



**Kioi v Consolidated Bank of Kenya Limited (Cause 1982 of 2015 & 1381 of 2016 (Consolidated)) [2024] KEELRC 1143 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1143 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1982 OF 2015 & 1381 OF 2016 (CONSOLIDATED)**

**K OCHARO, J**

**APRIL 30, 2024**

**BETWEEN**

**PATRICK KIOI ..... CLAIMANT**

**AND**

**CONSOLIDATED BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Judgment relates to the two matters, Elrc cause No. 1982 of 2015- Patrick Kioko v Consolidated Bank Kenya Limited, and Elrc cause No. 1381 of 2016- Julius Mwaniki Gikonyo, which were consolidated by an order of this court on 27<sup>th</sup> February 2018. For clarity and easy understanding of this judgment, the Claimant in the former cause shall hereinafter be referred the 1<sup>st</sup> Claimant while the Claimant in the latter shall be the 2<sup>nd</sup> Claimant.
2. At all material times, the Claimants were employees of the Respondent working in its Debt and Recovery Department as recoveries officers. The Claimants contend that on or about 6<sup>th</sup> November 2015, they were sent on compulsory leave pending an investigation into a reported malpractice within the Department. Further, after almost thirteen months of the date of the mandatory leave, they were dismissed from employment.
3. Contending that; the compulsory leave that they were subjected to was unnecessary and unfair; the Respondent’s decision to withhold 50% of their salary during the stated leave period was unfair and unjustified; and the summary dismissal against them was unfair, the Claimants sued the Respondent in their suits hereinabove mentioned, seeking various reliefs against it, reliefs that were in nature declaratory and compensatory.



4. The Respondent entered appearance and resisted the suits by filing Memorandums in Reply to the Claimants' Statements of Claim. In the Memorandum, the Respondent denied their claims and entitlement to the reliefs sought. At the close of pleadings, the matters destined for hearing on merit, and indeed the Claimants testified in support of their respective cases. The Respondent presented two witnesses to testify in support of its defence against the claims.

#### **The 1st Claimants' case**

5. At the hearing the Claimant adopted his witness statement dated 15<sup>th</sup> October 2015, and Supplementary witness statement dated 22<sup>nd</sup> May 2017, as part of his evidence in chief and tendered the documents filed herein as his documentary evidence.
6. The 1<sup>st</sup> Claimant states that he first came into the employment of the Respondent as a Recoveries Officer vide a Letter of Appointment dated 23<sup>rd</sup> July 2013 at a monthly salary of Kshs. 170,000/-. His duties in the said position included debt collection, monitoring the portfolio of risks, identifying potential defaulters within seven branches of the Respondent, and taking appropriate recovery action against such defaulters. He was also tasked with recommending payment of service agents for services rendered to the Respondent.
7. At all material times, in discharging these duties, he worked under the supervision and direction of the acting Head of Credit, acting Recoveries Manager, and Head of Finance and Credit Committee. subject to approval and authorization from the two Debt Recovery Managers, under whom he worked.
8. He states that on or about the 6<sup>th</sup> of November 2014, he received a letter of the even date from the Respondent's then-acting Human Resource Manager. The letter placed him on compulsory leave with effect same date, to allow investigations to be conducted on alleged malpractices in the manner he discharged his duties at the Debt Recovery Unit.
9. Through the letter, the Respondent undertook to get to him once investigations were concluded. Further, it was expressed that 50% of his salary was immediately withdrawn.
10. The 1<sup>st</sup> Claimant asserted that no sooner had he commenced the compulsory leave than the Respondent replaced him with a newly recruited employee.
11. Noting that the Respondent had not communicated to him for almost nine months after the suspension, the Claimant through his Counsel's letter dated 30<sup>th</sup> June 2015 contended that the forced leave did not have any support in its Human Resource Policy Manual and the stipulations of his employment contract. The forced leave was untenable under the law. Further, the Respondent's action of withholding his salary affronted the provisions of the Employment Act. The prolonged leave equated to a constructive dismissal. Based on these, he threatened legal action.
12. On the 6<sup>th</sup> of July 2015, the Respondent wrote to him and informed him that the matter was being investigated by the Banking Fraud Investigation Unit. It urged him to follow up with the Unit for an update.
13. The 1<sup>st</sup> Claimant testified that on 2<sup>nd</sup> December 2015, he received a



show cause letter. In the letter, the Respondent communicated that it had completed its investigations. Further, the investigations revealed that some service providers were irregularly paid on his recommendation. He was called to explain the basis upon which he recommended those payments, by 7<sup>th</sup> December 2015.

14. He stated that on 6<sup>th</sup> December 2015, he wrote back to the Respondent requesting access to the files and vouchers relating to the transactions that were in issue to enable him to submit an adequate response. Following this request, the Respondent wrote him a letter dated 14<sup>th</sup> January 2016, indicating that the documents he had requested for were available at the Bank for his review and he was at liberty to visit the Bank for the review. Further, it expected a response to the show cause letter by 21<sup>st</sup> January 2016.
15. On 14<sup>th</sup> January 2016, he visited the Respondent's place of work intending to peruse the files to prepare his response to the show cause letter dated 2<sup>nd</sup> December 2015 but the files were not produced for his inspection. Instead, he was provided with photocopies of payment vouchers but not all.
16. To his surprise, on the 19<sup>th</sup> of January, 2016 the Respondent issued him with another show cause letter dated 19<sup>th</sup> January 2016 requiring him to explain Kshs. 63,280/- he allegedly irregularly received via Mpesa from the Respondent's service providers, on various dates in 2013 and 2014. He was asked to respond to this second show cause letter by 5.00 pm on 21<sup>st</sup> January 2016.
17. Noting that the letter was in a tone suggesting that the Respondent had a pre-determined conclusion that the payments were irregular, that the phone number which allegedly received the payments and the specific amounts allegedly paid by each service provider to him had not been indicated, he was prompted to respond to the letter through his Advocate on 21<sup>st</sup> January 2016. He denied the allegations in the Respondent's letter and requested proof of the alleged payments, to enable him to formulate an adequate response. In this letter, he further complained of the Respondent's breach of his Constitutional right to privacy. They had accessed his private communication, without his consent.
18. Without responding to his letter dated 21<sup>st</sup> January 2016, the Respondent invited him for a disciplinary hearing on 29<sup>th</sup> January 2016, vide a letter dated 27<sup>th</sup> January 2016. The Claimant attended the disciplinary hearing where he was grilled on the alleged irregular payments made to bank service providers. During the disciplinary hearing, the response to the accusations, he had given in his letter dated 21<sup>st</sup> January 2016, was ignored.
19. He states that on 3<sup>rd</sup> March 2016, the Respondent dismissed him from employment by a letter dated the same day. The grounds for dismissal were that he made an improper recommendation for payment of auctioneers' fees. The recommendation was based on the open market value of securities rather than the forced sale values in instances where auctioneers had not conducted auctions; and that he irregularly received money via MPesa from service providers on the panel of the Respondent. Further, he refused to respond to the show cause letter of the improper receipt of the money.
20. The Claimant avers that his dismissal was pre-determined as the



