



REPUBLIC OF KENYA



**Wayiera v Standard Chartered Bank Kenya Ltd (Employment and Labour Relations Cause 2366 of 2016) [2024] KEELRC 2161 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2161 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2366 OF 2016**

**K OCHARO, J**

**JULY 31, 2024**

**BETWEEN**

**DAVID OTIENO WAYIERA ..... CLAIMANT**

**AND**

**STANDARD CHARTERED BANK KENYA LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times, the Claimant was an employee of the Respondent up to 3<sup>rd</sup> June 2016, when he was summarily dismissed. Charging that the dismissal was unfair and wrongful, he initiated this claim seeking the following reliefs:
  - a. Twelve (12) months' salary compensation as stipulated under Section 49 (1) of the Employment Act (Kshs. 704,452.60 x 12 months) Kshs. 8,453,431.20
  - b. Service pay computed at one (1) month's salary for every year of employment noting that he worked for six (6) years with effect from 2008 (Kshs. 704,452.60 x 6 yrs) Kshs. 4,226,715.60
  - c. Pension (Employer's contribution) Kshs. 9,980,712.00  
Total Kshs. 22,660,858.80
  - d. Costs of this claim
  - e. Interest on items (a), (b) and (c) above at court rates
  - f. Interest on item (d) above at court rates with effect from the date of filing this claim.
  - g. An order to compel the Respondent to issue a Certificate of Service pursuant to Section 51 of the Employment Act.



- h. Any further relief that this Court may deem just and fit to grant.
2. The Respondent resisted the claim through a Statement of response dated 15<sup>th</sup> November 2017, denying that the dismissal was unfair and the Claimant's entitlement to the reliefs he sought.
  3. At the hearing, the Claimant and his witness Boniface Kimoni, testified in support of the Claimant's claim. They adopted their witness statements filed herein as part of their evidence in chief. The Claimant tendered all those documents filed herein under the list of documents dated 22<sup>nd</sup> November 2016, as his documentary evidence.
  4. The Respondent presented one witness, Francisca Korir to testify on its behalf. The witness adopted his statement dated 4<sup>th</sup> October 2021 as his evidence in chief and produced the documents herein filed by the Respondent as its documentary evidence.

#### **Claimant's case**

5. The Claimant's case is that he commenced his banking career at the Respondent's in January 1999, having joined as a Management Trainee. Upon completion of the training, he was deployed to work at the Respondent's Moi Avenue Branch as a Customer Relationship Manager, then transferred to the Corporate Banking Division as a Relationship Manager, a role that he held until 2004 when he left the Respondent Bank to join a competitor, Citibank.
6. He stated that he rejoined the Respondent in March 2010 as a Senior Relationship Manager in the Corporate Banking Division, a role that he held up to 2012 when he took up the position of Regional Branch Manager, manning eleven [11] Branches. Hereafter, he changed roles at various times and variously. His last role at the Respondent Bank was as Director and Head of Sales and Relationship Management. The Claimant's last gross salary was a Kshs. 990,150/- per month.
7. In this last role, he supervised eleven [11] Relationship Managers and seven [7] Credit Analysts in Nairobi and Mombasa. The total number of customers under his portfolio was about five Hundred [500] managed by various Relationship Managers in Nairobi and Mombasa. He was their supervisor; his role was therefore supervisory. In practice and policy, the Relationship Managers had the primary responsibility and accountability for clients in their portfolio- this included primary responsibility for all risks [operational and credit].
8. The Claimant asserted that his dismissal from employment was alleged negligence that led to a potential loss from fraud perpetrated by a client- Cape Suppliers Limited. The client was managed by a Relationship Manager, in his team. The Relationship Manager, Aristarchus Weru, and he were in the same Management grade despite the former reporting to him.
9. The client was a long-term client of the Bank who was in the business of selling petroleum products to corporate entities. The client just like many other borrowing clients had identified credit weaknesses. The relationship management team put in place various mechanisms inclusive of conditions and covenants to minimize the risks to the lowest levels possible.
10. The Claimant stated that Cape Suppliers Limited enjoyed a trade facility that enabled financing against the presentation of sales invoices to the Trade Department. In particular, the client had an ongoing contract with Kengen for supply of heavy fuel oil for which it received the Trade facility.
11. On or about December 2015 it was discovered that Cape Suppliers Limited had defrauded the Bank by presenting fake/forged trade invoices which they purported had been issued by KenGen. Against the invoices, financing was provided by the Respondent. This presented a potential loss to the Respondent.



