit transaction.
13. According to the Respondent, the dismissal was further informed by the grounds that the circumstances of the subject transaction showed that he was part of the scheme and a beneficiary; and that he had contravened Section 8 (d) (d) of the Jamii Sacco HR Manual which prohibited employees from placing themselves in situations of conflict of interest and Clause 2 (3) of which prohibited employees from soliciting or otherwise accepting inducement either directly or indirectly in cash or in kind to extend favour[s] to a member in the provision of loans.



14. The asserted that though the dismissal letter was dated 14<sup>th</sup> December 2015, he was paid his salary, only up to October 2015.
15. On 24<sup>th</sup> December 2015, he appealed against the decision to dismiss him reiterating his innocence, but the appeal was dismissed immediately by the Respondent on the basis that it did not disclose any new grounds that would warrant reversal of the dismissal.
16. The Claimant contended that his dismissal was unfair, it was without any valid reason. The Respondent dismissed him on account of a transaction that reasonably, he couldn't be blamed for.
17. Cross-examined by Counsel for the Respondent, the Claimant testified that at the material time, he was serving as a cashier, and his main duties were to receive money from and payout to, members of the Respondent.
18. The Claimant further testified that on the morning of the 8<sup>th</sup> of October 2015, he met Ms Wambulwa at the car park within the Respondent's premises. They had a brief discussion about the loan that loan that she was pursuing from the Society. As they were discussing, Mr. Gitonga joined them. Thereafter, the Claimant left the two at the parking area and proceeded to his office.
19. Any member who wanted a further loan was obliged by the Respondent's policy, to first clear the earlier loan before qualifying for another one.
20. He stated further that Mr. Gitonga withdrew money from his account and left the same with him, with instructions to hand over the same to a lady who was to come for the same for depositing in her account. Further, he couldn't make any report to the CEO, his immediate supervisor, because he didn't have details regarding the arrangement between his colleague and the lady.
21. The Claimant admitted that he was served with a show-cause letter. The letter did set forth the accusation against him. Further, he responded to the letter on the same day.
22. He further testified that he was invited for an interview over the matter. The interview had nothing to do with a discussion on the breach of the Respondent's Regulations. He was only asked to explain what happened on the material day, and the extent of his participation in the events in issue. He explained.
23. In his evidence under re-examination, the Claimant stated that he couldn't ask Mr. Gitonga why he was giving the money to the lady. The money was his. He didn't at all know the arrangement that the two had. He explained this much to the disciplinary committee.
24. Mr. Gitonga was senior in rank than him. Had he known that he was lending the money to the lady, he would have cautioned him against it.
25. Mr. Danson Gitonga, testified as a witness for the Claimant. He stated in his testimony that he was an employee of the Respondent from 1992 to 2015. The Claimant was his colleague.
26. The witness urged the Court to adopt his witness statement dated 14<sup>th</sup> March 2017, as part of his evidence in chief.
27. The witness testified that where a member of the Respondent SACCO had an outstanding loan, he or she could qualify for another loan only after he or she cleared the outstanding one. Relevant to this matter, the witness stated that Ms Wambulwa approached him seeking his help. She had an outstanding loan, yet she wanted to take another. She urged him to help her source funds to enable her to clear the outstanding liabilities. He agreed to help her with his own funds.