Respondent did not give plausible reasons for his suspension at the first instance, and the suspension lasted 13 months giving the impression that the suspension was unjustified in the first place.

21. The Claimant also postulates that he was unfairly dismissed from employment for the following reasons. Firstly, he was issued with two show cause letters at different times, one on 2<sup>nd</sup> December 2015 and the other on 19<sup>th</sup> January 2016. Both notices were an afterthought. The grounds in the first notice did not need 13 months to establish; while the grounds in the second notice were clumsily laid. The Respondent had hoped that the Banking Fraud Unit would pin him down, enabling it to get a ground[s] for dismissal, but that did not happen. As a result, the Respondent had to fabricate the grounds to justify the long suspension and eventual dismissal.
22. Secondly, he was denied an opportunity to properly defend himself since he was denied access to the 14 files that contained the information he required to enable him to do so. He was, therefore, impaired from mounting a proper defence to the first notice to show cause dated 2<sup>nd</sup> December 2015.
23. Thirdly, the charge contained in the second notice to show cause dated 19<sup>th</sup> January 2016 lacked details on the sources of the information of the payments, and the phone line/number affected. His right to privacy was infringed upon. Fourthly, his responses to the charges levelled against him were ignored, to the extent that the Respondent asserted that he did not respond to the allegations.
24. The Claimant complains that the 13-month suspension on 50% pay, was unnecessary. It only helps demonstrate the presence of poor labour practices on the part of the Respondent. As a result of the protracted suspension, the Claimant suffered emotional and mental anguish and became a social wreck. He was subjected to this suffering despite his guilt having not been established.
25. Cross-examined by Counsel for the Respondent, the witness reiterated that withholding 50% of his salary during the suspension period was not provided in the provisions of its Human Resource Manual. Shown the Respondent's Document [on page 40], he stated that that version of the manual provided for the same.
26. Referred to page 39 of the Respondent's documents, the 1<sup>st</sup> Claimant testified that the manual spoke to conflict of interest. However, in his view, receiving money or gifts from third parties does not amount to a conflict of interest. In any event, the provision of the manual prohibited receiving of substantial gifts.
27. The Respondent didn't get back to him on the position of the investigations. This prompted him to write to it inquiring about the position. Further, he was not aware of any policy that barred him from engaging the services of an advocate as he did.
28. The 1<sup>st</sup> Claimant further testified that the Respondent didn't have specific guidelines on the allocation of work to its service providers. Instructions could only be given to them with the approval of the CEO.
29. Fees payable to the Auctioneers were computed as provided for under



- the *Auctioneers Act*. The Respondent didn't have any guidelines on the computation of the fees. Sometimes, the fees payable to the auctioneers were negotiated. In the negotiations, the debtors could be involved.
30. In his evidence under re-examination, he testified that the Human Resource Manual tendered in evidence was a 2016 version which was not applicable in the material times. The Manual applicable was the 2<sup>nd</sup> edition, 2011.
  31. Lastly, he stated under cross-examination that he had a right to be represented by an Advocate. There was no policy prohibiting the representation.
  32. The 2<sup>nd</sup> Claimant, Julius Mwaniki Gikonyo adopted the contents of his witness statement dated 9<sup>th</sup> June 2016 as his evidence in chief. The 2<sup>nd</sup> Claimant stated that he first came into the employment of the Respondent under a letter of appointment dated 21<sup>st</sup> January 1999 as a Recoveries Officer. Further, he was promoted over the years, and at the time of his exit, he was earning a gross salary of KShs. 162,000.
  33. He stated that his job entailed debt collection, and monitoring portfolios at risk, thus identifying facilities that were potential for defaulting across the seven branches, and taking appropriate recovery steps like issuing appropriate notices and initiating realization of securities where necessary as per the *Auctioneers Act* and Bank procedures.
  34. His other duties included recommending the payment of service agents for the work and services rendered to the Respondent following the relevant Rules and Regulations e.g. those stipulated in the *Auctioneers Act*. The payments could only be made if there was approval and authorization by the then Acting Debt Recovery Managers. In matters of settlement of the service providers' fees, he acted in consultation with the Head of Credit and Head of Operations.
  35. In his employment, he could interact with and work with various service providers including lawyers, private investigators, Auctioneers, and Property Agents, Valuers in the Respondent's panel. In giving out instructions to service providers, he did it free of any favouritism. His integrity was never compromised.
  36. The Respondent didn't have any laid down criteria for the distribution of work to the service providers. However, any instructions going out to the service providers required the approval of at least two officers i.e. Recovery Official and the Acting Recovery Manager.
  37. On or about the 6<sup>th</sup> of November, 2014 he received a letter from the Respondent dated 6.11.2014, placing him on an investigatory compulsory leave. In the letter, the Respondent promised to get back to him as soon as the investigations were completed.
  38. About 10 months into the compulsory leave, he was approached by the police requiring his explanation on money that he allegedly received from Auctioneers through M-pesa. He categorically denied the assertion and asked the police to provide evidence that he did. He recorded a statement with the police, never to hear them thereafter.
  39. The Respondent issued him a show cause letter dated 2<sup>nd</sup> December



2015 indicating that following investigations that were carried into some irregular payments to some service providers, it had been established that he recommended the payments.

