



**Ambia v KCB Bank Kenya Limited (Cause 283 of 2020)
[2024] KEELRC 1158 (KLR) (19 April 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 283 OF 2020**

**SC RUTTO, J
APRIL 19, 2024**

BETWEEN

ALBERT AMBIA CLAIMANT

AND

KCB BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent on 29th October 2012 as a Senior Dealer Retail Forex Unit in the Kenya Treasury Department on permanent and pensionable basis at a consolidated basic salary of Kshs 315,000/=. He was assigned to Juba, South Sudan on 1st February 2016 for a period of three months with effect from 4th February 2016 to 3rd May 2016 as the Head of Treasury Department KCB South Sudan. The Claimant's assignment at Juba, South Sudan was extended from 4th May 2016 to 30th August 2016, then from 30th August 2016 to 28th February 2016, and subsequently from 28th February 2016 to 28th February 2019.
2. According to the Claimant, he successfully undertook his assignment as Head of Treasury Department KCB South Sudan in accordance with Forex Allocation policies and received favourable appraisal including the period starting January to November 2018.
3. The record bears that the Claimant was asked through a letter dated 30th January 2019 by the Managing Director, KCB South Sudan, to provide a written explanation as to how Forex allocations were made to cover the posted Multi Data Captures at the Central Processing Centre and whether the Forex Allocation Policy was duly adhered to and why disciplinary action should not be taken against him. He rendered his explanation through a letter dated 30th January 2019.
4. The employment relationship further soured, when the Claimant was issued with a show cause letter dated 3rd April 2019 requiring his explanation on specific issues. Disciplinary proceedings ensued and through a letter dated 7th June 2019, the Claimant was terminated from employment



by the Respondent. Terming his termination from employment, unlawful, unprocedural and unconstitutional, the Claimant seeks the following orders against the Respondent:

- a. That the Respondent violated the Constitutional and statutory rights of the Claimant to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - b. That the Respondent's action amounts to wrongful, unfair, unjustifiable, and illegal termination of employment.
 - c. That the Claimant be paid Ksh 103,761,164.7 being the total entitlement to the Claimant as follows:
 - i. Severance Pay being 15 days for 6 years worked from 29th October 2012 to 29th October 2018 (Ksh 14, 892.1 x 15day x 6 years)= Ksh 1,340,289
 - ii. Severance Pay being 15 days for 7 months worked from 30th October 2018 to 7th June 2019 (Ksh 14, 892.1 x7.5 days))= Ksh 111,690.7
 - iii. Bonus for 2018 being one-month gross salary=Ksh 446,765
 - iv. Loss of earnings being 18 years before retirement at 60 years (Ksh 446,765 x216 months) = Ksh 96,501,240.
 - v. Damages for wrongful termination equivalent to 12 months salary (Ksh 446,756 x 12 months) = Ksh 5,361,180.
 - d. That the Claimant be awarded costs of the entire suit.
 - e. Interest on item (c) at 6% per annum or at prevailing Bank rates until payment in full.
 - f. That the Claimant be issued with a Certificate of Service by the Respondent.
 - g. Any other reliefs that the Honourable Court may deem just and expedient.
5. Through a Memorandum of Response dated 9th October 2020, the Respondent contends that the termination of the Claimant was in accordance with the laid down procedure in the [Employment Act](#). Consequently, the Respondent has asked the Court to dismiss the Claimant's Claim with costs.
6. During the trial, which took place on diverse dates, both parties called oral evidence.

Claimant's Case

7. The Claimant who testified in support of his case, started by adopting his witness statement, Replying Affidavit sworn on 4th October 2022 as well as the list and bundle of documents filed on his behalf to constitute his evidence in chief.
8. It was the Claimant's evidence that his job description as Head of Treasury Department KCB South Sudan was to generate from Treasury Products (Forex Sales and Money Market Products), through managing and optimizing operations and resources within the Corporate and Retail sectors of the Respondent.
9. He averred that by a letter dated 30th January 2019, Mr. Harun Kibogong, the Managing Director of the Respondent KCB South Sudan, informed him that unusual USD Credits were noted in three specified Accounts. He was required to provide a written explanation within one hour.