28. He withdrew money from his account and helped her as a friend. When he withdrew the money, he didn't carry the same with him. He left the same with the cashier [the Claimant] and then sent the lady to the cashier to transact. She cleared the outstanding loan and processed another.
29. The lady was to refund the money. Unfortunately, she didn't refund the same as agreed. This constrained him to involve a delegate of the Respondent who could reach her. To ask her to pay. Out of this, the matter escalated to the Respondent and became a disciplinary issue. He was eventually to be dismissed from employment on the account that he had conflicted himself by giving funds to the lady.
30. The witness stated that the Claimant was not involved at all in the arrangement between him and the lady. He didn't not defraud the Respondent. All he did was hand over the money that was left with him, with instructions to.
31. Cross-examined by Counsel for the Respondent, the witness testified, that he withdrew money from his account to help a member of the Society. The member was not introduced to him by the Claimant. He had met the lady twice before the subject date. She was at material working in Kitale, not Nairobi.
32. The Respondent though regulated by the Regulatory Authority, has its internal regulations, policies and code of ethics. The code regulates, the relationship between the members, the Respondent and members of staff. Further, he was not aware of any regulation forbidding the CEO or Director from helping a member of the Society to clear his or her loan.
33. The Claimant only executed his directions, to hand over the money to the member.
34. Later, Ms. Wambulwa paid the Kshs. 261,800 plus Kshs. 18000. In essence, he received more money than he had given her. He however denied the suggestion that he was doing money lending business. Employees of the Respondent were not supposed to lend money at a profit if they were to be allowed to, they were obligated to disclose to the CEO of the Respondent.
35. The lady repaid the money by depositing the same into his account hosted at the Cooperative Bank of Kenya. He denied that he received Kshs. 17,200 as transaction charges.
36. The Claimant was invited by the investigation team to give his statement on the matter that was in issue.
37. In his evidence under re-examination, the witness stated that the meeting at the parking lot was coincidental. They met there as they were reporting for work.
38. It was his position that the Claimant couldn't have a reason to question him about money that he had withdrawn from his account. The Respondent had no policy that forbids lending money to a friend or member.
39. The KShs. 18000 was money that he had separately lent to the lady to offset another loan that she owed the Ministry of Labour, to enable her to fully qualify for the Sacco loan.

### **Respondent's case**

40. The Respondent presented Mr. Eliud Chepkwony to testify on its behalf. The witness moved the Court to adopt his witness statement filed herein on the 27<sup>th</sup> March 2019, as his evidence in chief. It was his testimony that he was a former CEO for the Respondent Organization and before exiting the Organization he had served for 34 years.
41. The witness further stated that on the 8<sup>th</sup> October, 2015. Ms Elizabeth Nafula Wambulwa visited the Respondent's offices where she met the Claimant and Mr. Gitonga. The two of them appraised and advised her on the type of loan to apply for. She opted for a normal loan. The lady had an outstanding



loan of KShs. 261,800, a sum which Mr. Gitonga offered to clear. He withdrew cash from his FOSA account and entrusted the same to the cashier [Claimant] with instructions to settle Ms Wambulwa's outstanding loan.

42. He further stated the member filled out a cash deposit slip for KShs. 261,800 and gave it to the Claimant who received and stamped it. Mr. Gitonga gave her another KShs. 18,000 to clear liability with Mulwasa -Welfare at her Ministry of Labour Headquarters.
43. He further stated that the loan was processed and disbursed to the Member on 9<sup>th</sup> October 2015. Danson Gitonga gave her his account hosted at the Co-operative Bank so that she could repay his money through the account.
44. Subsequently, Ms Wambulwa was put under immense pressure to refund the money. She complained to the witness. Following the complaint, the witness instituted investigations into the matter. Eventually, Mr. Gitonga was found culpable of misconduct. This led to the termination of his employment.
45. The Claimant misconducted himself by; accepting to hold Mr. Gitonga's cash in trust, cash which was to be utilized to clear a member's loan, against the Respondent's policy; accepting to stamp the deposit slip for the funds in breach of the Respondent's policy and placing himself in a situation of conflict of interest and; failing to caution Mr. Gitonga against involving himself in the matter, the way he did.
46. The Claimant knew the purpose for which the money was being withdrawn by Mr. Gitonga, and deposited by the lady.
47. The witness testified that action was taken against both Mr. Gitonga and the Claimant. They were both dismissed from service after being taken through due process. They were issued with show cause letters, and given an opportunity to defend themselves before a disciplinary action against them.
48. Cross-examined by Counsel for the Claimant, the witness stated that he is not certain whether Ms. Wambulwa was introduced to Mr. Gitonga by the Claimant. The Claimant was junior to Mr. Gitonga in rank.
49. The Claimant never worked with the loans Department of the Respondent but at its FOSA.
50. Though in his witness statement, it is indicated that the lady complained as to why she was being asked to deposit the money into the Claimant's account, the true position is that after the loan was disbursed to her, she was directed by Mr. Gitonga to deposit the money into his account at Cooperative Bank of Kenya. Indeed, the money was deposited into his account, not into the Claimant's.
51. The Claimant was invited for a disciplinary hearing. However, the Respondent didn't place the invitation letter before the Court. His right of accompaniment was intimidated to him.
52. The witness asserted that the KShs.17000 might have been shared between the Claimant and Mr. Gitonga. This amount was over and above what Mr. Gitonga had given the lady.