40. On the 6<sup>th</sup> of December 2015 he wrote a letter to the Respondent asking to be allowed to access the files, the subject of the investigations, to enable an adequate response to the show cause letter. The Respondent replied to this letter on 14<sup>th</sup> January 2016, indicating that the files were available for perusal and that he was at liberty to visit it for the perusal of the documents.
41. On the 14<sup>th</sup> of January 2016, he visited the Respondent intending to peruse the files and vouchers but the same were not duly availed. He was only given copies of fee notes. This prompted him to complain about the Respondent's failure through its letter of 20<sup>th</sup> January 2016.
42. The 2<sup>nd</sup> Claimant further stated that on the 19<sup>th</sup> of January 2016, he received another show cause letter through which he was asked to explain the circumstances under which he received KShs. 470,700. from various auctioneers.
43. On 21<sup>st</sup> January 2016, he approached an Advocate for legal advice on the 2<sup>nd</sup> Show cause letter. The Advocate wrote to the Respondent on the same day raising various issues and inviting the Respondent to provide finer details on the alleged receipt of funds from auctioneers.
44. Without answering his letter dated 20<sup>th</sup> January 2016, the Respondent invited him to a disciplinary hearing by a letter dated 27<sup>th</sup> January 2016. The disciplinary hearing was conducted on the 29<sup>th</sup> January 2016, and flowing therefrom, he was dismissed from employment summarily by the Respondent. The Respondent's decision to dismiss the Claimant was communicated through the Respondent's letter dated 3<sup>rd</sup> March 2016.
45. Cross-examined by Counsel for the Respondent, Mr. Kigatha, he testified that he worked under the Respondent's Recoveries Department since 1999, and was duly conversant with recovery processes.
46. The latter dated 6<sup>th</sup> November 2014 placed him under an investigatory suspension. Further, he had a job description. Among the roles spelled out in the description, was providing for bad debts in line with the Bank's policies and guidelines.
47. He further testified that at the material time, the Respondent Bank had in place a credit policy that inter alia guided lending, realization of securities, and settling of auctioneer's charges. Where an auction process was unsuccessful, the auctioneer could not be entitled to fees, but directly incurred expenses like advertisement costs.
48. The Recovery Manager, approved the Auctioneers' fees that the

**Respondent alleged were irregularly paid.**

49. The Claimant confirmed that he was invited to and attended a disciplinary hearing.

**Respondent's case**

50. The Respondent presented two witnesses to testify in this matter on



its behalf, Mr. Edward Ntuli [RW1] and Rose Mukoba [RW2]. RW1 is its Head of Operations while RW2 is its Human Resources Manager. At the hearing, the witnesses adopted their witness statements filed herein as their evidence in chief.

51. RW 1 testified that on or about September 2014, the Respondent received a complaint vide an undated letter to the effect that its members of Staff working in the Remedial Recoveries Unit under the Credit Department, were acting in concert with some service providers on the Bank's panel to defraud it and its debtors through irregular billing for services rendered, the recovery of debts.
52. The matter was subsequently reported to the Ethics and Anti-Corruption Commission on 5<sup>th</sup> November 2014. Later on, the same was transferred to the Banking Fraud Investigation Unit for investigations. Further, on the 25<sup>th</sup> May 2015, the Respondent placed a complaint with the Directorate of Criminal Investigation for their necessary action.
53. The witness stated that the Respondent's Security and Anti-Fraud Department conducted investigations on the Recoveries Unit, into the alleged malpractices. On 4<sup>th</sup> November 2015, a preliminary report was submitted to the Respondent's Board.
54. The investigations revealed that Timeless Dolphin, Dalai Traders and Nguru Enterprises, handled the lion's share [90%] of the total work [debt recoveries] allocated to the Respondent's service providers under the category of auctioneers. Further, the auctioneers could be paid even where auctions had not taken place, and in some instances where the Respondent had been stopped from exercising its right of sale of the securities by court orders.
55. The investigation also revealed a total lack of adherence to the Respondent's Credit Policy, Consumer Protection Guidelines [CBK/PG/22] as provided by the Central Bank of Kenya and the [Consumer Protection Act, 2022](#) in the Management of Debt Collection.
56. The witness further stated that the Claimants were suspended on half pay pending further investigations. The suspension was in line with the Respondent's Human Resources Policies and Procedures Manual.
57. He further stated that investigations by the Respondent's Internal Auditors noted irregular payment of fee notes to service providers; the majority of fee notes settled were contrary to the stipulations of the Auctioneer's Act, they were charged based on the market value of the property and charged at scale as if the auction had taken place thus inflating the fees; debt recovery unit seemed to overly rely on only three auctioneer firms for the debt recovery processes. There was no justification for these; customers could not be notified of auctioneer's fees and valuation fees contrary to the provisions of the [Consumer Protection Act](#); auctioneer fees were loaded into the loan accounts thus increasing the exposure and concealing expenses; the auctioneers were paid huge sums and in most cases there was no evidence of the work done or money corrected; and instances where copies of invoices/fee notes were not traced, the basis for the payments could not be ascertained therefore.
58. The report recommended that the Claimants be required to explain the circumstances under which they recommended the fee amounts to be debited on the Customers' accounts without adhering to the laid down procedure. Further, for the instances where the auctioneers