10. He averred that despite the short notice, he endeavored and provided the required explanation to the effect that the Forex Allocation Policy was not violated since the items listed in said letter were as a result of transfers between USD to USD accounts and not currency conversions.
11. He further informed Mr. Kibogong, that on 1st March 2018, while surveying/interrogating cash USD payments at the branches, he had noticed anomalies at the UN House and forwarded his concerns to the Head of Corporate for action.
12. He also informed Mr. Kibogong that the relevant transactions were as a result of transfers (USD to USD) done at the Central Processing Centre (CPC) using Multi Data Captures (MDCs) menu within the environment of KCB South Sudan and therefore liquidity was not affected.
13. That further, he informed Mr. Kibogong that the second part in which the customers were then paid cash in USD at UN House is when the USD liquidity was affected and thus the reason why he expressed his concerns for which the following actions were taken:
 - a. The Branch Manager UN House was relieved of his duties as Head of the Unit.
 - b. The highlighted accounts by the Treasury were blocked and the customers concerned were referred to the Head of Retail for further interrogation.
 - c. The Central Processing Centre personnel were prohibited from posting such customer transactions.
14. Subsequently, he (Claimant) spent five days with the team from the forensic services of the Respondent taking them through and providing structured detailed information with regard to the matters under review.
15. He proceeded on annual leave on 20th February 2019 and later realized from his bank balance that he had been paid half salary for the month of March 2019 and upon enquiry with the Human Resource Manager, he was informed that he had been suspended and the letter had been forwarded to his official email address.
16. The Claimant further stated that from September 2018, he started experiencing harassment from one Mr. Roba Jaldesa, Ag. Head of Business who wanted him to report directly to him yet as the Head of Treasury, he reported to the Managing Director in accordance with the Reporting Structure as indicated in his letter of assignment.
17. That in March 2019, Mr. Roba Jaldesa, was promoted to the position of Ag. Managing Director, KCB South Sudan and he seized the opportunity to pursue him by immediately suspending him without basis.
18. The Claimant further averred that by a letter dated 3rd April 2019, from Roba Jaldesa, he was informed that as a result of a Forensic Report which was not provided to him and the statement he recorded regarding malpractices relating to Forex allocation, he was required to explain within 24 hours (4th April 2019) among others why he failed to implement and/or adhere to the Foreign Exchange (FX) Allocation Policy as approved by the Board in 2018; why he failed to comply with Human Resource Circular HR No. 01/2017 dated 8th February 2017; why he denied the Respondent revenue by irregular transactions; and why severe disciplinary action should not be taken against him for acting contrary to the Respondent policies, Procedures and Code of Conduct.



19. He stated that at the time of the issuance of the Show Cause Letter, he was undergoing physiotherapy at Menelik Hospital in Kenya due to a back problem for which he informed the Human Resource Manager of his inability to meet the 24-hour deadline to respond to the Show Cause Letter.
20. Upon feeling better, he gave a detailed explanation in reply to the show cause vide a letter dated 9th April 2019.
21. By a letter dated 26th May 2019, he was invited to attend a disciplinary hearing on 31st May 2019.
22. He was provided with the minutes of the disciplinary hearing duly executed by all in attendance.
23. The Claimant stated that at the disciplinary hearing, he was not provided with the Forensic Report and Witness Statements the Respondent relied on to enable him prepare an adequate response and cross-examine the witnesses.
24. That by a letter dated 7th June 2019, his employment was terminated by the Respondent. It was the Claimant's contention that he was not informed of his right to appeal the decision terminating his employment.