### **Claimant's Submissions**

53. In his submissions dated 16<sup>th</sup> March 2023, the Claimant identified two (2) issues for determination, namely: -
  - a. Whether the Claimant was wrongfully and unfairly terminated from employment;
  - b. Whether the Claimant is entitled to the reliefs sought.



54. The Claimant submitted that in order for an employer to successfully assert that the termination of his employee's employment was fair, he must prove that the same was in adherence to procedural fairness and substantive justification. To support this point, reliance was placed on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. The Claimant further supported the submissions with the stipulations of Sections 41, 43 (1) and 45 of the *Employment Act* 2007.
55. Submitting on the substantive justification aspect, the Claimant stated that the law placed an obligation on the Respondent to demonstrate that it had a good cause to terminate the Claimant's employment. The Respondent failed to prove that it had a reason and a valid one to terminate the Claimant's employment.
56. Despite the termination letter setting out the reasons for the termination as, gross misconduct, failure to uphold his integrity, tarnishing the image of the Sacco and acting unprofessionally hence loss of trust, the Respondent failed to place forth sufficient evidence to establish the reasons. To the contrary, the evidence on record exonerates the Claimant from any allegation of misconduct. There is ample evidence from the Claimant, the lady's statement, and the testimony of the Respondent's witness, that when she approached the Claimant he referred her to the loans department. Mr. Gitonga confirmed that he was the one who advised the lady on the appropriate loan to take.
57. The Claimant further submitted that although the Respondent alleged and made it a reason for the dismissal of the Claimant, that accepting the money from Mr. Gitonga, as he did was a violation of the Respondent's policy, the policy was not presented as evidence before the Court.
58. The Claimant was junior in rank to Mr. Gitonga, he was not working with the loans Department, so it couldn't have been reasonably possible for the Claimant to caution Mr, Gitonga against the action of clearing a loan for Ms. Wambulwa.
59. The Respondent's witness's evidence revealed on a pivotal point, the Respondent was hell-bent on dismissing the Claimant at whatever cost. The witness's evidence in Court was radically different from that which was contained in his witness statement. This much he admitted under cross-examination. For instance, In the witness statement, he asserted that the Claimant directed Ms. Wambulwa to deposit the money in his account, only to change the story in his testimony under cross-examination.
60. The Claimant further submitted that the Respondent failed to demonstrate how the Claimant tarnished the image of the Sacco and acted unprofessionally, culminating in loss of trust.
61. The Claimant summed it up by stating that the Respondent failed to demonstrate that there was substantive fairness in the termination of the Claimant's employment.
62. Concerning procedural fairness, the Claimant took issue with his suspension for the reason that it contravened the Respondent's terms and conditions of service. The Claimant was not guilty of any of the circumstances for which an officer may be suspended.
63. The Claimant postulates that he did not receive notice to attend the disciplinary hearing save for a phone call made to him, a fact which was confirmed by the Respondent's witness. He therefore was not notified of the charges against him which he was required to respond to prior to the hearing. As such, his rights under Section 41 were contravened with impunity. To buttress this submission, the Claimant relies on *Wanyama Murambwa John v IEBC* where the court held that a show cause letter cannot amount to notice of the charges the Claimant was facing.
64. The Claimant concludes that he was wrongfully and unfairly terminated from employment and hence is entitled to the reliefs sought.