12. This led to the Claimant's suspension vide a letter dated 15<sup>th</sup> December 2015 to allow further investigations.
13. The Claimant contended that the termination of his employment on account of negligence was unfair, characterized by victimization and driven by malice. He did not breach any policy or procedure. Indeed, the termination letter didn't set out any breached policies or procedures. It only generically quoted negligence that had led to a potential loss by the Respondent.
14. The Claimant further took issue with the fact that the Respondent blanketly labelled him as negligent, yet the weaknesses that led to the potential loss were systemic. The Respondent had no procedures or processes that would have identified the fraud perpetrated by the client. In fact, it was after the incident that several changes were made to the trade operating processes relating to financing invoices, an attempt to prevent the recurrence of a fraud such as the one that had happened.
15. The Claimant contended that the Respondent deliberately ignored the fact that the primary responsibility and accountability for all risks pertaining to a client rested with the Relationship Manager, in this case, Aristarchus Weru. The Relationship Manager was not held accountable but was cleared by senior managers, the Head of Human Resources and the Head of Commercial Banking.
16. The Respondent dealt with the matter selectively and in a biased manner by condemning him while retaining the Relationship Manager in employment. The Relationship Manager was the implementer while he was a supervisor. It isn't reasonable that the implementer can go uncondemned but the supervisor be.
17. He asserted that invoices presented for financing could not be to the Relations team. As per practice, they could be presented directly to trade operations and would often be processed without intervention from the Relationship Manager/sales team. The decision as to the completeness and authenticity of the invoices presented was the preserve of the Trade Operations team. Therefore, the Relationship Team could not practically validate the authenticity of presented invoices unless prompted. Indeed, the fraud was detected when the Relationship Manager was prompted to check the validity of two specific invoices.
18. The Claimant further stated that as the Head of the Relationship Management Team, he recommended steps to be taken to mitigate the credit risk of the client, e.g. domiciliation of invoices, and enforcement of proceeds from KENGEN. Two weeks before the discovery of the fraud, he had recommended that the Respondent cease any further financing of invoices presented by the client on account of breached covenants. As such, he exercised sufficient due diligence in ensuring that risks to the Bank were minimized.
19. He further contended that the client deliberately exploited the Bank's weak procedures and controls in handling invoice financing transactions in perpetrating the fraud. The weaknesses were not unique to Cape Suppliers' facilities but were bank-wide. He had no authority to put in place mechanisms to prevent fraud.
20. Further, during the period of his suspension from work, which was to facilitate investigations into the fraud, his position was substantively filled as per a staff announcement by the Head of Commercial Banking-Mr. Fred Michuki. This indicated that the decision to terminate his employment was predetermined and that the disciplinary process that would ensue was cosmetic.
21. Cross-examined by Counsel for the Respondent, the Claimant testified that in 2013, he took over the Head of Medium Enterprises position. Following changes within the Respondent Bank, the position