- were paid, yet they had not recovered any debt, they show cause why disciplinary action could not be taken against them.
59. The witness stated that flowing from the recommendation, the Claimants were summoned to appear before the Respondent's Corporate Disciplinary Committee. They were so summoned in accord with the Respondent's HR Policy and the provisions of the Employment Act. They were given adequate time to prepare for their defence. They were notified of their right of accompaniment.
60. The Disciplinary Committee recommended the termination of the Claimants' services. The termination of their services was justified and the process leading thereto was fair and in line with provisions of the Employment Act, and the stipulations of the HR policy.
61. Cross-examined by Counsel for the Claimants, the witness testified that the letter by the whistle-blower did not mention the Claimants at all.
62. The Respondent's letter dated 5<sup>th</sup> November 2014 addressed to the Anti-Corruption Commission indicated that it had carried out preliminary investigations internally, and it was concluded beyond reasonable doubt that there were malpractices within the Credit Department. This letter was written before the Claimants were suspended. The audit report is dated 1<sup>st</sup> October 2015.
63. Pressed further, the witness testified that the reason for the suspension was that there were ongoing investigations which had not been concluded.
64. The Claimants were on suspension for one full year. In between the date of termination, 6<sup>th</sup> November 2014, and the date of termination, the Respondent didn't communicate with the Claimants.
65. The witness admitted that in his statement he had stated that the Respondent commenced an internal investigation into the matter on 25<sup>th</sup> May 2015, six months after the Claimants had been suspended.
66. The witness testified that the Respondent's Credit Policy didn't specifically set out the method of allocating work to the service providers. Further, the Policy didn't provide for the computation of auctioneers' fees. The formula that could be applied was that stipulated by the Auctioneers Act.
67. No settlement of auctioneers' fees was effected without the approval of the Head of the Department. In addition, the Head of the Department could not approve any fee note, not accompanied by a copy of the advertisement done, and, notices issued, by the auctioneer.
68. Settlement of a fee note could be considered irregular if it didn't have
- supporting documents.**
69. As at the time the Claimants were being dismissed from employment, the Police hadn't given any report on their investigations on the matter. In his view, none of the Claimants was charged in a criminal Court. Lastly, due to the disciplinary process that the Respondent initiated, the Police investigations did not proceed to completion.



70. Rose Mukoba, the Respondent's Human Resource Manager testified as its second witness. At trial, she adopted her detailed consolidated witness statement dated 15<sup>th</sup> November 2021 as her evidence in chief.
71. The witness stated that the 1<sup>st</sup> Claimant, Patrick Kioko, was first employed by the Respondent on the 23<sup>rd</sup> of August 2013 as a Recoveries Officer, whilst the 2<sup>nd</sup> Claimant, on the 21<sup>st</sup> of January 1999. She largely reiterated the Respondent's 1<sup>ST</sup> witness's evidence on; the whistle-blower's letter; the investigations by the Security and Anti-Fraud department; and the suspension of the Claimants from employment.
72. She asserted that the suspension was anchored on the stipulations of the Respondent's Human Resource Policies and Procedure Manual, specifically clause 10.5 thereof. The suspension was investigatory. The result of the investigations could determine the course of action that was to be taken against the Claimants. According to the stated clause, the suspension period could ordinarily depend on the peculiar circumstances of each case. Further, during the suspension period, the affected employee will receive half his/her monthly salary.
73. The 1<sup>st</sup> Claimant was not constructively dismissed as he alleges. Throughout the suspension period, the Respondent paid him half his monthly salary, the suspension was to allow investigations into his conduct to be carried out smoothly. In those circumstances, he cannot be heard to allege constructive dismissal.
74. The Claimant's employment was terminated in a procedurally fair **manner.**
75. On the show cause letter dated 19<sup>th</sup> January 2016, the witness asserted that true, the Claimant was called upon to explain why he had received money via Mpesa from some of the Respondent's service providers. There was nothing wrong with the Respondent issuing the second show cause letter. The accusations against the Claimant were set out therein, and the Claimant allowed adequate time to respond.
76. She further stated that in response to the 2<sup>nd</sup> show cause letter, the Claimant instructed his Advocate to write to the Bank and the Advocate did, through a letter dated 21<sup>st</sup> January 2016. The letter raised constitutional issues not within the purview of the Respondent.
77. The witness contended that a disciplinary hearing is an internal process to investigate the guilty conduct of an employee and legal representation is not necessary in such hearings and investigations. The Respondent was therefore not under any duty to respond to the letter from the Claimant's Advocate and the said Advocate was a stranger to the disciplinary proceedings.
78. The witness stated further that on the 27<sup>th</sup> of January 2016, the Respondent invited the 1<sup>st</sup> Claimant to attend a disciplinary hearing. He was informed of the allegations he was to respond to during the hearing. He was informed of the right to be accompanied by an employee of his choice for the hearing.
79. Flowing from the disciplinary hearing of 29<sup>th</sup> January 2016, it was concluded that he had not acted prudently when he recommended payment of fees to auctioneers based on the open market value of properties when the auction had not taken place, this was contrary



- to the Respondent's practice that when an auction doesn't take place, auctioneer's fees are based on the forced sale value of the property being auctioned.
80. It was further held that the 1<sup>st</sup> Claimant did not explain the circumstances under which he had received money from the service providers.
  81. The Disciplinary Committee recommended that he be dismissed from employment for failing to act in the Bank's interest and also for receiving money from the Bank's service providers contrary to the Bank's Code of Business Conduct. Following the recommendation, the Respondent dismissed the Claimant vide a letter dated 3<sup>rd</sup> March 2016.
  82. He was informed of his terminal benefits being salary up to and including 2<sup>nd</sup> March 2016 and 58 pending leave days earned but not taken as of 2<sup>nd</sup> March 2016.
  83. On the 2<sup>nd</sup> Claimant's dismissal, the witness stated that on 5<sup>th</sup> November 2014, the Respondent reported the matter to the Ethics and Anti-Corruption for carrying out in-depth and independent investigations and prefer charges against him if found culpable. The matter was later transferred to the Banking Fraud Investigation Department.
  84. The witness further stated that on diverse dates between 29<sup>th</sup> April 2015 and 3<sup>rd</sup> December 2015, the Respondent sought an update on the investigations from the Investigative Agencies. The Commission responded by indicating that it was overwhelmed by matters. It had high-priority matters to handle first.
  85. The suspension of the 2<sup>nd</sup> Claimant accorded with the Respondent's above-stated manual. It was well-informed as he was suspected to have committed an act amounting to gross misconduct under section 44[4].
  86. An investigation by the Respondent's Internal Auditors revealed that in the discharge of his duties at the Debt Recovery Unit, he allowed payment of fee notes irregularly to service providers.
  87. Following the investigation report by the auditors, the Respondent issued a show cause letter dated 2<sup>nd</sup> December 2015, to the 2<sup>nd</sup> Claimant.
  88. On receiving the show cause letter, the Claimant requested more time to enable him to review the necessary documents and respond adequately. The Respondent allowed him seven more days.
  89. Later, the Respondent issued him with a second show cause letter dated 19<sup>th</sup> January 2016 requiring him to explain the circumstances under which he received KShs. 470,000 from different subscribers. The names of the subscribers were given.
  90. The Claimant responded to this second show cause letter through his Advocate. The response raised constitutional issues.
  91. On the 27<sup>th</sup> of January 2016, the Claimant was invited to attend a disciplinary hearing slated for the 29<sup>th</sup> of January 2016. In the letter, he was informed of the allegations levelled against him and his right of accompaniment.