## Respondent's Submissions

65. The Court notes that the Respondent in its submissions, heavily reproduced the evidence by the parties. The Court will avoid summarizing the evidence, as prudence and care for the scarce judicial time will not tolerate it. However, the Respondent should take comfort that I have considered the same only to the extent that it is reflective of the evidence as presented to the Court.
66. The Respondent submitted that it acted fairly and within the law while managing the separation with the Claimant. It ensured that the precepts of procedural fairness were adhered to. Before issuing the Claimant with a show cause letter, it investigated the issue that was at hand and in the investigative process interviewed people including the Claimant.
67. It was submitted further the Respondent is in the Banking Industry. The employees in the industry are expected to act diligently to preserve the integrity of the bank. They hold a fiduciary position on behalf of the Organization. The customers of the Respondent who are vulnerable in the transactions have vested confidence, good faith, and trust in the Respondent as the custodian of their money. The Claimant was expected to be diligent in his duties so as to preserve that confidence and trust.
68. A fiduciary duty is defined in Black's Law Dictionary 11<sup>th</sup> Edition as "a duty of utmost good faith, trust, confidence, and candour owed by a fiduciary to the beneficiary...a duty to act with the highest degree of honesty and loyalty towards another person in the best interest of the other person...also termed as duty of loyalty, duty of fidelity, duty of faithful service, duty to avoid conflict of interest". The Claimant was in a well-organized cartel within the Respondent's workplace to defraud the Respondent's Customers. The Respondent had every reason to suspect the direct involvement of the Claimant as the transaction was peculiar. The dealings weren't honest.
69. On fiduciary relationship, the Respondent urged the Court to be guided by the holding in the American case of *Wolf vs Superior Courts* (2003) 107 Cal. App. 4<sup>th</sup> 25, 29 [130Cal.RPTR.2d 860] and *Family Bank vs Panda Co-operative Society*.

## Analysis and Determination

70. I have carefully considered the pleadings, the evidence, and the submissions filed by both parties and the authorities cited. The issues emerge for determination: -
- a. Whether the termination of the Claimant's employment was fair;
  - b. Whether the Court should grant the prayers sought by the Claimant.
    - a. Whether the termination of the Claimant's employment was fair.
71. It is not in dispute that the parties herein were in an employer-employee relationship from 27<sup>th</sup> August 1990 till 14<sup>th</sup> December 2015 when the Claimant was dismissed from employment on alleged grounds of gross misconduct. In my view, and as shall come out shortly hereinafter, he was summarily dismissed.
72. Section 44 of the *Employment Act* 2007 contains provisions on summary dismissal. It states that:
- “ 44. Summary dismissal
- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.



- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by her conduct indicated that she has fundamentally breached her obligations arising under the contract of service.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
  - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of her work;
  - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform her work properly;
  - (c) an employee willfully neglects to perform any work which it was her duty to perform, or if she carelessly and improperly performs any work which from its nature it was her duty, under her contract, to have performed carefully and properly;
  - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to her employer or to a person placed in authority over him by her employer;
  - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of her duty to obey, issued by her employer or a person placed in authority over him by her employer;
  - (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or



- (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 her employer or her employer's property.”

73. The termination letter dated 14<sup>th</sup> December 2015, expressly stated that the termination of the Claimant was effective 4<sup>th</sup> November 2015. In essence, it had a retroactive effect. The notice period was therefore not as contemplated under Section 35 of the Employment Act. By operation of the provisions of Section 44[1] of the Act, a summary dismissal occurred.

74. Invited as this Court has been, to interrogate and determine the presence or otherwise of fairness in the termination of an employee's employment, the Court has to consider two statutory aspects and render itself thereon. The two aspects, procedural fairness and substantive justification are embedded in the provisions of Sections 41, 43, 45 and 47[5] of the Employment Act. This was aptly captured by the Court of Appeal in Pius Machafu Ishindu vs- Lavington Security Guards Limited [2017] eKLR, thus;

“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. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing”.