Respondent's Case

25. The Respondent called oral evidence through Mr. Robley Ngonje and Mr. Peter Maseno who testified as RW1 and RW2 respectively. Mr. Ngonje who was the first to go, identified himself as the Head of Employee Relations & Wellness within the Respondent's Human Resource Division.
26. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced all the documents filed on behalf of the Respondent as exhibits before Court.
27. It was RW1's evidence that in the year 2018, the Board of Directors of the Respondent approved the FX Allocation Policy.
28. He is aware that by a letter dated 30th January 2019, the Managing Director of KCB Bank South Sudan, wrote to the Claimant informing him that some unusual USD withdrawals had been noted in the Accounts.
29. By the said letter, the Managing Director, of KCB Bank South Sudan, required the Claimant to provide a written explanation of how the Forex allocation was made to cover the posted MDC.
30. He is aware that the Claimant provided an explanation on the same day which the Managing Director did not find satisfactory. As a result, the Managing Director suspended him vide a letter dated 13th March 2019.
31. The Respondent then proceeded to engage the services of its Forensic Team to investigate the malpractices noted on FX allocations at the CPC. The Claimant was invited and recorded a statement with the Forensic Investigators.
32. Investigations conducted by the Forensics Team vide Report No. 131/2019 established various malpractices of not adhering to the Respondent's guidelines and policy by the Claimant.
33. Consequently, a show cause letter dated 3rd April 2019 was issued to the Claimant as a follow up to the forensic investigation as the malpractices established were attributable to him.
34. The Claimant responded to the notice to show cause on 9th April 2019 in which he denied any wrong doing. He did not complain about his inability to respond to the notice to show cause because he did not have a copy of the Forensic Investigation Report.



35. According to RW1, the response by the Claimant was unsatisfactory for the following reasons;
- i. He did not satisfactorily explain how the Forex allocations were made to cover the posted MDC at CPC;
 - ii. He did not satisfactorily explain why the Forex Allocation Policy was not duly adhered to as required;
 - iii. He did not explain why he generated the Forex Allocation request;
 - iv. He failed to take proactive action to stop Forex allocation irregularities as the person responsible for Forex utilization;
 - v. He allowed malpractices of not adhering to the guidelines and policy Forex Allocation of which he was the 'owner'.
36. Consequently, a Disciplinary Committee was constituted and the disciplinary hearing was conducted on the 31st May 2019.
37. The Claimant presented his responses to the Committee which were found to be unsatisfactory. The Disciplinary Committee recommended summary dismissal on grounds of gross negligence, misconduct, and abdication of duty.
38. Consequently, by a letter dated 7th June 2019, the Managing Director of KCB Bank South Sudan Limited wrote the letter terminating the Claimant's employment.
39. RW1 further stated that the findings and contents of the Forensic Report were captured and detailed in the show cause letter dated 3rd April 2019 and addressed to the Claimant hence he was adequately informed.
40. That the suspension letter was explicit that the Claimant was suspended from employment for 21 days with effect from 13th March 2019 and not 60 days as he has alleged.
41. That the notice to show cause and the letter of termination of employment were clear on the infractions the Claimant had committed and conduct constituting violation of the FX Allocation Policy.
42. It was the Claimant's responsibility to oversee the correct application of methods and processes in the Treasury Department including putting in place clear governance structures or framework on the management of the FX allocation.
43. RW1 further stated that the security docket is under the Head of Operations and therefore it was expected by implication that issues to do with security allocations would be initiated by the Head of Operations as opposed to the Head of Treasury Department.
44. That further, the Human Resource Circular - HRC No.01/217 dated 8th February 2017, required all Heads of Department to ensure compliance with the Bank Policies, Procedures and Code of Conduct. The Claimant was the Head of Treasury Department and was therefore obliged to comply with the said circular.
45. That the Claimant as the 'policy owner' had the functional responsibility for implementation and accountability in the area covered by the policy including compliance issues.
46. Mr. Peter Maseno who testified as RW2, identified himself as a Forensic Investigator employed by the Respondent and attached to the Forensic Services Department. Equally, he adopted his witness statement to constitute his evidence in chief.