- was renamed, Director and Head of Sales and Relationship Management. However, his duties did not change.
22. According to his job description. Relationship Managers reported directly to him. He was to oversight their day-to-day work.
  23. The Claimant admitted that prior to the incident the subject matter herein, he had two warnings, the 2<sup>nd</sup> warning concerned failure to communicate valuable information.
  24. He further testified that his suspension revolved around the issue of fake invoices by Cape Suppliers Limited. He pointed out that he was the one who investigated the fraud and brought the matter to the attention of the Respondent Bank. The issue was not raised by Mr. Weru.
  25. On or about November 2015, the client sought an extension of the tenure of the facility. However, there were concerns that KENGEN had unsettled invoices against which the facility had been given. Upon inquiry, KENGEN indicated that they had no unsettled invoices in favour of the client. It is at this point that it dawned on him that a fraud had been committed.
  26. Enhancement of the facility had been done two years before the discovery of the fraud. Before enhancement, his team did reviews and there was no anomaly detected.
  27. The Claimant admitted that he was invited to and attended a disciplinary hearing on 19<sup>th</sup> January 2016. After the hearing, he signed on the minutes thereof. In the minutes he stated that Oceanic Ltd was a customer under his docket.
  28. Referred to the suspension letter, the Claimant testified that it did not specifically mention Cape Suppliers Limited, but several clients' accounts. Oceanic Limited was one of them.
  29. In his report [page 15 of the Respondent's documents] he stated that the fraud was discovered by the Relationship Manager, Mr. Weru who was in charge of the account of Cape Suppliers. He escalated the matter to him in November 2015.
  30. When the facility enhancement was approved, there was no requirement for domiciliation. The mechanism was later on put in place to minimize credit risks.
  31. Before the discovery of the fraud, he had written to the client about the delay in the domiciliation process. Further, upon discovery of the fraud, they decided to investigate all the invoices.
  32. The Claimant testified that he appealed against the decision to terminate his employment. He attended the appeal hearing.
  33. He asserted that he didn't have the authority to make decisions on funding of customers. The powers lay on the Relationship Manager and Credit team. His role in the process was only limited to ensuring that the Respondent's policies and procedures were followed.
  34. As there was an impending audit, it became necessary that they review the entire portfolio accounts and documents. The review was specifically for the audit purposes. This review was different from the review of the day-to-day transactions. It was then, that it was noted that KENGEN was not remitting any money directly to the Client's account. The money was being remitted from other accounts. This prompted him to decide that domiciliation be effected to bind KENGEN to be remitting payments through the clients account.
  35. According to him there was no need to escalate the matter to the top management. All that was needed was a change of facility conditions, as, at that time the client was not in default in repaying the facility.



- Further, at the time, there was no requirement that KENGEN make payments into the client's account as domiciliation wasn't in place.
36. The bank's interest was secured by the condition that the client was to avail funds to offset the facility.
  37. Referred to his job description, the Claimant admitted that one of his responsibilities was to support the Relationship Managers in the various areas identified therein.
  38. He testified that they had several meetings with the client and despite the meetings, the client failed to avail the domiciliation documents.
  39. It was not his responsibility to scrutinise local purchase orders. In the disciplinary hearing, he didn't personalise the responsibility as Counsel for what was suggested.
  40. In his view, instead of terminating his employment, the Respondent ought to have rewarded him for discovering the fraud.
  41. The Claimant asserted that it is not possible for one to with scientific precision forecast that a customer could be fraudulent. Cape Suppliers was one of the Respondent's largest and long-term customers.
  42. In his evidence under re-examination, the Claimant testified that his role was a people management role. His was to ensure that the objectives of the bank were met. That, their actions were within the stipulated standards, guidelines, policies and procedures.
  43. Mr. Weru was the Relationship Manager of the client and therefore, bore the primary responsibility on matters the account[s] of that client. If the customer had any issue concerning his account[s] Mr. Weru was the first port of call. As regards Cape Suppliers, he had more contact with it than him [the Claimant]. Further, Mr. Weru was not subjected to any disciplinary process. This speaks to unfairness and victimization in the process.
  44. The Contract between KENGEN and the client was entered into on 30<sup>th</sup> June 2012. The contract didn't have an expiry date. As of this date, he hadn't assumed the role of Head of the Business Relationship team. The domiciliation condition in the letter of offer was at his initiation.
  45. The Claimant testified further that in the disciplinary proceedings, under the item "background comments", Joseph Waweru Mburu [Senior Credit Manager for Commercial Banking] commented in acknowledgement that there were product lapses. This meant that the bank's procedures and practices concerning Export Invoice Financing Products had lapses. Mr. Mburu worked independently of the Relationship team.
  46. Further, Mr. Mburu who was responsible for credit approval, recognized that the responsibility of due care lay with the Relationship Manager and blamed him for not exercising due care.
  47. Mr. Micheal Gichuru, the Trade Manager responsible for Invoice Financing Product and reviewing the product program to ensure that it was in line with the intended objective, also acknowledged that there were issues with the product. Indeed, he was involved in the review of the program by enhancing conditions for financing to mitigate risks.
  48. Lastly, the Claimant testified that after the discovery of the fraud, Mr. Gichuru revised the program of invoice financing to mitigate credit risks as were in the case of Cape Suppliers.
  49. The Claimant's witness, Boniface Kimoni [CW2] testified that he was employed by the Respondent in July 2005 as a graduate trainee/clerk and posted as a risk analyst at the card centre. His role involved monitoring suspicious and fraudulent transactions and escalating the same to the supervisors for further action.