75. Section 45(2) the Act provides what constitutes an unfair termination in the context of the Employment Act, thus;

- “(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.”

76. Section 41 of the Act provides for a procedure that must be adhered to by any employer contemplating terminating an employee's employment. In my view, the procedure embodies three components, notification- the employer must inform the employee that it intends to terminate his or her employment and the grounds for the intended action, hearing- the employer must accord the affected employee adequate opportunity to prepare and make a representation on the grounds. Connected to this component, is the employee's right of accompaniment. He should be allowed to be accompanied during the presentation by a colleague of his own choice or a trade union representative [if he or she is a member of a union]. Lastly, consideration- the employer must consider the representations made by the employee and or the accompanying person before deciding on the matter.



77. It is against this lens that I shall consider whether procedural fairness was present in the dismissal of the Claimant from employment. There is no dispute that through its letter dated 2<sup>nd</sup> November 2015, the Respondent wrote to the Claimant requiring him to show cause why disciplinary action. In the show cause letter, the Respondent did set forth, the grounds, for the intended action. Further, the Claimant responded to the letter through his dated 3<sup>rd</sup> November 2015. One could expect that once the Claimant made the response to the show cause letter, the Respondent could notify him whether or not the explanation was sufficient to stymie the intended disciplinary process expressed in the letter.
78. I say the foregoing [para. 77] cognizant of the fact that sometimes an employee's response to a show cause letter can attract his or her employer's change of position, to either drop the intended action fully and give the employee a clean bill of health of the accusations against him, or drop a few of the grounds of accusation and press on with the disciplinary process with the remaining grounds. The employer, after duly considering the explanation and deciding in whichever way, must unambiguously indicate its decision to the affected employee. It is here that I must say that a show cause letter is not a charge sheet for purposes of a disciplinary hearing.
79. Where the employer decides that the explanation is insufficient and that the employee has to face a disciplinary hearing in accordance with its Human Resource Manual, or established workplace practices, it must overtly invite the employee to appear for the disciplinary hearing, stating the place, date, time and the grounds that shall be the subject matter, for the hearing.
80. I have carefully scanned through the material presented before this Court, and it has become clear to my mind that the Respondent didn't in any manner communicate to the Claimant the sufficiency or otherwise of his explanation to the show cause letter and or invite him to a disciplinary hearing and expressly indicating to him the aspects mentioned hereinabove. I have not lost sight of the fact that in his evidence under cross-examination, the Respondent's witness testified that there was no such invitation.
81. The Respondent contended in paragraph 14 of its statement of Defence, thus;
- “On 17/11/2015 the Claimant was invited to appear before the staff disciplinary committee whereby the customer who had been involved in the transaction was present. The customer gave evidence and the Claimant who was present gave his version of the story which was similar to what the customer had narrated.”
82. In his pleadings the Claimant had denied having been taken through a disciplinary process. In his testimony which in my view, was not shaken, he maintained that he was not invited to any disciplinary hearing. However, he alluded to having been called for an interview to explain the events of the material day.
83. A critical consideration of the document titled “Jamii Sacco Report on Staff Disciplinary Cases, that the Respondent presented in evidence and asserted that they were disciplinary minutes, reveals, true as the Claimant alleged, the meeting that was not disciplinary, it was an interview session. The introductory part of the document read in part;
- “..... We held our meeting on 17<sup>th</sup> November 2015 and invited the following to attend: 1. Mr. James Kithinji 2. Mr. Danson Gitonga 3. Ms Elizabeth Wambulwa.
- The purpose was to establish whether Ms. Wambulwa the Complainant visited the Sacco on 8<sup>th</sup> October 2015 to seek loan services.”



84. Paragraph 2 of the document spelled out the Terms of Reference for the Committee. No impression can be gathered therefrom, that the Committee had then a disciplinary mandate. In clause 6 of the report, the Committee held;

“Recommendation.