92. Following the hearing, the Committee held that the 2<sup>nd</sup> Claimant had not acted prudently when here recommended payment of fees to auctioneers based on the open market value of properties where an auction had not taken place, the fees were supposed to be premised on the forced value of the property in issue. Further, he didn't respond to the show cause letter in respect of the irregular receipt of money from service providers.
93. After reviewing the recommendations by the Disciplinary Committee, the Respondent terminated the services of the Claimant on account of gross misconduct on 3<sup>rd</sup> March 2016. The reasons for the termination were expressly set out in the termination letter.
94. The witness asserted that the termination of the Claimant's employment was both procedurally and substantively fair.
95. She stated that the Claimant was paid his terminal dues, i.e. salary up to 2<sup>nd</sup> March 2016, and compensation for 46 leave days earned but not utilised as of 2<sup>nd</sup> March 2016.
96. Cross-examined by Counsel for the Claimant, the witness testified that the extract of the Human Resource Policy and Manual [3<sup>rd</sup> edition] that the Respondent placed before this Court came into effect in January 2016. When the Claimants were being sent on compulsory leave in November 2014, the applicable Manual was that of 2011. True, the 2016 Manual was somehow different from the earlier version.
97. Comparing the 2016 edition presented by the Respondent against the 2011 edition presented by the Claimant, there is a notable difference in their respective clauses on suspension. The 2011 version didn't provide for suspension on half pay.
98. The witness asserted that after a preliminary investigation was handed in on the 4<sup>th</sup> of November 2014, the Claimants were suspended on the 5<sup>th</sup> of November 2014.
99. The suspension letters were not specific on the infraction[s] the Claimants were accused of.
100. The Claimants were out on suspension for about one year, throughout the period, not on a single time did the Respondent write on its own motion to the Claimants, informing them of the status of the investigations.
101. On 30<sup>th</sup> June 2015, the Claimants wrote to the Bank inquiring about the status of the investigations. Though the Bank responded on 7<sup>th</sup> July 2015, it didn't give a proper update. It referred the Claimant to the external entities.
102. She further testified that in their letter dated 21<sup>st</sup> January 2016, the Claimants complained that though they had been given some files, by the Respondent, the files, only contained receipts. The files were missing various documents that they required. Further, the Respondent did not present before this Court the documents from which it can be deduced that the Claimants committed the infractions alleged.

### **The Parties' Submissions.**

103. After hearing the parties' respective cases, this Court directed them to



file their submissions. This they did. However, I must state that the submissions filed were unnecessarily lengthy. I have made a conscious decision not to summarize the same to save this Court's precious time and to have Counsel for the parties pick a lesson to be sensitive next time they are granted an opportunity to file written submissions. However, parties should take comfort that I have read and considered their lengthy submissions.

### **Analysis and Determination.**

104. I have carefully considered the pleadings, the evidence and submissions by the parties herein, and the following issues emerge for resolution;
- a. Whether the protracted suspension of the Claimants and withdrawal of 50% of their salary during the period of suspension was justified and lawful;
  - b. Whether the Respondent unfairly terminated the Claimants' employment; and
  - c. Whether the Court should grant the prayers sought by the Claimant.

Whether the protracted suspension of the Claimant and withdrawal of 50% of his salary during the period of suspension was unlawful

105. It was common cause that the Claimants were suspended from employment by the Respondent on what the latter termed the need to investigate an allegation that had been levelled against staff in the Department, where they were working. Further, the Claimants were on suspension for almost ten months, before the Respondent decided to initiate disciplinary action against them. They took the position that the decision to suspend them was prompted by ill faith, and was unnecessary. The Respondent held a contrary view.

106. The *Employment Act*, of 2007 has not codified matters of suspension.

Maybe it is time for the legislature to legislate in the Act, general aspects that would guide on this topic which hasn't remained without controversy. However, it must be said that often employers are faced with situations where a decision must be taken whether an employee allegedly involved in misconduct should be suspended. In my view, a decision to suspend will hugely depend on the circumstances regarding the alleged misconduct and an employee should not be suspended unless there are prima facie grounds for believing that the employee has committed serious misconduct and that there is some objectively justifiable reason for excluding the employee from the workplace.

107. In the case of *Fredrick Saundu Amalo v Principal Namanga*

Mixed Day Secondary School cited by the Claimants, the Court held:

“There must be a clear reason why the employee interdiction is necessary, independent of any contention relating to the seriousness of the misconduct. An interdiction or suspension in employment is the equivalent of criminal trial arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. Thus, a suspension or interdiction should only follow pending a disciplinary enquiry only in exceptional circumstances, where there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee defend himself in a



meaningful way. See also, *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331[LC].

108. The question that springs up at this juncture is, independent of the seriousness of the allegations that were levelled against the Claimants, was there an objectively justifiable reason for their exclusion from the workplace? This Court notes that on the 6<sup>th</sup> of November 2014, the Respondent wrote the Claimants individually, the letters which were couched in a similar style read;

#### Compulsory Leave

“There have been reports on some malpractices in how you carry out your duties at the Debt Recovery Unit.

For this reason, you are required to proceed on compulsory leave with effect from 6<sup>th</sup> November 2014 to allow room for investigations to be carried out.

We shall communicate to you the way forward as soon as the investigations are complete.”

109. The Respondent bore the burden to prove the existence of an objectively justifiable reason. I have carefully considered the evidence that was placed forth by the Respondent’s two witnesses, and find no difficulty in holding that the evidence didn’t address this point at all. As a result, the Respondent didn’t discharge the burden.