50. In 2006 he was confirmed into employment and moved to the small & Medium Enterprise Banking Division at the Head Office as SME credit analyst. He worked among a team of 10 analysts. Their role included; preparing a business credit application to help the Credit Committee determine customer creditworthiness and either approve or disapprove the application; daily, monthly, quarterly and annual monitoring of the existing borrowing customers to satisfy the Division that the customers are compliant with, among others, all the loan triggers, conditions and terms; and dealt with both new applications and annual renewals for all existing credit facilities.
51. The witness stated that the Claimant joined the team in December 2012 as Head of Sales & Relationships Management and became his immediate supervisor. Relationship Managers and Service Managers also reported to the Claimant.
52. He stated that the Claimant was their line manager. They could share reports on their various portfolio monitoring reports and sales and general line management's needs. The Claimant would only interface with clients on a need basis, and only with recommendations from a Credit Analyst or Relationship Manager.
53. The witness was in the team that introduced and onboarded Cape Suppliers. He prepared the Business Credit Application sometime around 2011. The trade limits, and all other facilities, were approved by the Credit Department who were approvers as per the bank policies and processes.
54. He testified further that part of the credit facilities extended to Cape Suppliers, was the Invoice Financing Facility, the subject matter of the instant suit. Invoice Financing was managed by the Trade Operations Department in conjunction with the Relationship Manager.
55. The witness asserted that the Trade Operations Department would receive invoices to be financed, and then process them in terms of processing, booking and drawing the corresponding trade loans. The Claimant's department, the Commercial Banking Department, where he worked would not be involved in invoice discounting, except in cases where the Trade Operations flagged irregularity. Further, the Claimant's Department never dealt with such invoices, and neither did it have the technical or other capacity to vouch for the bona fides of such invoices.
56. Relevant to this matter is the facility that was extended to Cape Suppliers based on its contractual relationship with KENGEN for the supply of Fuel and oil products. An invoice Finance facility. The responsibility to ensure that covenants and triggers were met and that the same were dutifully adhered to was the responsibility of the Relationship Manager- Aristarchus Kuria Weru.
57. The witness asserted that Mr. Kuria at some point sought and obtained approval from the Credit Department for an exception for a while for Cape Suppliers to continue enjoying the Invoice Facility as they waited for the contract to be renewed. The approval was by an independent department independent from the Commercial Banking Division. The point of discovery of the fraud was within the period of the extension.
58. The contract took longer than expected to be provided, raising a sense of concern within his department. As a result, the Relationship Manager as the proper officer escalated the breach of condition to the Claimant. Consequently, the Claimant was prompted to suspend the Invoice Financing Facility until the contract was provided.
59. The application for an extension was considered and rejected. The Relationship Manager Contacted another Division, the Origination and Client Coverage Division, which had the Responsibility of Managing the Ken Gen relationship, who contacted KEN GEN to confirm why it was not paying



