



**Obayi v Judicial Service Commission & another (Cause E030 of 2022)  
[2024] KEELRC 1672 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1672 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E030 OF 2022  
DN NDERITU, J  
JUNE 27, 2024**

**BETWEEN**

**GODFREY OCHIENG OBAYI ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF REGISTRAR OF THE JUDICIARY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The claimant commenced this cause by way of a statement of claim dated 2<sup>nd</sup> August, 2022 filed in court on 15<sup>th</sup> August, 2022, through Odhiambo Opar & Co. Advocates. As expected, the statement of claim is accompanied with a verifying affidavit, the claimant's witness statement, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following -
  - a. A declaration that termination of the claimant was unfair, wrongful, unlawful and illegal.
  - b. The claimant is entitled to -
    - i. Immediate and unconditional reinstatement to the employment,
    - ii. Payment of all the outstanding salaries and benefits from the date of interdiction, suspension and dismissal up to reinstatement,
  - c. In the alternative to the above, the claimant urges this Honourable Court to find that he is entitled to payment of -
    - i. One month's salary in lieu of notice,



- ii. 12 months' compensation as per section 49 (c) of the *Employment Act*,
  - iii. Salaries for the remainder of the contract,
  - iv. General damages for statutory breach under the *Employment Act* and *the Constitution of Kenya*,
  - v. Certificate of service,
  - vi. Costs of the cause.
3. The 1<sup>st</sup> and 2 respondents entered appearance on 26<sup>th</sup> October, 2022 through their joint representation, Muma & Kanjama Advocates. The respondent filed a response to the statement of claim dated 9<sup>th</sup> February, 2023 accompanied with a list of witnesses, a list of documents, and a bundle of copies of the listed documents. In the said response the respondents pray that the claimant's suit be struck out and or dismissed with costs for lack of merits.
  4. The claimant filed a reply to the respondents' statement of response on 17<sup>th</sup> February, 2023 dismissing the defence set out in the said statement of response and reiterating that judgment be entered against the respondents as prayed in the statement of claim.
  5. The cause came up for virtual hearing on 8<sup>th</sup> May, 2023 when the claimant (CW1) testified and closed his case. The defence was heard on 5<sup>th</sup> June, 2023 when Peter Mwai Muriuki (RW1), the 1<sup>st</sup> respondents' auditor testified, and on 27<sup>th</sup> June, 2023 when STEPHEN MUTUA (RW2), assistant human resources director, testified and thereafter the respondents' case was closed.
  6. Counsel for both parties summed up their respective client's case by way of written submissions. Mr Opar for the claimant filed his submissions on 17<sup>th</sup> August, 2023 while Mr. Kanjama (SC) for the respondents filed on 4<sup>th</sup> October, 2023.

## **II. The Claimant's Case**

7. The claimant's case is expressed in the statement of claim, oral and documentary evidence adduced through CW1, and the written submissions by his counsel. The same is summed up hereunder.
8. In the statement of claim the claimant states that he was an employee of the 1<sup>st</sup> respondent initially employed as a clerical officer and rose through the ranks to become an executive assistant officer. At the time of his alleged unlawful dismissal he was stationed at Molo Law Courts earning a gross salary of Kshs95,181/=. He avers that he was unlawfully, unfairly and illegally terminated on 4<sup>th</sup> January, 2021.
9. He avers that he worked for the respondent at Kericho and Molo Law Courts with a clean record of employment. He claims to have dedicated over twenty (20) years of service to the 1<sup>st</sup> respondent.
10. On the events leading to his dismissal, the claimant alleges that on 23<sup>rd</sup> September, 2019 he received an internal memo entitled "Audit Queries – Draft Internal Audit Reports" from the Chief Magistrate in-charge of Molo Law Courts, Hon. E.G Nderitu. The memo alleged that the claimant had issued seven (7) parallel receipts in fraudulent collection of revenue amounting to Kshs1,534,121/=:, which collections were not recorded in the counterfoil receipt book (CRB) register. In the memo, the claimant was asked to provide a statement regarding the source of the impugned receipts. The claimant responded to the internal memo vide a letter dated 26<sup>th</sup> September 2019 stating that he was unaware of the alleged parallel receipts mentioned in the memo.