110. This Court’s attention was drawn to the Respondent’s letter dated 5<sup>th</sup> November 2014. The letter was addressed to the Ethics and Anti-Corruption Commission. The letter read in part;

“.....A preliminary investigation was internally carried out and it proved beyond reasonable doubt that indeed there was malpractice at the department touching on the mentioned staff members and others.

The matter was discussed at the highest level of the Bank and it was decided that criminal investigations should be undertaken and anybody found to be culpable to face the full force of the law. Please assign an officer for who should get in touch with the undersigned for further guidance on the investigations.....”

111. It is clear that before the Claimants’ suspension, the Respondent had carried out internal investigations, whose result was sufficient, for the conclusion that “beyond reasonable doubt”, they had been involved in the alleged malpractice. It goes without saying, and indeed it was admitted by the Respondent’s witnesses that these investigations were done without the Claimants being excluded from the workplace. The question that needs to be answered then is, what changed? with such a conclusion what was the justification for the exclusion? were the Claimants a danger to any further investigations? The Respondent didn’t provide any explanation. Considering the circumstances, I am persuaded to conclude that the suspension was unjustified.

112. The Respondent contended that the suspension was well-anchored on its Human Resource Manual stipulations. It then presented the 2016 version. However, its witnesses in their evidence under cross-examination admitted that the Manual took effect after the Claimants had been suspended. It was not therefore applicable at the material time. The 2011 version



was. The witnesses further admitted that the 2011 version didn't have a provision for suspension. In conclusion, the Respondent's reliance on the Human Resource Manual 2016, was deliberately misplaced and intended to mislead.

113. The Claimants challenged the rationale and lawfulness of withholding

50% of their monthly salary during the whole period they were on suspension. The Respondent asserted that its Human Resource Manual 2016 version provided for the same in clause 10.5. Having said that the manual wasn't applicable, and in the absence of any evidence by the Respondent in rebuttal of the Claimants that the 2011 version didn't provide for suspension and half salary pay, I will not hesitate to find that the withholding of the Claimants' salary lacked any legal and or contractual justification.

114. In of the Chief Justice and President of the Supreme Court of Kenya & Judicial Service Commission Bryan Mandila Khaemba, the Supreme Court of held, and my forgoing finding gets inspiration therefrom, thus:

“26 The respondent on his part submitted that this court has held in several decisions, that it was unlawful for an employee to be suspended without pay, and cited the case of James Njuguna Muchiri v Armed Forces Canteen Organization (AFCO) eKRL for the proposition that there was no inherent right to suspend an employee without pay and that any power to do so must arise from the terms of the contract. Worse that the alimentary allowance permitted under paragraph 17 of the third schedule to the Judicial Service Act was not available to the respondent as per the suspension letter.

27. As noted by this court in James Njuguna Muchiri v Armed Forces Canteen Organization (AFCO) [2016], the starting point in any inquiry as to whether suspension without pay is legal is the terms of employment. Paragraph 17(3) of the Third Schedule to the Judicial Service Act in this respect provides that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the commission may by regulations determine. An allowance is a share or portion of money that is assigned or granted. The concise oxford English dictionary declines alimentary as “relating to nourishment or sustenance”.

115. It is imperative to state that I have arrived at the foregoing conclusion

fully cognizant of the general principle of law espoused in the case of Aviation and Allied Workers Union vs Kenya Airways Limited [2012] eKLR that Courts will very sparingly interfere in the employer's entitlement to perform any of the human resource functions including disciplinary control of its staff. However, I am equally conscious to the fact that Courts never hesitate to intervene where there is evidence that in the discharge of the functions the employer has trespassed on the requirements of the law and or those contractual.

116. Undoubtedly, a claim can be founded by an employee on matters

flowing from his or her suspension from employment, independent of a claim for unfair termination. And where he or she establishes his claim, remedies recognized in law can be availed to him. Where the employer places an employee for an unreasonably long time, with or without pay, a claim for constructive dismissal can be successfully mounted against it.



## **Whether the Respondent unfairly terminated the Claimants' employment**

117. In a dispute regarding the termination of an employee's employment or wrongful dismissal, Section 47 (5) of the *Employment Act* 2007, places different legal burdens on the employee and the employer. The Section provides that: -
- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
118. The provision suggests that the employee bears the original burden. It is only after he has discharged the same that a burden shifts to the employer to prove a couple of matters; the reason[s] for the termination or dismissal [section 43 of the Act]; that the reason[s] was valid and fair [section 45]; and that the statutory cannons of procedural fairness were adhered to [Section 45[2] and 41]. To discharge his or her duty, the employee is required to establish a prima facie case that an unfair termination or wrongful dismissal occurred.
119. I have carefully considered the Claimants' evidence as regards the process that led to the decision on their summary dismissal, more specifically on their request for perusal of the Respondent's files, relevant to the allegations that were levelled against them and the fact that the Respondent deliberately neglected act on the correspondence from their Counsel on the subject, receipt of money from service providers, and conclude that prima facie they have made a case that the dismissal was procedurally unfair. Further, the Court shall hold hereunder that contrary to the Respondent's decision, the Claimants did at all material times evince the intention to respond adequately to the M-pesa transactions issue, but the Respondent deliberately impeded it.
120. Section 43 of the Act places a burden on the employer, in a dispute regarding the termination of an employee's employment to prove the reasons for termination, a failure to do so will render the termination deemed unfair by dint of the provisions of Section 45. However, it isn't enough for the employer to prove the reason[s] for the termination, he or she must move a further step to demonstrate that the reason[s] was valid and fair. See, the Court of Appeal decision in *Pius Machafu Isundu v Lavington Security Guards Limited* [2017]eKLR.
121. Section 45 (2) provides:
- “(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.”
122. The Respondent held that dismissing the Claimants was substantively



fair. In other words, it discharged the twin burden under Sections 43 and 45[2] of the *Employment Act*. True, as submitted by Counsel for the Respondent, the termination letters issued to them set forth the reasons for the dismissal. In the present case, the reasons given for the termination of the Claimant's employment are contained in the letter dated 3<sup>rd</sup> March 2016. It reads in part as follows:

“Following investigations into allegations that you had irregularly recommended payment of fees to some service providers on the Bank's panel and that you had also irregularly received money from the same service providers, your responses to the show cause letters on the same as well as the disciplinary hearing which you attended on 29<sup>th</sup> January 2016, it has been established that:

1. You did not act prudently when you recommended payment of fees to auctioneers based on the open market value instead of the forced sale value of properties where auctions did not take place.
2. You irregularly received money via Mpesa from some service providers on the Bank's panel and you could not explain under what circumstances you had received money from them.