47. It was RW2's evidence that the forensic services department of the bank carries out internal forensic investigations on suspected fraudulent activities perpetrated within the KCB Group and where necessary liaises with the police in the course of such investigations.
48. He stated that on 5th February 2019, the Forensic Department received an email from the then Group Regional Business Director, Paul Russo in response to an issue tracker raised by the same unit in regard to alleged malpractices, which had been noted in CPC in 2017 and 2018.
49. The request was to carry out investigations into alleged malpractices that had been noted at the KCB South Sudan, CPC Department whereby a/c no.5500875590 held in the name of Leju John Taban, the then Manager CPC who had repeatedly received account-to-account transfers from customer account Nos.5590288185 held in the name of Filmon Tekeste Ghebrearegai and 5502569799 held in the name of Nitek Gen & Construction Co. Ltd, which transactions were irregularly posted at the KCB South Sudan CPC Department.
50. RW2 stated that together with Mr. Lumumba Mutonga who has since left the Respondent's employment, they carried out the investigations. In the course of their investigations, they invited the Claimant and he recorded a statement in response to their questions.
51. At the close of the investigations, they prepared a Forensic Report. Their investigations established various malpractices of not adhering to the guidelines and policy of the Respondent by the Claimant. That reviews conducted at the Treasury Department to ascertain strict compliance to the FX Allocation Policy, whose owner is the Head of Treasury, revealed non-compliance with the said Policy. This included but was not limited to ensuring the presence of an FX Allocation Committee, whose role was to oversee the implementation of the FX Allocation Policy across the business.
52. That in the absence of the Allocation Committee, decision making with regard to FX allocation was left in the hands of the Claimant, who was then the Head of Treasury, and Andrew John Manyok, the then Section Head Treasury.
53. Analysis of the activities of the two dealers revealed notable cases of subjectivity and/or inconsistency as well as evident inequality in FX allocations to customers. A case in point is that of a customer by the name, Bravo Family Investments Ltd, holder of a/c no. 559028544 held at KCBSS Kololo Branch which had received FX allocation four times in 2018.
54. The said customer (Bravo Family Investment) was accorded favorable rates on various dates. That on 3rd April 2018, Andrew gave the customer the lowest operating rate of SSP 168/USD while on 12th July 2018, the rate applied was SSP 200/USD, which was a staff rate yet on the material dates the dealers had purchased dollars at higher rates of SSP 240/USD and SSP 250/USD from Bollore Transport & Logistics and Rhino Stars respectively. On 14th September 2018, the said customer was again allocated USD at a rate of SSP 185/USD while the staff rate for the day was at SSP 200/USD.
55. RW2 further stated that on 6th June 2018, the Claimant originated a request for FX allocation i.r.o security operations a function/unit under the Head of Operation in violation of the FX Allocation Policy which guides that such requests would be advised by Finance, Credit, and Operations departments. Subsequently, the Claimant provided FX allocation i.r.o the said security pot which had not been deliberated on by ALCO and/or EXCOM as directed by the FX Allocation Policy. As such the said allocation to the security pot was found to be irregular.
56. RW2 further stated that upon being interviewed, the Claimant confirmed that on 6th June 2018, he wrote an email to the then MD and copied David Munyei, the then Head of Operations requesting for a FCY special rate of SSP 200/USD to take care of the security personnel and that in the process,



- the bank was to generate FX income of SSP 3.355Mn, which request was exceptionally approved by the then Managing Director on 8th June 2018.
57. Later between July and October 2018, four other allocations were made with the beneficiary being a/c no. 5590237106 held i.n.o Tes and Sam General Trading Co Ltd and which account is operated by Tesfaldet Abraha Debesai as the sole signatory.
 58. In his submission, the then Managing Director, Mr. Harun Kibogong confirmed that before approving the allocation to security, he had a meeting with the Head of Treasury, Operations and the Security Manager and what he approved was the idea of sorting out the security personnel but left the three to come up with methodologies on how the same would be effectively implemented.
 59. According to RW2, the said security pot was considered irregular and totally illegal in the face of the Respondent's policies, procedures as well as the corporate ethical posture.
 60. That on the basis of the foregoing, appropriate disciplinary action was recommended against the concerned staff amongst them the Claimant, for failing to implement and/or adhere to the FX Allocation Policy by originating a request for FX allocation towards security operations (security pot), a role that in the FX Allocation Policy lies with the operations department; as well as providing FX allocation towards a security pot without clear governance structures on the management of the FX allocation.