11. On 2<sup>nd</sup> October, 2019 the claimant avers that he was served with a letter titled “Gross Misconduct” in which he was interdicted on half salary as he awaited his fate. On 12<sup>th</sup> November, 2019 the claimant received another letter which stated that the final internal audit on revenue deposit, procurement, and expenditure management carried out on Molo Law Courts books of accounts covering the period between 1<sup>st</sup> November, 2017 to 30<sup>th</sup> June, 2019 dated 24<sup>th</sup> October, 2019 had revealed fraudulent activities wherein the claimant allegedly collected a sum of Kshs1,534, 121/= and approved cheque payments totalling Kshs33,932, 144/= that were not supported by payment vouchers, court orders, deposits receipts and other requirements. The claimant was invited to show-cause why he should not be dismissed on account of the alleged gross misconduct. The claimant was suspended without salary with only an alimentary allowance equivalent to a third (1/3) of his basic salary.
12. It is pleaded that the claimant responded to the show-cause letter vide a letter dated 25<sup>th</sup> November, 2019 wherein he allegedly provided sufficient cause not to be disciplined. It is pleaded that the respondents failed to consider the response. The claimant pleaded that he requested for copies of the final internal audit report and the evidence against him in accordance with the [Employment Act](#), Judiciary Human Resource Policies and Procedures Manual 2014, Judicial Service Commission Act and other applicable laws but the respondents failed, refused, and or ignored his request.
13. It is pleaded that the claimant attended a disciplinary hearing on 17<sup>th</sup> November, 2020, but the respondent failed to disclose and did not provide him with copies of the alleged final audit report dated 24<sup>th</sup> October, 2019, and counterfoil receipt books or receipts for the alleged fraudulent collections amounting to Kshs1,534,121/= despite several requests. It is pleaded that the disciplinary meeting was unfair, sham, biased, and unprofessional and allegedly contravened Articles 47, 48 and 50 of [the Constitution](#), Section 41 of the [Employment Act](#) (the Act) and Section 25(4) of the Judicial Service Commission Act.
14. The claimant further avers that the disciplinary hearing was unfair because he was not given enough time to prepare for his defence and that during the disciplinary hearing he was not given an opportunity to question the persons who investigated and prepared the reports in the matter, and that his appeal was not considered on merit.
15. In his testimony in court the claimant reiterated the contents of the foregoing pleadings and his written statement filed on 15<sup>th</sup> August, 2022. He produced and adopted the documents in his list and bundle of documents dated 2<sup>nd</sup> April, 2022 which were marked as exhibits 1 to 10. He denied obtaining the alleged sum of Kshs1,534, 121/= or any other sum or at all and denied issuing parallel receipts. Further, he denied making or authorizing payments amounting to Kshs33, 932,144/=. He stated that the audit report is biased and inadequate as it did not specify the cases involved and particulars of the omitted specific receipts.
16. The claimant testified that he was not shown the signatures on the documents and was uncertain if the signatures were his. He stated that he was not interviewed by auditors and had not seen the receipts listed from pages 5 to 7 of the respondent’s bundle and list of documents. Additionally, he stated that he was not provided with the audit report dated 24<sup>th</sup> October, 2019 and the alleged fraudulent receipts before or during the disciplinary proceedings and only saw the said report in court during the hearing. He stated that as an assistant executive officer he acted as an alternate signatory to the accountant and would sign only with explicit authorization from the accountant if a signatory was unavailable.
17. In cross-examination, the claimant stated that he had worked for the 1<sup>st</sup> respondent for 20 years in various sections, including the accounts section for five years. He further stated that he shared an office with the accountant and learned accounting skills while at Molo Law Courts. He confirmed



that he understood his duties as outlined on page 4 of his bundle of documents dated 2<sup>nd</sup> August, 2022 and that he was aware of the procedure in making payments in the Judiciary which entailed preparation of payment vouchers with supporting documents which are then signed by an authorized officer. Additionally, he stated that a cheque is then prepared and signed by an authorized officer. The supporting documents to be attached include court orders, deposit receipts, or any other documents as the case may demand.

18. The claimant reiterated that he responded to the show-cause letter. He maintained that he did not sign any cheques. He stated that he attended the disciplinary hearing and alleged that the auditor, RW1, was a panellist. The claimant denied signing cheques withdrawing Kshs33 million as alleged. He further stated that he did not complain about the disciplinary proceedings during the hearing and that the minutes produced are a fair reflection of the proceedings. He confirmed that during the disciplinary hearing he was accompanied by his advocate, Mr. Tom K'Opere, and that he was aware of the allegations of loss, theft, and fraudulent false accounting while he was working at the Molo Law Courts.
19. In re-examination, the claimant denied any involvement in the loss, theft, misappropriation, or mismanagement of the alleged funds and reiterated that he did not sign or issue any of the alleged fraudulent receipts or cheques. He denied benefiting from the allegedly lost funds. He reiterated his evidence in-chief stating that Mr. Mwai (RW1) the author of the audit report was a panellist and not a witness during the disciplinary hearing.
20. Responding to a clarification sought by the court, the claimant stated that he was not charged with a criminal offence in connection with the allegations made against him and that he was not aware of any criminal charges against any other person.
21. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

### **III. The Respondents' Case**

12. The respondents' case is contained in the statement of response to the statement of claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions by their joint counsel.
13. In their response to the claim, the respondents admit the claimant's employment with the 1<sup>st</sup> respondent but deny the alleged illegality and unfairness in his dismissal.
14. The respondents aver that the claimant failed to provide sufficient defence or show-cause in the face of the allegations levelled against him but instead took the route of blaming others for his misconduct. The respondents state that the decision to terminate the claimant was based on the Final Internal Audit Report that revealed irregularities in revenue collection, deposits, procurement, and expenditure management at Molo Law Courts for the period from 1<sup>st</sup> November, 2017 to 3<sup>rd</sup> June, 2019.
15. It is pleaded that the report indicated that the claimant was involved in operating parallel receipt books and fraudulently collected revenue totalling to Kshs1,534,121/=. Additionally, as one of the signatories to Molo Law Courts' bank account, the claimant is alleged to have approved cheque payments totalling to Kshs33,932,144/= without proper supporting documentation such as payment vouchers, court orders, deposit receipts, and or other required documents.
16. The respondents aver that the claimant violated the provisions of the Judiciary Finance Policy & Procedures Manual 2014 in a manner amounting to gross misconduct that led to his dismissal per



Section D. 7.2 of the Judiciary Human Resource Policies & Procedures Manual 2014 and Section 44 (3) & (4) of the Act. The respondents aver that the claimant confessed to the audit team of his misconduct as a result of which he was interdicted from work on 2<sup>nd</sup> October, 2019 pending finalization of the audit process. The claimant was later suspended from duty for gross misconduct and issued with a show-cause letter dated 12<sup>th</sup> November, 2019 stating specific and particular charges against him to which he responded vide a letter dated 25<sup>th</sup> November, 2019.