- Cape Suppliers on time. They responded and indicated that they had not issued the invoices to Cape Suppliers. The invoices were fraudulent.
60. The Claimant directed him to do a reconciliation of cash received from KenGen against financed invoices for one previous year. It was discovered that no payment had been made to Cape Suppliers for the previous six months.
  61. The witness contended that having actively participated in the operation of the Cape Suppliers account, the Claimant should have been commended rather than for his role.
  62. As a result of the Claimant's flagging of the irregularities in the invoice Financing Facility process, a policy was put in place requiring a call back by Trade Operations to confirm the authenticity of the invoices.
  63. Cross-examined by Counsel for the Respondent, the witness reiterated that he was involved in the onboarding of Cape Suppliers in 2011.
  64. The facility they were enjoying was under the Export Invoice Product. This meant that they had to have valid invoices from KEN GEN and a valid contract between them.
  65. The witness testified that at the material time, he was a Credit Analyst. Though he didn't specifically deal with the client's file, he got to have facts thereof out of the departmental meetings that they could have to discuss various files.
  66. The witness asserted that he discovered the fraud around mid-October 2015. The fraud was in the form that the client was not routing to the Respondent Bank as expected. The failure was a breach of the conditions for the Invoice Finance Facility.
  67. The witnesses asserted that the Claimant's Department was not charged with the responsibility of receiving and considering invoices. There was a department that had that specific mandate. In the 10 years he worked for the Respondent, he didn't see any invoice being received in his Department. The Claimant could not receive and interrogate invoices as his job description did not provide for it. It was not within the power of their department to interrogate whether invoices were genuine.
  68. As can be discerned from the contract exhibited by the Claimant, the contract between KenGen and Cape Suppliers Ltd, it had no expiry date.
  69. The correspondence by Ken Gen to the Relationship Manager indicated that the invoices that the client had presented to the bank were not issued by them.
  70. The witness testified that Mr. Weru was subjected to a disciplinary process over the issue of invoice Financing Facility to Cape Suppliers.
  71. In his evidence under re-examination, the witness clarified that he and his team didn't onboard the account of Cape Suppliers, but did rehabilitate the same. The account had a problem but through a process, the witness made it good.
  72. The Customer could take the invoices to the Trade Services Department, the Claimant was not working in this Department. It was therefore wrong for the Respondent to assert that the Claimant allowed receipt of fraudulent invoices.
  73. The witness testified that the Claimant was sacrificed because people at the local level panicked as there was pressure from the Headquarters, Singapore.



## Respondent's case

74. The Respondent presented Ms. Fransisca Korir, Head, Local & Mid Corporates Kenya to testify on its behalf. The witness stated that the Claimant was employed as a Senior Relationship Manager, Local Corporates, on 10<sup>th</sup> February 2010. He was later promoted to Head, of Medium Enterprise vide a letter dated 27<sup>th</sup> May 2013. At the time of the Claimant's termination from employment, he was earning a monthly salary of Kshs. 704,452.60.
75. The witness stated that, on 23<sup>rd</sup> May 2011, the Claimant was issued a warning letter for failure to counter-check the contents of an offer letter issued to Bidco Oil Refineries, which caused the disclosure of information to another client, Midcom. The amount in the offer letter was different from the amount the Bank approved, causing the Bank losses.
76. Further, on 15<sup>th</sup> December 2015 the Claimant was suspended when fake invoices were presented by two clients, Cape Suppliers and Oceanic Oil Limited, and financed under the Export Invoice Financing (EIF) product.
77. The witness explained that under the Export Invoicing Financing Product, money is paid in advance against the value of unpaid invoices to allow the client being financed to source goods, on condition that when the invoice is paid to the client, it will be paid through the client's accounts with the Bank.
78. The Claimant was found to have provided insufficient management oversight over two companies Cape Suppliers Limited and Oceanic Oil Limited in that he was aware that the customers were defrauding the Respondent Bank by providing fraudulent audited financial statements, invoices and supporting documents acknowledging delivery. In particular, Cape Suppliers Limited used forged documentation relating to Kenya Pipeline Corporation (KPC). There were also receivables relating to financed invoices from KenGen's clients who were not making payments directly to the Bank's accounts, but some payments were being made from the client's accounts in other banks.
79. At the disciplinary hearing held on 19<sup>th</sup> January 2016, the Claimant admitted the foregoing. The minutes of the proceedings are a testament to this. The disciplinary hearing culminated in the Claimant's termination from employment on 7<sup>th</sup> March 2016.
80. on 11<sup>th</sup> March 2016, the Claimant lodged an appeal against his termination from employment on grounds that, among others, his culpability if any did not warrant termination; he reasonably implemented the Bank's systems, controls and procedures; the fraudulent transactions were caused by an operational failure of the Bank's systems; and his role was limited to implementing existing policies and procedures and not amending them.
81. The Respondent, vide a letter dated 22<sup>nd</sup> March 2016 acknowledged receipt of the Claimant's appeal and invited him for a Disciplinary Appeal Hearing on 31<sup>st</sup> March 2016 before an independent appeal panel. The Claimant's appeal was declined on the premise that the Claimant continued the facility with the clients despite being aware that their contract with KenGen had lapsed and not been renewed; and because he displayed weak oversight when Cape Suppliers Limited failed to ensure execution of domiciliation documentation. Payments by KenGen to the client were also not being routed through the client's bank account held with the Bank. Despite presence of the above issues, the Claimant did not raise an alert or terminate the Bank's relationship with the client, but rather enhanced their facility.
82. The witness contended that the Claimant did not exercise due diligence and protect its interests. It also insists that due process was followed, hence the Claimant's claim should be dismissed.