Submissions

61. Upon close of the hearing, both parties filed submissions which I have considered. On his part, the Claimant submitted that he was suspended for a total of 86 days contrary to the Terms of Service and Reference Guide for Managers. He argued that the suspension became unlawful on the date when the 60 days provided for in the Terms of Service and Reference Guide for Managers lapsed.
62. According to the Claimant, all subsequent disciplinary proceedings during and after the unlawful suspension period are equally unlawful and wrongful. In support of this position, the Claimant cited the case of ELRC Kisumu Cause No. 295 of 2016 Gregory Otieno Owuoth v Mumias Sugar Co. Limited.
63. It was further submitted by the Claimant that the letter of termination did not particularize with precision nor cite the provisions of the FX Allocation Policy which he allegedly failed to implement and/or adhere to and demonstrate the manner in which they were allegedly infringed.
64. The Claimant further submitted that the decision to deny him a copy of the Forensic Report during the disciplinary proceedings occasioned monumental prejudice to him to cross-examine his accusers and rely on the exculpatory findings of the report that vindicate him.
65. Referencing the case of Katiba Institute v Presidents Delivery Unit & 3 others (2017) eKLR, the Claimant submitted that by withholding vital information from him, the Respondent prejudiced his defence and subjected him to an unfair administrative action in contravention of his rights under Article 35 and 47 of *the Constitution*. In the same vein, he posited that the Respondent violated his right to information contrary to the provisions of Article 35 of *the Constitution* of Kenya and *Access to Information Act* No. 31 of 2016.
66. In further submission, the Claimant stated that he cannot be faulted for the omission of the South Sudan Respondent's Managing Director to set up the Allocation Committee, in which he was to be a mere member in his capacity as the Head of Treasury. On this score, he argued that the Managing



- Director who was the accounting executive, gave the approval for which he acted upon. He contended that any deviation would have resulted in insubordination on his part.
67. Placing reliance on the case of Janet Nyandiko v Kenya Commercial Bank (2017), the Claimant submitted that the termination of his employment was wrongful, unfair, unjustifiable and illegal.
 68. It was the Claimant's further submission that the Respondent did not comply with the procedural steps required to terminate his employment. He further submitted that the reasons for termination are manifestly different from the items contained in the show cause letter.
 69. On the Respondent's part, it was submitted that the Claimant had no mandate to generate proposals regarding security allocations which is under the Head of Operations. The Respondent argued that the Claimant's responsibility was to obtain the necessary approval and ensure that there were sufficient structures in place for implementation and accountability of the proposal once properly approved.
 70. It was the Respondent's further submission that the allocation for the security pot proposed by the Claimant was an allocation outside the policy and was therefore required to be approved by the ALCO. In the Respondent's view, this explains why the Claimant purported to obtain approval for the same from the Managing Director who had no authority to grant such approval. The Respondent maintained that the purported approval granted by the Managing Director was granted without authority and in violation of the FX Allocation Policy and is therefore null and void. It was the Respondent's contention that the Managing Director has absolutely no capacity to approve exceptions to the Allocation Policy and when he does, his actions are ultra vires, null and void ab initio.
 71. Along the same lines, the Respondent submitted that the Claimant as the policy owner, ought to have guided the Managing Director as appropriate and not misled him to exercise a power that he did not have under the policy. On this score, the Respondent posited that the Claimant was therefore either negligent in the performance of his duties or willfully aided the exercise of unlawful authority. That either way, the Claimant acted in contravention of the FX Allocation Policy.
 72. The Respondent further argued that by seeking to rely on the purported approval by the Managing Director, the Claimant is attempting to benefit from his own wrong which should not be countenanced by this Honourable court. The Respondent posited that two wrongs do not make a right.
 73. With regards to the Claimant's argument that he did not seek approval from the ALCO because it was not in place, the Respondent submitted that as the policy owner in charge of the policy's implementation, it was the Claimant's responsibility to ensure that the Committee was in place to approve the exceptional allocation as required by the Policy.
 74. The Respondent further submitted that the investigations established that the Claimant failed to ensure that there were sufficient structures in place for the implementation of FX allocation to the security pot. That this included the lack of a standing FX Allocation Committee comprising various Heads. The Respondent argued that lack of clear governance structures led to notable cases of subjectivity and/or inconsistency as well as evident inequality in FX allocations to customers.
 75. The Respondent stated in further submission that the security pot was irregular and totally alien to its FX Allocation Policy. The Respondent maintained that the Claimant as the policy owner, failed in his legal and contractual duty to implement or adhere to the Policy.
 76. The Respondent further argued that by failing to adhere to the FX Allocation Policy, the Claimant also failed to comply with the Human Resource Circular HRC No. 01/2017 which required all Heads of Department to ensure compliance with the Bank policies.