17. The respondents aver that the claimant participated in the disciplinary hearing before the Human Resource Management Advisory Committee (HRMAC) and that he was during the hearing accompanied by his advocate. It is pleaded that the committee concluded that the claimant's defence was inadequate and recommended his dismissal on the ground of gross misconduct. The claimant was also required to refund the money lost within 14 days. The recommendations by the HRMAC were adopted by the Human Resource Management (JSC-HRM) Committee on 7<sup>th</sup> December, 2020, approved by the 1<sup>st</sup> respondent on 10<sup>th</sup> December, 2020, and implemented on 4<sup>th</sup> January, 2021 culminating in the claimant's dismissal. The claimant's appeal against the dismissal was disallowed on 24<sup>th</sup> June, 2021, and he was accordingly informed of his right to apply for review in a letter dated 28<sup>th</sup> June, 2021.
18. It is pleaded that the claimant was served with the extract of specific findings against him in the audit report that formed the basis of his response to the charges. It is further pleaded that the charges framed against the claimant were specific and clear and at no point did he either raise any issue on the clarity of the charges and neither did he object to the disciplinary proceedings.
19. It is pleaded that the respondents did not deny the claimant the opportunity to cross-examine any witness or his alleged accuser as the claimant did not put forward such a request. The respondents aver that all the relevant materials and information, including the oral and written responses by the claimant, together with the evidence availed, were all considered in arriving at the decision to dismiss the claimant.
20. It is pleaded that the claimant was negligent in execution and performance of his duties and the allegation that he was an alternate signatory to accounts does not negate the weight of his signature on the fraudulent documents. It is pleaded that the claimant knew that his signature gave way to disbursement of Judiciary/public funds and should have taken proper care in assessing and evaluating all the documents, including the supporting documents, before appending his signature. It is pleaded that his failure to check and verify the supporting documents amounted to neglect of duty and gross misconduct.
21. It is pleaded that the disciplinary proceedings were procedural, fair, and lawful and the claimant was given all the time that he needed to defend himself. He raised no objection to the manner or style in which the proceedings were executed.
22. In his testimony in court, RW1 stated that he has worked for the respondent as an internal auditor since 2015. He reiterated the contents of his written statement dated 1<sup>st</sup> February, 2023 which he adopted as his evidence in-chief and he produced the listed documents as exhibits 1 and 2 respectively. He stated that his responsibilities involve supporting the audit director in conducting audits to ensure that internal controls mitigate risk for the respondents.
23. RW1 testified that the claimant was terminated for gross misconduct while working at Molo Law Courts. He insisted that there was serious revenue mismanagement at Molo Law Courts, where the claimant, alongside others, misappropriated the revenue collected. He stated that there was a direct loss of revenue of over Kshs1,500,000/= in revenue collected from fines. He stated that it was established



- that the claimant in conjunction with others issued fraudulent parallel receipts to divert the funds for personal gain.
24. He stated that the lost revenue, in the hands of the claimant and his two co-workers amounted to Kshs1,534,121/= which was mainly collected from traffic offences fines. He stated that the money fraudulently not accounted for was not banked, and the claimant and his comrades defrauded the respondents by issuing fake receipts. He explained that each revenue collection booklet contains 50 receipts in quadruplicate and he stated that upon examining the fraudulent receipts it was concluded that it was the claimant who authored and issued some specific receipts as per the audit report. He stated that the claimant was interviewed by the audit team and he confirmed that he, the claimant, was responsible for the issuance of parallel receipts whose value in revenue collected amounted to Kshs275,334/=.
  25. He stated that during the investigation the claimant, a Mr. Osoro, and a Mr. Tamar were questioned and the claimant confessed to issuing the parallel receipts. He further stated that the draft audit report was circulated internally and the claimant responded to the said report. He stated that the claimant was given an opportunity to defend himself and that he admitted and owned up to his gross misconduct in issuing parallel receipts and fraudulently signing cheques for fake or fraudulent refunds of fines or cash bail deposits.
  26. He stated that the claimant was an alternate signatory to cheques and accounts. He further stated that payment vouchers paid against were also fake as none was supported with court orders. He testified that the final audit report recommended that disciplinary action be taken against the claimant who was invited to a disciplinary hearing vide a letter dated 11<sup>th</sup> November, 2020. He stated that he attended the disciplinary hearing and testified as a witness, representing the director of audit, not as a panellist as alleged by the claimant.
  27. In cross-examination, RW1 confirmed that he was the leader of the team that conducted the audit. He stated that the audit unearthed fake receipts used in a parallel receipting system to freeze and defraud revenue collected by the claimant and other officers. He stated that he did not know the persons whose names were appearing on the 17 fake receipts that were used to siphon out the money as the said receipts were not filed in Court. He stated that the claimant issued and signed the fake receipts, but he confirmed that he is not a handwriting expert. He confirmed that the respondents did not engage the services of a handwriting expert as the claimant allegedly owned up and admitted to authoring, signing, and issuing the fake receipts. However, he stated that the claimant denied the authenticity of the signatures that were on the fake receipts in response to the show-cause letter. He further stated that the claimant contributed to the loss of collected revenue amounting to Kshs1,534,121/=.
  28. He stated that the audit team which he led sampled 17 files and out of 13 of those files the claimant had issued parallel receipts amounting to Kshs275, 334/= . He stated that the fake parallel receipts were never surrendered to the respondent's headquarters and the revenue collected was not banked. He however stated that the respondents did not avail the bank statements and that he did not have all the documents for the transactions in the alleged fraud in the sum of Kshs33,932,144/=.
  29. He stated that the final audit report filed in court was carried out at the court station and that what was filed in court is an extract from the original audit report. He stated that the audit team recommended that the matter be investigated by the Directorate of Criminal Investigations (DCI) but he did not know whether the DCI took over the investigation of the matter but he confirmed the same was reported thereat. He stated that he was not aware of any criminal charges against the claimant or any other person. He stated that one of the claimant's primary duties was revenue collection as per his job description.