83. The witness asserted that among the key responsibilities of the Claimant per his job description, was to support Relationship Managers carrying out customer meetings that have defined call objectives, desired outcomes and well-constructed plans. Another role was people management, he had a duty to ensure compliance with business policies and procedures.
84. The witness testified that through his email dated 13<sup>th</sup> March 2014, addressed to one Christopher and copied to the Claimant, Mr. Weru sought an opinion from KenGen on Cape Suppliers Limited. He was doing this as a precautionary measure.
85. A customer applying for an Invoice Financing Facility, was required to furnish the Respondent Bank with the invoices at the time of the application.
86. The witness asserted that she was the one who onboarded the client in 2008. She was then serving in the position of Relationship Manager. She dealt with them up to 2010.
87. In his email dated 13<sup>th</sup> November 2014, addressed to Emmanuel Panda and copied to the Claimant captioned ‘review of operations’, Mr. Weru described the status of the account as “flagged”, suggesting, therefore, that the account required immediate attention.
88. The witness explained that advances were made to Cape suppliers on the strength of the invoices by KenGen. Ordinarily, then, KenGen was supposed to pay the proceeds of the contract between it and Cape Suppliers Ltd hosted at the Respondent Bank. However, KenGen was not legally bound as there existed not a deed of assignment or assignment of receivables.
89. The witness asserted that the Claimant never responded to Mr. Weru’s emails.
90. She further testified that Trade Checks were vital in the Invoice Finance Facility product, as evidenced by the email correspondence dated 17<sup>th</sup> July 2015, which was addressed to others and copied to the Claimant, he instructed the addressees to undertake checks on various suppliers and buyers. In the email, KenGen was listed as a buyer. The process of trade checks existed as of 2016.
91. The witness alleged that executing a deed of assignment was a precondition to disburse facility sums under the IFF. The facility letter dated 6<sup>th</sup> March 2015, made availing of the deed imperative.
92. The witness contended that the Claimant didn’t make any follow-ups or take action on the matter. The primary responsibility was on him as a team leader and the person with oversight authority.
93. Cross-examined by Counsel for the Claimant, the witness testified that the suspension letter set the tone for the disciplinary process against the Claimant. Prior to the suspension letter, he had no other disciplinary letter. The suspension letter set forth only one accusation against the Claimant, fraudulent/fake invoices. The letter dated 12<sup>th</sup> January 2016, that invited him for a disciplinary hearing was consistent as regards the charge.
94. The termination letter dated 7<sup>th</sup> March 2016, had more grounds that were the basis of the termination than to the ground identified in the two letters foretated.
95. The Respondent did not suffer any actual loss. It was subjected to a potential loss.
96. The outcome of the appeal was communicated to the Claimant through a letter dated 3<sup>rd</sup> June 2016. In the letter, the Panel mentioned, fraudulent transactions, that the client flouted several control measures, and that the client breached the requirement for domiciliation. Further, he is accused of allowing the disbursement of a facility on an expired contract.