As a result of your actions, you exposed the Bank to increased credit exposure as a result of the excessive auctioneer fees charged to the customers' accounts; the risk of litigations from the aggrieved customers and reputational risk. Additionally, you breached the Bank's code of business conduct which is not acceptable.”

123. The two reasons were the same basis on which the 2<sup>nd</sup> Claimant was dismissed from employment. Undoubtedly, to discharge the burden under Section 43 of the *Employment Act*, the Respondent needed to adduce evidence to demonstrate the basis for its position that the Claimants used a wrong formula in calculating, fees that were payable to Auctioneers for services rendered. Though the Respondent's witnesses' testimony on this point was that the formula they employed, which was prejudicial to the interest of the Bank, was contrary to its credit policy, the allegedly offended policy document was not placed before this Court for consideration.
124. The Claimants contended that the Respondent didn't have any policy document to guide the computation of Auctioneers' fees, contrary to its assertion. The Court notes that the Respondents' witnesses in their evidence under cross-examination, accepted this position. The Claimants further argued that in the circumstances, they often used the stipulations of the *Auctioneers Act*, as a guide on the computation. Additionally, in some instances, they could negotiate the fees outside of the Act, with the involvement of the debtors. I find this explanation reasonable and plausible.
125. The Respondent's witness also asserted that the manner in which the Claimants computed the fees and subsequently made a recommendation for payment in some instances offended the provisions of the *Auctioneers Act*. They didn't cite any provision of the Act, that could support their assertion. The Respondent's Counsel didn't cite any in his submissions.
126. I note that the issue of how the fees was allegedly charged was a live issue in the disciplinary proceedings. Just like the instant proceedings, the Court notes, there was not that single instance when the specifically offended policy and or stipulation thereof was cited, and or specifically put to the Claimants, for their explanation. Inexplicably, even in the show-cause letter it was not specifically set out.



127. Considering the position taken by the Claimants in the disciplinary hearing, and subsequently maintained in its pleadings, it could reasonably be expected of the Respondent to plead with specificity and place forth at the hearing hereof material proof of, the offended provisions. The red flag by the Claimants was all through visible, the Respondent comfortably didn't get bothered with the same.
128. By reason of this premise, I cannot help but make an adverse inference that no policy or statutory provision could support the Respondent's allegations. In relation to Section 43 of the Act, the Respondent only stated the reason for the dismissal but did not prove the same, and this leads this Court to conclude that the Respondent didn't discharge its burden under the provision of the Act concerning the 1<sup>st</sup> ground.
129. There is no dispute that when the Claimants received the 2<sup>nd</sup> show cause letter, their Counsel wrote to the Respondent raising concerns over how the information therein was obtained. He argued that the same violated their right to privacy. Further, the letter was deficient of vital details. In my view, these were not idle issues raised. They touched on the Claimants' right to; privacy; fair administrative action [Article 47 of *the Constitution*]; fair hearing [Article 50]; and fair Labour practices [Article 41]. The Respondent appreciated that indeed the letters raised constitutional issues but went ahead to dismiss the same never to react to them on the very narrow ground[s] that it was not in its purview to deal with the constitutional issues raised, and that the Counsel could not properly address them as what was at hand was an internal disciplinary process.
130. With great respect to the Respondent, it could only take an unreasonable and uncaring employer to disregard constitutional issues brought to its attention, the rule of the thumb being that any action or workplace that trenches on an employee's rights will more often than not have repercussions on the employer.
131. By its action, the Respondent impeded the Claimants from adequately defending themselves on the accusations on the M-pesa transactions. It could not be available for them to conclude against them that they didn't give satisfactory explanations. The Respondent didn't act with equity, it cannot be allowed to benefit from the inequity.
132. The Respondent did not refer this Court to any policy or contractual term that could prevent the Claimants from engaging services of Counsel as they did, to respond to a show cause letter on their behalf or point out to the Respondent the issues he did, if in their consideration their interest could best served, that way. Important to state that this Court does not accord to any school of thought that suggests that it is unnecessary, undesirable, and improper for affected employees to have legal representation in an internal disciplinary process. Such a school of thought could only have meaning in the pre-2010 constitutional dispensation when the human rights approach had not been onboarded into the employment and labour relations realm. Further, it ignores the impact that a termination of employment or dismissal of an employee normally has on the affected employee[s] and families.
133. As a result of the foregoing premises, I also pronounce that the Respondent did not demonstrate that the reasons for the dismissal of the Claimants from employment were valid and fair. It didn't, therefore, discharge the burden under section 45 of the Act.