77. Placing reliance on the case of *CFC Stanbic Bank Limited V Danson Mwashako Mwakuwona* (2015) eKLR, the Respondent submitted that the Claimant cannot escape responsibility by relying on the approval by the Managing Director who had no authority to grant the same. The Respondent maintained that it had valid reasons to terminate the Claimant's employment.
78. The Respondent stated in further submission that it used the information in the Forensic Investigations Report to frame the allegations against the Claimant as per the notice to show cause. That the Claimant responded to the notice to show cause without raising any complaint of his inability to respond to the same because he did not have sufficient information or calling for the report. In support of this position, the Respondent cited the case of *South African Sports Confederation and Olympic Committee (SASCOC) v Commission for Conciliation, Mediation and Arbitration and others* (JR 2642/2019) (2021) ZALCJHB 23 (1 March 2021).
79. The Respondent further posited that the relevant contents and findings of the Forensic Report were captured and detailed in the show cause letter and addressed to the Claimant in such a way that he was able to respond to all the allegations.
80. The Respondent further contended that the employer has no duty to provide the employee with exculpatory evidence.
81. As to the Claimant's argument that he was not informed of his right to appeal in the letter of termination, the Respondent submitted that the same is far-fetched as the said right is already provided for in its Policy books which the Claimant as the Head of treasury Department, had access to and knowledge of.
82. The Respondent maintained that the Claimant's termination followed due process and any allegations to the contrary have not been substantiated.

Analysis and Determination

83. Arising from the pleadings by both parties, the evidentiary material on record, as well as the rival submissions, the following issues stand out for determination:-
 - i. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant was taken through a fair process prior to termination; and
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason for termination?

84. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Related to this provision, is Section 45 (2) (a) and (b) of the Act which provides that a termination of employment is unfair if the employer fails to prove:-
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...