30. He stated that the claimant was afforded a fair hearing and the audit report was availed to the claimant before the disciplinary hearing. He stated that he attended the disciplinary as a representative of the director of audit. However, he admitted that the minutes of the disciplinary proceedings do not indicate that he attended the hearing as a witness.
31. RW2, an assistant human resource director, testified that he joined the 1<sup>st</sup> respondent in 2002 and he has held his current job for the last four years. He reiterated the contents of the pleadings filed and his written statement dated 2<sup>nd</sup> February, 2023. He adopted the list and bundle of documents produced and marked as exhibits 1 and 2 respectively. He stated that he knew the claimant as an employee. He stated that an audit report was done at Molo Law Courts following reports of mismanagement of revenue collected whereby Kshs.33 million was lost.
32. He stated that the claimant was interviewed by the auditors who conducted the audit process and he responded to the draft audit report. He stated that the claimant was interdicted vide a letter dated 2<sup>nd</sup> October, 2019. Further, he stated that after the final audit was released the claimant was issued a letter dated 26<sup>th</sup> September, 2020 informing him of the charges against him and he was thus invited for a hearing. He stated that the claimant was suspended vide a letter dated 12<sup>th</sup> November, 2019 and that the claimant responded vide a letter dated 25<sup>th</sup> November 2019.
33. He stated that the disciplinary hearing took place a year after the process had started hence the claimant had plenty of time to prepare. He stated that the disciplinary committee recommended the claimant's dismissal after the disciplinary hearing. He stated that he attended the disciplinary hearing and took the minutes of the meeting. He stated that the claimant was given the opportunity to defend himself and he was represented by an advocate who addressed the panel. He stated that there were two meetings held one virtual the other was physical. The virtual meeting was unsuccessful due to technical hitches with the internet connectivity hence the subsequent physical meeting. He stated that the claimant was ordered to pay the money lost but he did not and the panel concluded that the claimant had conspired with others in the fraudulent loss of over Kshs33 Million.
34. Further, he stated that the matter was referred to DCI but no criminal charges were commenced against the claimant and his conspirators. He stated that upon serious and due consideration it was decided that the claimant be dismissed from service as communicated to him vide a letter dated 4<sup>th</sup> January, 2021. He stated that the claimant appealed against the dismissal vide a letter dated 10<sup>th</sup> February, 2021 and that the appeal was considered by the 1<sup>st</sup> respondent's appeals committee which dismissed the appeal for lack of merits. The outcome of the appeal process was communicated to the claimant vide a letter dated 28<sup>th</sup> June, 2021. He stated that the claimant had six months thereafter to apply for review in case there was discovery of new material evidence. He stated that the interdiction, suspension, and dismissal of the claimant were all fair and lawful and in accordance with the law and the 1<sup>st</sup> respondent's human resources management and procedure manuals.
35. In cross-examination, RW2 stated that the reasons for the claimant's summary dismissal are contained in the letter dated 4<sup>th</sup> January, 2021. Making reference to the draft audit report he stated that it indicated that the claimant fraudulently collected Kshs.1.5 million and that the claimant admitted to the same. He stated that he did not see the fake receipts as there were no images presented before the court and no document examiner's report was filed confirming that the signatures appended on the impugned documents were by the claimant. He stated that the admission of gross misconduct by the claimant was allegedly orally made to RW1. He clarified that the sum of Kshs1.5 million is the amount in the receipts issued by the claimant and a Mr. Osoro while an amount of Kshs3.3 million is the money that was discovered as lost for the entire station.



36. RW2 stated that the signed cheques and bank statements were not presented before the court and the auditor did not testify at the disciplinary hearing. He stated that the minutes that were before the court were not signed, and there were missing pages. He also confirmed that the money lost or stolen was not recovered. He stated that the criminal investigation was still pending before the DCI. He stated that he did not know why no action had been taken by the DCI so far. He stated that the money belonged to depositors and the claimant was an alternate signatory but he took it upon himself to sign the cheques without attaching the necessary supporting documents including vouchers, court orders, deposit slips and receipts, as per the established procedure and practice.
37. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. The submissions by the counsel for the respondents shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