134. In the upshot, I conclude that the dismissal of the Claimants from employment was not substantively fair.
135. No doubt, the Claimants sought to be allowed access to documents from the Respondent, documents which they held to be vital to an adequate response to the show cause letter and defence to the accusations that had been levelled against them. From the evidence before me, I am convinced that true as the Claimants contended the documents were not made available to them. In the circumstances of the matter, the vitality of the documents cannot be downplayed. To confirm or discount the Respondent's assertions, required that various documents be looked at and weighed against each other. In my view, this didn't sit well and cannot do with procedural fairness.
136. Further, it has not escaped the sight of this Court that as indicated hereinabove, the Respondent deliberately neglected to provide the Claimants with the details they had sought to enable them to adequately respond to the 2<sup>nd</sup> show cause letter, and prepare for their defence. As concluded above, the Respondent's action was improper and unjustified. Relating it to procedural fairness, it ignored the Claimants an opportunity to prepare for their defence/ representation as mandated by Section 41 of the Act, and the tenets of natural justice are now considerable in employment contract disputes. This is upon the basis of the born doctrine- constitutionalizing of the workplace, anchored on Articles 41, 47, and 50, of *the Constitution* of Kenya, 2010, inter alia.
137. Procedural fairness is a mandatory statutory requirement in every process leading to termination of employment, including summary dismissal. Section 41 of the Act, provides that: -
- QUOTE{startQuote “}
- Notification and hearing before termination on 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 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.”
138. The above premises notwithstanding, it is imperative to state that the Respondent partially complied with the mandates of procedural fairness. It issued to the Claimants two notices to show cause dated 2<sup>nd</sup> December 2015 and 19<sup>th</sup> January 2016, explaining to the Claimants clearly, why it was considering taking an adverse action against them. The show cause letters had the allegations made against them. They were invited for a disciplinary hearing by the Respondent vide its letter dated 27<sup>th</sup> January 2016 (attached to the Respondent's List of Documents dated 29<sup>th</sup> June 2016) and were notified of their right to have another employee or a shop floor union representative of his choice to accompany them. During the disciplinary hearing held on 29<sup>th</sup> January 2016, the Claimant's representations were heard as evidenced by the Minutes of the said hearing.



The Respondent considered those representations while making a final decision, as evidenced by the recommendation of the committee (indicated on page 4 of the Minutes).

139. However, partial adherence to the canons of procedural fairness does not make the dismissal procedurally fair. Procedural fairness embodies three components, notification, hearing, and consideration. See *Kenfreight (E. A) Limited vs Benson K. Nguti*, [2016] eKLR. The absence of any of these components will often render the process procedurally unfair. The hearing component cannot be a complete component where the affected employee is denied adequate material to prepare for his or her defence.

**Whether the Court should grant the prayers sought by the Claimant.**

140. Having held that the Claimant was indeed unfairly terminated, I now consider the matter of the reliefs that he is entitled to.

141. I decline to grant the declarations sought that there was constructive dismissal, as the 1<sup>st</sup> Claimant was not constructively dismissed, but rather terminated vide the letter of termination dated 3<sup>rd</sup> March 2016.

142. On the claim for a declaration that the Claimant is entitled to damages for loss of employment computed on the basis of his expected earnings up to a retirement age of 60 years, I return that the Claimants did place forth any evidential and legal premise, for grant of the relief. In any event, this is a remedy that Courts have always declined to avail for good reason. The Court of Appeal in *D.K. Marete vs Teachers Service Commission* [2020] eKLR held thus:

“

- “26. On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in *Engineer Francis N. Gachuri v Energy Regulatory Commission* [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word „permanent employment?”

27. Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

Similarly, I decline to grant this prayer.

143. Having found as I have hereinabove, that the suspension of the



- Claimants from employment and the withholding of one-half of their salary was unjustified, I direct that they be paid that 50% portion of their salary for the 13 months, they remained on suspension.
144. Concerning their claim for unpaid leave, I hold that the Respondent has successfully demonstrated that the Claimants were compensated for their earned but untaken leave days. The Claimants did not controvert its evidence. I decline the relief.
145. The Claimants sought exemplary damages, it is trite law that this kind of damages is only awardable in exceptional cases and where the party seeking its award has proved the pre-requisite legal conditions. In *Rookes vs Bernard* (1964) 1 ALL ER 367, it was held that an award of exemplary damages is granted in exceptional cases, thus, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in a case where the defendant's conduct had been calculated to make a profit for himself which might exceed the compensation payable to the Plaintiff/ Claimant. The principles enunciated in *Rooks vs Bernard* (supra) were followed in the cases of *Haria Industries vs P.J. Products Limited*, (1970) E. A 367 and in *Obongo & Another vs Municipal Council of Kisumu*, (1971) E.A.91. The Claimants did not present evidence to demonstrate that their cases were exceptional and that they met the threshold for the grant of the remedy. As a result, I decline to grant the relief.
146. The Claimants' contracts of service were terminable under the provisions of Section 35 of the Act by a twenty-eight days' notice. The notice was not issued. Having found that the summary dismissal was unfair, then it follows that they are entitled to notice pay in line with the provisions of Section 35 as read with Section 36.
147. I now turn to the prayer for damages for unfair termination. The Claimants each pray for a grant of the compensatory relief contemplated under the provisions of Section 49 [1][c] of the *Employment Act*, 12 months' gross salary. An award of the relief contemplated in the provision is discretionary. Its grant and to what extent, heavily depends on the circumstances of each case. I have considered the length of service by each of the Claimants to the Respondent, their expectation that they were to serve the Respondent [as expressed by one of the reliefs sought] till their retirement ages, the fact that the Respondent acted without substantive justification, and due compliance with the tenets of procedural fairness, and find that each of them is entitled to the compensatory relief, the 1<sup>st</sup> Claimant, three months' gross salary, and the 2<sup>nd</sup> Defendant, 6 months gross salary.
148. It is trite law that per Section 51 of the *Employment Act* 2007, the Claimants should be issued with Certificates of Service.
149. In the upshot judgment is hereby entered in favour of the Claimants in the following terms: -
- a. A declaration that the termination of their employment was unfair and unlawful;
  - b. The 1<sup>st</sup> Claimant shall be paid:
    - i. One month's salary in lieu of notice Kshs. 170,000/-
    - ii. Compensation for unfair termination (3 months gross salary) Kshs. 510,000/-
  - iii. The withheld half salary for 13 months.



The 2<sup>nd</sup> Claimant shall be paid:

- i. One month's salary in lieu of notice KShs. 162,000
- ii. Compensation for unfair dismissal KShs 810,000
- iii. The withheld half salary for 13 months.
- c. Interest on (b) above at court rates from the date of this judgment until payment in full.
- d. Costs of this suit.
- e. The Respondent does issue the Claimants certificates of service within 30 days of this judgment.

150. It is so ordered.

Read, delivered and signed at Nairobi this 30<sup>th</sup> day of April 2024

**OCHARO KEBIRA**

**JUDGE**

**In the presence of:**

Mr. Njoroge for the Claimants

**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.

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**Ocharo Kebira**

**Judge**

CAUSE NO 1982 OF 2015 JUDGMENT Page 26 of 26