Based upon the evidence that has been collected, it is recommended that the respective members of staff be considered for disciplinary action as follows.....”

On the Claimant they specifically recommended that he be dealt with as per the HR manual. This gives the impression that a disciplinary process was to be initiated upon the recommendation. None had been initiated before the report.

85. As a result of this premises, I come to a clear view, that the Claimant was not taken through any disciplinary process and or a process as contemplated under Section 41 of the *Employment Act*. Consequently, I inevitably, conclude that the termination was procedurally unfair.

86. I now turn to consider the aspect, of substantive fairness. The Claimant contended that the termination of his employment was justified and it was based on valid reasons. I have carefully, considered the evidence that was placed forth by the Respondent, I find it not difficult to conclude that the same was not sufficient at all to aid it in discharging its legal burden under Section 45 of the Act. The Respondent further alleged that the acts of the Claimant violated its policies. No policy document was placed before this Court, to show in the first place that it existed, and that the Claimant’s actions ran afoul of any part thereof.

87. It is not enough for an employer to allege that the employee breached its policies, without supplying specifics in evidence from which it can be truly discerned that the policy had specific dictates on its employees’ conduct at the workplace, nonetheless affected the employee decided to do contrary to the dictates.

88. I have carefully considered the grounds upon which the termination of the Claimant’s employment was anchored. I return that no reasonable employer could terminate his employee’s employment on the grounds, and considering the circumstances of this matter. The Respondent asserted that the Claimant failed to advise, Mr. Gitonga against giving the member money to clear the loan. I am unable to fathom any duty that was on him to so do, failure of which it could become a gross misconduct to warrant a dismissal.

89. I am unable to agree with the Respondent that it had any valid and fair reason to terminate the Claimant’s employment.

### **Whether the Claimant is entitled to the reliefs Sought**

90. The reliefs section of the Claimant’s pleadings is couched in a manner that one cannot by a casual glance see the wood from the trees. However, doing the best I can, I deduce that he inter alia seeks an order of reinstatement. Considering that the termination of the Employment of the Respondent took effect on 4<sup>th</sup> November 2015, by operation of the law, Section 12 of the *Employment and Labour Relations Court Act*, the remedy cannot be availed to him. Three years lapsed a long time after the separation.

91. In my view, the Claimant’s employment was in nature one terminable by a twenty-eight days’ notice under Section 35 of the Act. There is no dispute that the notice was not issued. This entitles him to notice pay per Section 35 read together with Section 36 of the Act.



92. I have considered; how the Claimant's employment was terminated, without fair and valid reason, and fair procedure; the length of time that he was in the service of the Respondent; and that I am not convinced that he in any way influenced the termination of his employment, and hold that he is entitled to the compensatory award contemplated under Section 49[1][c] of the Act to the extent of 7 months gross salary.
93. The Claimant asserted that at the material time, he had a facility with the Respondent The facility was not on commercial interest rates. Apparently, it was at a lower rate. To allow the Respondent to move to charge a rate different from the preferential rate, shall be tantamount to allowing the Respondent to benefit from its wrongdoing to the prejudice of the wronged, the Claimant.
94. In the upshot, judgment is hereby entered for the Claimant for;
- I. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
  - II. One month's salary in lieu of notice, KShs.78,094.
  - III. Compensation for unfair termination, 7 months' gross salary, KShs. 546,658.
  - IV. Interest on the awarded sum in [ii] and [iii] above at court rates from the date of this judgment till full payment.
  - V. Costs of the suit.

**READ, DELIVERED AND SIGNED THIS 8th DAY OF MARCH, 2024.**

**OCHARO KEBIRA.**

**JUDGE**

**In the presence of:**

**Ms. Kubayi for Claimant**

**Okech for the Respondent**

**ORDER**

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

**A signed copy will be availed to each party upon payment of Court fees.**

.....

**OCHARO KEBIRA**

**JUDGE**