#### **IV. Submissions By Counsel for the Claimant**

38. The claimant's counsel identified the following two issues for determination - Whether the claimant's dismissal was unfair, and, Whether the claimant is entitled to the reliefs sought.
39. On the first issue, it is submitted that the respondents did not adhere to both substantive justification and procedural fairness and their actions cannot pass the legal test. Counsel relied on the case of *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* on the applicable substantive and procedural tests before termination or dismissal.
40. It is submitted that the claimant worked as an executive assistant at Molo Law Courts and had been employee of the 1<sup>st</sup> respondent for over 20 years with a clean record free of warnings and disciplinary proceedings. Counsel cited Sections 43, 45(2) & 47(5) of the Act in supporting the argument that the respondents failed to justify the reason for the summary dismissal. It is submitted that Section 47(5) of the Act places the burden of proof for the reasons for termination or dismissal on the employer and the same theme is repeated in Section 43 of the Act.
41. Further, it is submitted that Section 45(2) of the Act provides that termination of employment is deemed unfair when the employer fails to prove that -
- a) The reason 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
42. Further, it is submitted that Section 45 (4) (b) of the Act provides that termination of employment shall be unfair where, in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee. Section 47(5) of the Act provides that the burden of proving unfair termination lies upon the employer.
43. Counsel cited *Nicholas Otinyu Muruka V Equity Bank (K) Ltd Cause No. 25 of 2013* where the court observed that employers must prove a link between an employee's criminal conduct and gross misconduct for summary dismissal or else risk being held guilty of harassment and intimidation of employees without just cause. Further, counsel cited *British Leyland Ltd V Swift (1981) I.R.L.R 91* where Lord Denning described the reasonableness test. It is submitted that based on the evidence on



record there was no valid reason warranting the dismissal of the claimant. It is further submitted that the procedure applied by the respondents did not comply with Section 41 of the Act.

44. Further, counsel cited *David Gichena Omunya V Mombasa Maize Millers Limited* (2014) eKLR, *Pelecia Olum V Export Processing Zones Authority Cause No. 194 of 2013*, and [\*Jacqueline Kanja V Visa Cemea Holdings Limited Cause No. 1012 of 2014\*](#) in support of the same issue insisting that the summary dismissal was grossly unfair and unlawful.
45. It is submitted that the claimant responded to the show-cause letter vide a letter dated 25<sup>th</sup> November, 2019 wherein he requested to be supplied with a copy of the final audit report to enable him prepare for his defence. Unfortunately, the respondents did not reply to the claimant's request nor did they supply him with a copy of the final internal audit report. It is also submitted that the claimant did not get an opportunity to question the witnesses during the disciplinary hearing and that he was not accorded an opportunity to cross-examine them.
46. Further, it is submitted that the minutes of the disciplinary hearing do not show how the charges were read out to the claimant and how the claimant pleaded to the same and further the said minutes do not contain the names of the witnesses that were presented by the 1<sup>st</sup> respondent during the disciplinary hearing. It is submitted that the minutes that were presented before the court do not reflect the true record of the disciplinary hearing and especially what was said by the claimant during the hearing.
47. On the second issue, it is submitted that the claimant is entitled to an order of reinstatement based on Sections 49(3)(c), (4)(c) & (d) of the Act and Section 12 (3) (vii) of the [\*Employment and Labour Relations Court Act\*](#). Further, it is submitted that the claimant is entitled to payment of all outstanding salary arrears and benefits from the date of suspension till the date of reinstatement, an award equivalent to 12 months' gross salary in compensation based on Section 49(1)(c) of the Act, and one month's salary in lieu of notice. It is submitted that the claimant be awarded general damages for statutory breach under the Act and [\*the Constitution\*](#) amounting Kshs5,000,000/=, an order that he be issued with a certificate of service, and that he be awarded costs and interest at court rates.

## **V. Submissions By Counsel For The Respondents**

48. The respondents' counsel identified the following three issues for determination - Whether a valid and fair reason to dismiss the claimant has been proved; Whether due process was followed in dismissing the claimant; and, What the appropriate reliefs are in the circumstances.
49. It is submitted that it is trite law that for termination or dismissal from employment to be fair the employer must prove that there was a valid reason or substantive justification and that proper procedure was followed in accord with procedural fairness. Counsel relied on the Court of Appeal decisions in *Judicial Service Commission V Beatrice Nyambane Mosiria* [2020] eKLR, *CFC Stanbic Bank Limited V Danson Mwashako Mwakuwona* [2015] eKLR, *Pius Machafu Isindu V Lavington Security Guards Limited* [2017] eKLR and *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* [2019] eKLR all dealing with substantive and procedural fairness under Sections 41 and 43 of the Act. Counsel also cited *Godfrey Barasa Ochieng V Security Guards Service Limited* [2022] eKLR amongst several other decisions.
50. On the first issue, it is submitted that during the disciplinary hearing the respondent produced the draft and final audit reports dated 6<sup>th</sup> September, 2019 and 24<sup>th</sup> September, 2019, respectively, establishing that there was mismanagement of revenue collected amounting to over Kshs33million out of which the claimant and his two co-workers accounted for Kshs1,534,121/= from the Molo Law Courts Deposit Account. The money was withdrawn without supporting documents such as payment vouchers, court



orders, affidavits, IDs, and original deposit receipts. It is submitted that the claimant was an alternate signatory to the bank account.