85. In essence, beyond proving the existence of reasons to justify the termination of an employee from employment, an employer is required to prove that the said reasons were fair, valid and related to the employee's conduct, capacity, compatibility, or its operational requirements.
86. Back to the instant case, the Claimant was terminated on grounds that:
- a. He failed to implement and/or adhere to the FX Allocation Policy as approved by the Board in 2018.
 - b. He provided FX allocation towards security allocation without clear governance structures or framework on the management of the FX Allocation so provided contrary to policy neither did he provide accountability as required in the FX Allocation Policy.
 - c. He initiated an email security allocation when the security docket was under the Head of Operations.
 - d. He failed to comply with Human Resource Circular – HRC No. 01/2017 dated 8th February 2017 which required all Heads of Departments to ensure compliance and acted contrary to the Bank's Policy on FX Allocation.
 - e. By his actions, he denied the Bank revenue by allowing irregular FX transactions to be undertaken in the Bank under his watch.
87. Fundamentally, the Claimant was alleged to have breached the provisions of the Respondent's Foreign Exchange (FX) Allocation Policy.
88. It is not in dispute that through an email dated 8th June 2018, the Claimant sought the Managing Director's approval of USD purchases in favour of security personnel. The Managing Director in his email of even date, approved the request exceptionally.
89. In his response to the notice to show cause, the Claimant stated that according to the FX Allocation Policy, the Managing Director is responsible for ensuring that the business and functions receive adequate support in the implementation of the policy. He further stated that the Managing Director is the final authority in KCB South Sudan and it was within his powers to grant exemption.
90. The Claimant's argument is at variance with the terms of Clause 8.4 of the FX Allocation Policy, which provides that the FX Allocation Committee (ALCO) was to approve exceptions to the allocation methodology and policy. Further, it is notable that under Clause 8.4.1 of the FX Allocation Policy, ALCO is mandated to oversee the implementation of the policy across the business.
91. What I can deduce from the foregoing is that approval of any exception was to be undertaken by ALCO which constituted the Head of Finance as Chairperson, Head of Corporate, Head of Retail, and Head of Treasury. As such, the decision did not rest with one individual and more particularly, the Managing Director KCB South Sudan. If that were the case, the Policy would have provided as much in express terms.
92. It is thus evident that there was a breach of the FX Allocation Policy when the Managing Director granted the approval exceptionally without the entire ALCO sitting to consider the request.
93. It is also notable that during the disciplinary hearing, the Claimant stated that the situation in South Sudan had changed and that even the FX Allocation Committee was not operational due to the limited amount of US Dollars available. This notwithstanding, it was not a through pass for the Claimant to make a request that was in clear breach of the Policy. In any event, this only proves that there were no governance structures in place for the implementation of the FX allocation for the security pot.



94. According to the Claimant, he initiated the email on security allocation following a meeting he had with the Managing Director, the Head of Operations, and the Security Manager.
95. Being aware of FX Allocation Policy requirements and most of all, as the policy owner, it behoved the Claimant to advise his counterparts at the meeting that any such allocation was to be undertaken by ALCO. At the end of the day, it was the Claimant's obligation to ensure that any allocation is undertaken in line with the FX Allocation Policy.
96. In as much as the Claimant did not personally approve the exceptional allocation in respect of the security pot, his actions put into motion a process that led to the eventual breach of the FX Allocation Policy.
97. This is more so noting that under Clause 8.5 of the FX Allocation Policy, the Claimant who was the then Head of Treasury, was designated as the owner of the policy hence had functional responsibility for implementation and accountability in the area covered by the policy.
98. The bottom line is that the Claimant was equally to blame for breach of the FX Allocation Policy just as the Managing Director KCB South Sudan.
99. The total sum of my consideration is that the Respondent has proved to the requisite standard that the Claimant breached the FX Allocation Policy. Therefore, this availed the Respondent a fair and valid reason to commence termination of his employment within the meaning of Section 45(2) (a) and (b) of the Act.

Fair process?

100. In terms of Section 45 (2) (c) of the Act, an employer is required to prove that it terminated an employee's employment in accordance with a process that is fair. The specific requirements of a fair process are encapsulated under Section 41(1) of the Act thus: -
 - 41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
101. In this case, the Claimant has raised several issues regarding the process he was subjected to, prior to his termination from employment. In this regard, he contends that he was not given adequate time to respond to the show cause letter. He further states that he was not provided with the Forensic Investigation Report and witness statements during the disciplinary hearing. That further, he was not accorded adequate and sufficient information on the allegations against him. He further averred that he was not accorded an opportunity to appeal against the termination of employment.
102. From the record, the Claimant was suspended for 21 days with effect from 13th March 2019. He was to report back to work on 4th April 2019. This was not to be, seeing that on 3rd April 2019, the Claimant was issued with the notice to show cause.
103. Through the notice to show cause, he was required to respond to the issues raised therein on or before 4th April 2019. Through an email of 4th April 2019, the Claimant indicated that he could not meet the 24 hour deadline as he was unwell. Therefore, he requested for more time to allow him address the notice to show cause. Through a letter dated 9th April 2019, the Claimant responded to the notice to show cause. There is no evidence that the same was rejected by the Respondent on account of failure



to adhere to the deadline given. Therefore, any prejudice the Claimant may have suffered as a result of the short notice period contained in the notice to show cause was mitigated as his response dated 9th April 2019 was still considered.