51. It is submitted that from the letter by the head of station dated 23<sup>rd</sup> September, 2019, the letter of interdiction dated 2<sup>nd</sup> October, 2019, the show-cause letter, and the letter of suspension dated 12<sup>th</sup> November, 2019 the claimant was informed of the contents of the audit report and the charges and allegations made against him and granted the opportunity to respond to the same and defend himself. Upon the disciplinary hearing, the respondents were not satisfied with the explanation given by the claimant. It is submitted that the claimant's dishonesty in signing and approving cheques and receipts provided justifiable and sufficient grounds for the respondents to act against the claimant and to subsequently summarily dismiss him. Counsel cited ELRC Petition No. E190 of 2021 Jacob Waka V JSC & Others in support of the action taken by the respondents under similar circumstances which action was upheld by the court.
52. It is also argued that the claimant's negligence and failure to take responsibility in verifying payments and receipts resulted in the loss of funds amounting to Kshs32,895,888/=. Despite being aware of the applicable financial procedures, the claimant did not report to his employer the irregular practice of signing and approved of cheques without proper documentation. Additionally, different people were signing on behalf of senior officers and there were poor record-keeping practices. It is submitted that in the circumstances the employer, the 1<sup>st</sup> respondent, was justified in summarily dismissing the claimant under Sections 44(3) & (4) of the Act as read with section D. 7.2. of the employer's Manual. Further, it is submitted that the alleged gross misconduct is contrary to the Public Finance Management (National Government) Regulations and Judiciary Finance Policy and Procedures Manual. It is also submitted that the evidence establishes that the claimant had personal interests which conflicted with his duties contrary to the Judiciary Code of Conduct and Ethics.
53. Counsel cited Kenya Revenue V Reuvel Waithaka Gitahi & 2 others (Supra) wherein the court cited Evans Kamadi Misango V Barclays Bank of Kenya Limited [2015] eKLR where the court held that it is not the role of the court to re-enact the internal disciplinary process already undertaken at the workplace and that court's responsibility is to review the legality and reasonableness of employer's actions against an employee.
54. On the second issue, on whether the procedure adopted was fair, it is submitted that the respondent informed the claimant of the charges against him and that he was allowed an opportunity to be heard on the allegations and as such the procedural fairness was observed and served upon the claimant. It is submitted that the claimant failed to discharge his burden of proof under Section 47(5) of the Act which places the burden of proof of unfair termination of employment or wrongful dismissal upon an employee. Counsel cited Section 41 of the Act on procedural fairness and Section 45(4) of the Act on unfair termination. Counsel cited Kisang V Judicial Service Commission (Supra) in support of that position. It is submitted that in the entire circumstances of this cause, due process was applied and followed in dismissing the claimant.
55. On the third issue, it is submitted that the claimant is not entitled to the reliefs sought and counsel relied on the case of John Ngoko Isoe V Nyasiongo Tea Factory Co. Ltd [2017] eKLR wherein the court held that the claimant had failed to prove that his termination was unfair and was therefore not entitled to any of the relief sought. Counsel also relied on Amos Kitavi Kivite V Kenya Revenue Authority [2020] eKLR wherein the court held that the claimant was neither entitled to reinstatement nor the alternative prayer for damages for alleged unlawful termination. It is further submitted that in Jacob Waka V JSC & Others the court declined an award of damages as the claimant had failed to demonstrate that the dismissal was wrongful or unlawful.



56. In response to the claimant's submissions, it is submitted that the alleged violation of his rights to a fair hearing are misplaced because during the disciplinary hearing the claimant was provided with excerpts of the Final Audit report relating to his charges. It is submitted that the said report contained sensitive information touching on the operations of the court station and hence in accordance with Paragraph 23(2) of the 3<sup>rd</sup> schedule of the *Judicial Service Act* it was not proper that the claimant was to be supplied with the entire report. In any event, it is submitted that he was supplied with the part that was relevant to his matter. Counsel cited the case of Civil Appeal Nakuru No. E082 of 2022- JSC & Another V Aggrey Oure Onyango where the court held that an order for reinstatement is not an appropriate remedy where it would be difficult for the employer to trust the employee given the events that led to the dismissal. The court is urged to find and hold similarly in this cause.
57. In conclusion, it is submitted that the respondents complied with the requirements for substantive justification and procedural fairness in dismissing the claimant thus the cause be dismissed with costs to the respondents.

## **VI. Issues For Determination**

58. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence presented from both sides, and the written submissions by counsel for both parties. In the considered view of the court the following issues commend themselves for determination: -
- a. Whether the dismissal of the claimant was wrongful, unfair, and unlawful,
  - b. If (a) above is in the affirmative, whether the claimant is entitled to the reliefs sought; And,
  - c. What is the appropriate order on costs of the cause?

## **VII. Substantive Justification & Procedural Fairness**

59. It is now settled on what constitutes unfair, wrongful, and unlawful termination or dismissal – See Mary Chemweno V Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno V Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro V Teachers Service Commission (2012) eKLR.
60. The court need not reproduce the evidence adduced as summarized in the foregoing parts of this judgment. It is not contested that the claimant was indeed an employee of the 1<sup>st</sup> respondent having joined the institution in 2001 as a clerical officer. Over the years, he rose through the ranks and served in various court stations finally becoming executive assistant stationed at Molo Law Courts in Nakuru County. The claimant performed multiple tasks, duties, and responsibilities but the notable ones included receiving and verifying collection of revenue and issuing receipts for the same, writing A.I.E (Authority to Incur Expenditure) cheques to merchants, signing depositors' cheques as 2<sup>nd</sup> signatory alternate, and signing AIE cheques as 2<sup>nd</sup> signatory alternate.
61. The 1<sup>st</sup> respondent conducts regular audits in courts across the country cross-checking with the accounting books in terms of revenue collections and deposits for proper financial management and accountability. In one of such audits covering the period from 1<sup>st</sup> November, 2017 to 31<sup>st</sup> June, 2019 it was discovered that there had been fraudulent accounting and or misappropriation of monies collected as revenue at the said court station. According to the draft and final audit reports the alleged fraud was executed through issuance of parallel receipts which in total amounted to Kshs1,534,121/=. The evidence on record indicates that upon conclusion of the auditing a draft audit report was prepared dated 6<sup>th</sup> September, 2019 and in page 3 of the said draft audit report it is stated that the claimant and a Mr. Osoro had confessed and admitted to having been involved in the alleged fraud.



62. However, in the final audit report dated 24<sup>th</sup> October, 2019 the claimant and the said Mr. Osoro retracted what they had allegedly stated in the draft audit report and denied the issuance of the parallel receipts and or the fraudulent misappropriation of revenue collected. In the audit report it is stated that there were irregular payments from the deposit bank account totalling to Kshs33,932,144/= and that this amount of money had been withdrawn without the requisite supporting documents such as payment vouchers, court orders, and deposit receipts showing that indeed money had been deposited in the said deposit bank account. The claimant was an alternate signatory while the signatories were two accountants. The report concluded that the money from the deposit account was withdrawn through cheques signed by the authorized signatories including the claimant. The report recommended that disciplinary action be taken against the claimant and the other signatories.
67. In a letter dated 26<sup>th</sup> September, 2019 the claimant denied any involvement in the alleged fraud and vehemently denied issuing any parallel receipts or signing any such receipts or vouchers to withdraw or make payments to any person as alleged in the audit report. However, he was interdicted on half-pay with effect from 2<sup>nd</sup> October, 2019 as per a letter of that date addressed to him for and on behalf of the 2<sup>nd</sup> respondent.
68. In a show-cause letter dated 12<sup>th</sup> November, 2019 the claimant was called upon to respond to the specific allegations stated therein showing cause why he should not be dismissed for the alleged gross misconduct. He was suspended from duty on alimentary allowance equivalent to one-third of his basic salary. The claimant responded to the show-cause letter vide his letter of 25<sup>th</sup> November, 2019 wherein he requested that he be served with the final audit report on which the allegations in the show-cause were founded. Nonetheless, he denied all the allegations against him in toto. He alleged that he only signed his part in the vouchers after the other signatories had signed and that he issued receipts only when the cashier was absent but he could not tell which receipt books were genuine and which ones were fake or fraudulent.
69. The court has gone through both the draft and final audit reports wherein the details of the alleged fraud are stated. It is a fact that the claimant worked in the section wherein the revenue was lost through fraudulent means at Molo Law Courts. It is also important to state that this is not a criminal trial. The standard of proof on any allegation made by either party is on a balance of probabilities. The claimant admitted to issuing receipts but he denied issuance of any fake or fraudulent receipts. However, the audit report alleges specific fake receipts were issued by the claimant. It is a fact that the respondents did not engage the services of a hand-writing examiner to establish that indeed the claimant authored any of the fake receipts save for the visual examination by RW1 and his audit team which concluded that it is the claimant who authored, signed, and issued the impugned receipts.
70. In the circumstances described above, the court has to decide on a balance of probabilities whether the respondents had genuine and reasonable grounds for taking disciplinary action against the claimant. It was alleged by RW1 & 2 that the fraud was reported to DCI but the status of the criminal process is unknown and the fact is that no criminal charges were filed against the claimant.
71. As the adage goes, law abhors a vacuum. Section 43 of the Act provides as follows –
43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

72. The necessary implication from the above cited law is that the test for the reason for dismissal or termination is subjective on the part of the employer. The employer only needs to demonstrate that it “genuinely believed” that the ground was good, genuine, and reasonable. As noted above, the audit report by the internal auditors indicated that funds from revenue collected had been fraudulently misappropriated in excess of Kshs33 million. Between the claimant and his two colleagues it was alleged that for the audited period a sum of over Kshs1.5 million had been stolen or lost or could not be accounted for. The auditors submitted that the claimant had issued fake receipts amounting to Kshs275,334/=. In those circumstances, can it be said that the respondents were unreasonable in taking disciplinary action against the claimant that culminated in his dismissal? My answer is no.
73. As stated above the applicable test is not objective but subjective based on the genuineness of the action taken by an employer. The court holds that even when viewed from the lens of reasonableness, the respondents had good, genuine, and reasonable grounds for acting against the claimant in the way that they did based on the audit report. The claimant worked in the section where the money was lost. Based on the evidence on record he sat in the office wherein the alleged fraud occurred. It is inconceivable that as an honest, dedicated, and committed employee he had no evidence or information with which to aid his employer to catch the fraudster instead of just offering a denial of liability as much as he was entitled to defend himself.
74. It is for the foregoing reasons and circumstances that the court finds and holds that on a balance of probabilities the respondents had genuine and reasonable grounds for acting against the claimant as they did. Therefore, in terms of substantive fairness the respondents have passed the test.
75. On procedural fairness the court faults the respondents for failure to supply the claimant with a copy of the audit report and other evidence against him at the earliest opportunity as he requested in his letter of 25<sup>th</sup> November, 2019. The administration of justice is no longer a hide and seek game. All evidence, by either party, must be disclosed well in advance. Articles 47 & 50 of *the Constitution*, Fair Administrative Actions Act, and Sections 41, 43, 45, & 47 of the Act confirm that the playing ground has been levelled with the requirement of disclosure of all materials and evidence against the other party based on the rules of natural justice. RW1 & 2 admitted that the claimant was not supplied with the said audit report and only saw it in court. It matters not that the claimant appeared through counsel during the disciplinary hearing of 17<sup>th</sup> November, 2020.
76. However, the minutes of said disciplinary hearing clearly indicate that the claimant was represented by Mr. K’Opere who led the claimant in his defence. There is no evidence that the claimant had been supplied with all the materials supporting the charges prior to the disciplinary hearing. This in my view prejudiced the claimant. RW1 claimed that the audit report was confidential and as such it was risky and not strategic to supply the claimant. Be that as it may, why was the claimant not so informed in response to his request for supply of the same to him? This rhetorical question finds no answer from the respondents.
77. In the circumstances described above, it is the view of the court that although a disciplinary hearing is not a court trial the failure by the respondents to disclose and serve all the materials upon the claimant prejudiced his defence in the disciplinary hearing. For this reason, the court finds and holds that the procedural steps taken by the respondents in the disciplinary hearing were not fully compliant with the rules of natural justice as envisaged in the constitutional and statutory provisions cited above.