104. What is striking is that following the end of the 21 days suspension period, the Claimant was issued with the notice to show cause and was not informed whether his suspension was still on. It was following his termination from employment that the Claimant was notified that his suspension letter had been lifted. My understanding of this is that throughout the entire disciplinary process, the Claimant was under suspension.
105. This takes me to the Terms of Service and Reference Guide for Managers, which provides that “no suspension shall exceed 60 days unless the manager is awaiting prosecution”.
106. By simple arithmetic, the Claimant was under suspension for more than 60 days. Evidently, this went against the Respondent’s own policy.
107. In its submissions, the Respondent has stated that upon termination, it is the letter that was lifted and not the suspension. This is not logical at all as the suspension of the Claimant was communicated through the letter of suspension. How then was the letter still in place if the suspension had been lifted? In any event, there was no communication to the Claimant prior to the termination, informing him that his suspension had been lifted.
108. My findings on the issue notwithstanding, it is my considered view that the suspension beyond the set timelines did not affect the validity of the disciplinary process. In any case, the Claimant has not sought any relief with regards to this issue.
109. The Claimant has further stated that he was not furnished with the Forensic Investigations Report during the disciplinary hearing. It is clear that the Claimant’s notice to show cause dated 3rd April 2019, made reference to the Forensic Investigations Report. Therefore, the Claimant was aware of its existence at the time he was served with the said notice to show cause. From the record, there is no evidence that the Claimant requested for a copy of the Forensic Investigations Report ahead of the disciplinary hearing and that such request was denied. Consequently, the Respondent cannot be faulted for not availing the same to the Claimant.
110. With respect to failure to inform the Claimant of his right to appeal, I do not find the same fatal. In my view, this did not invalidate the process applied by the Respondent in terminating the Claimant’s employment.
111. In considering the import of Section 41 of the Act, the Court of Appeal had this to say in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR: -

“Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”



112. Applying the above decision to the instant case, I am satisfied that the Respondent complied with the minimum requirements stipulated under Section 41 of the Act hence fulfilled the spirit of the said statutory provision.
113. In the circumstances, I find that the Claimant was accorded procedural fairness as he was informed of the allegations levelled against him and was given an opportunity to be heard on his explanation to the said allegations. To that extent, the Respondent cannot be faulted.
114. Accordingly, I cannot help but conclude that the termination of the Claimant was neither unfair nor unlawful.

Reliefs?

115. As the Court has found that the Claimant's termination was neither unfair nor unlawful, the claim for compensatory damages cannot be sustained.
116. The claim for severance pay is declined as the same is only payable under Section 40(1) (g) of the Act where termination of employment is on account of redundancy. This was not the case herein.
117. The claim for bonus is equally declined as the Claimant has not proved the basis for the award. In this case, there is no evidence before the Court that the Respondent declared bonus for its employees in respect of the year 2018 and that the Claimant was entitled to the same at the time of the separation.
118. The claim for loss of earnings for 18 years also fails as the same is anticipatory in nature. In arriving at this finding, I am guided by the determination of the Court of Appeal in the case of D K Njagi Marete v Teachers Service Commission [2020] eKLR, where it was held as follows: -

“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?.”

119. As the employment relationship has not been disputed, the Claimant is entitled to a Certificate of Service in line with Section 51(1) of the Act.

Orders

120. It is against this background that the Claim is dismissed in its entirety with an order that each party bears its own costs.



121. The Respondent shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Mboya

For the Respondent Mr. Opole instructed by Mr. Musyoka

Court Assistant Kemboi

ORDER

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

STELLA RUTTO

JUDGE