78. As it was noted in an earlier part of this judgment, the jurisprudence on substantive justification and procedural fairness in employment matters is now a fairly well travelled path. For example, in *Walter Ogal Anuro V Teachers Service Commission* (Supra) the court held that -

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

79. In *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* [2017] eKLR it was held that: -

“What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”

80. Finally, in *Beatrice Nyambune Mosiria v Judicial Service Commission* [2019] eKLR, the court held that: -

“In employment matters, the employer has to prove both valid reason and fair procedure.”

### **VIII. Reliefs**

81. Bar the procedural impropriety cited above, the court is of the considered view and holds that the claimant was the author of his own misfortune. In the circumstances that prevailed, the respondents had a legal duty and authority to act against the claimant and his co-workers who worked in the concerned department or section. If at all the claimant was so ignorant and unaware of the alleged fraudulent activities and that he signed documents, including vouchers and cheques, as and when they were presented to him without due diligence, then he was equally guilty of gross misconduct based on neglect and carelessness in performance of his duties – See Section 44(4)(c) of the Act.

82. Having found and held as above, the court shall now consider each of the reliefs sought as hereunder.

83. Prayer (a) is for the court to declare that the summary dismissal was unfair and unlawful. The court has found and held that the respondents erred in the procedure adopted for failure to supply the claimant with the evidence and materials gathered against him even after he requested for the same. To that extent the dismissal is declared wrongful and hence unlawful.

84. Prayer (b)(i) is for an order of reinstatement. For all intents and purposes the claimant held a fiduciary position whereby he was entrusted with public revenue and funds. The audit report indicates that money was fraudulently lost in the office occupied by the claimant and others and some of the receipts and cheques through which money was lost were signed by the claimant. Handling of money, and more so for the public, is a very sensitive issue that is based on trust and honesty. As they say once lost trust is not recoverable. It is for that very reason, lack of trust, that the respondents summarily dismissed the claimant based on the particulars of the gross misconduct. The respondent has not expressed any willingness to re-engage or to work with the claimant in any way or manner. In those circumstances, it would amount to forcing a marriage where one of the parties is unwilling if the court was to order reinstatement. As stated elsewhere in this judgment, if the claimant was this honest, trustworthy, hardworking employee that he wishes the court to believe, he ought to have come out clean and assisted the respondents in identifying the persons involved in the fraudulent racket wherein millions of taxpayers’ money was lost.



85. While the court may order reinstatement even after expiry of three years from the date of dismissal if the same was a nullity, the court finds that the dismissal of the claimant was not null and void. It was wrongful and unfair only for lack of proper procedural steps by the respondents.
86. For the foregoing reasons reinstatement is denied.
87. Prayer (b)(ii) is for payment of all outstanding salaries and benefits from the date of interdiction till the date of reinstatement. The relief of reinstatement has been denied above and unless the said salaries and benefits are specified, and they have not been so specified and particularized, the same are denied.
88. As an alternative to the foregoing, the claimant prays for 12 months' salary in compensation under Section 49(c) of the Act. The court has elaborately stated above that the respondents had good and genuine grounds and reasons for acting against the claimant as they did. Huge sums of public funds were lost and the claimant and his co-workers in the section did not help in shedding light on where the money was taken and by whom or help in recovery thereof. In fact, had the procedural process been fair the court should have awarded nil under this head. In the circumstances, the court finds and holds that an award of two month's gross salary is fair and adequate compensation in the circumstances. The same is calculated at Kshs95,181/= \* 2= Kshs190,362/=. This amount is subject to statutory deductions.
89. As far as the court understands the employment relationship between the claimant and the 1<sup>st</sup> respondent, the claimant was on permanent and pensionable terms. This arrangement is sometimes misunderstood by employees into believing that they are indispensable and or that they are entitled to work till retirement no matter what. That is not the correct position and as such prayer (c)(iii) for salaries for the remainder of the contract is wrong and misplaced. The same is denied as the claimant has already been compensated in the foregoing paragraph.
90. Prayer (c)(iv) is even more misplaced as it seeks for general damages for statutory breach of the contract under the Act and *the Constitution*. The same is denied.
91. Prayer (c)(v) is for a certificate of service and the same is allowed under Section 51 of the Act.

### VIII. Costs

92. The claimant is awarded costs of the cause.

### X. Orders

93. The court enters judgment in favour of the claimant in the following terms -
  - a. The summary dismissal of the claimant is declared wrongful and unlawful for lack of procedural fairness.
  - b. The claimant is awarded the following –
    - i. One months pay in lieu of notice ..... Kshs95,131/=
    - ii. Two month's gross salary  
in compensation ..... Kshs190,262/=
    - TOTAL ..... Kshs285,393/=
  - c. The respondents shall issue and deliver to the claimant a certificate of service within 30 days hereof.
  - d. The claimant is awarded costs of the cause.



**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**DAVID NDERITU**

**JUDGE**