97. Referring to the contract between KenGen and the Client dated 30<sup>th</sup> June 2012, the witness admitted that the contract referred to in the “outcome of the appeal” letter. Further, the contract didn’t have an expiry date.
98. The witness admitted that the letter of domiciliation dated 13<sup>th</sup> October 2011 presented by the Claimant in evidence was duly executed by the Directors of Cape Suppliers Ltd.
99. The email dated 13<sup>th</sup> November 2014 by Mr. Weru was addressed to Mr. Banda Emmanuel, who was the immediate supervisor of the Claimant. Mr. Weru directly reported to the Claimant. Therefore, Mr. Weru bypassed his supervisor, the Claimant. The email suggests a conversation on a matter that had been under discussion. However, the witness was not certain whether it was a follow up on the facility extension.
100. In the email, the author stated that credits were not being received directly from KenGen but through accounts in other Banks.
101. The letter dated 12<sup>th</sup> November 2014, captioned “review of operations and facilities” was addressed to the Director Commercial Business. It sought for enhanced partnership. The letter was therefore addressed to Mr. Banda and not the Claimant.
102. In response to the letter, Mr. Weru supported the request for enhancement of the facility on condition that the credits be channeled through the account hosted at the Respondent bank.
103. According to the witness, a trade check denotes a call back. It is a verification process. The process was in place even before the fraudulent attempt by the client, Cape Suppliers Limited.
104. The witness testified that the letter dated 4<sup>th</sup> December 2016, whose subject matter was Invoice financing procedures, is the only document that speaks to trade check. The letter came in post-termination of the Claimant’s employment. Further, there was no document from which it can be discerned that prior to the “ new changes” the Claimant was bound to undertake trade checks.
105. The testified that invoices would never go to the Claimant’s Department, Relationship Management. They could go to the Trade Department. The Claimant was not in charge of the Trade Department. Looking at his job description, he had no role connected to trade checks.
106. During the disciplinary process, Mr. Joseph Waweru [Senior Credit Manager] acknowledged that the were product lapses. He suggested that he could have the role of approving credit. Further, the duty of care lay on the Relationship Manager, in this case Mr. Weru. Relationship Managers were responsible for preparing and monitoring business credit applications and therefore were ultimately responsible for the extension of contracts.
107. The witness testified further that in the process, Mr. Micheal Gichuru, stated that there might have been issues with the product, for instance in receiving instructions from customers. However, the problem was fixed by the Product Programme Guidelines [PPG] established in January 2016. Then the Claimant was no longer an employee of the Respondent.
108. Ms. Chege, on her part observed that drawing of proper domiciliation letters was what might have lacked in the KenGen and Tata transactions.
109. The witness concluded her testimony under cross examination by admitting there were product lapses, and that the same were fixed in 2016. Further, throughout the disciplinary process, the Claimant was clear that that it was through his due diligence that the lapses came to the fore, hence the new guidelines.



110. In her evidence in re-exam, the witness testified that the suspension against the Claimant was investigatory. The client, Cape Suppliers was under the Claimant's docket. The potential loss was estimated at USD. 20,000,000.
111. In 2014, the Claimant was in the Commercial Business department. Despite the comments by the three, a decision was made to terminate the Claimant's employment.

### **Claimant's Submissions**

112. The Claimant submitted that the fraud by the client was as a result of the Respondent's failure to put in place adequate organizational policies, processes and procedures. This fact finds fortification in the statements made by Joseph Waweru Mburu, a Senior Credit Manager and Approver, Michael Gichure, a Trade Product Manager, and Jane Chege, Legal Counsel, during the disciplinary hearing. The Respondent could therefore, not justifiably place condemnation on him.
113. He further submitted that the final responsibility for managing risks relating to Cape Suppliers Limited lay with the Relationship Manager, a fact which was also corroborated by the said Joseph Waweru Mburu and Jane Chege. The Claimant submitted further that it is his team's due diligence which exposed the fraud, a evidenced by email correspondence exchanged among the team between 9<sup>th</sup> February 2014 and 13<sup>th</sup> November 2015. The Claimant submits that his department did not deal with invoices as it was not in their province to.
114. On the charges preferred against him, the Claimant submitted that he comprehensively answered the charges relating to the fraudulent invoices. In a surprising twist of things, the Respondent then came up with a new charge that was not a subject at the disciplinary hearing, namely, "failure to exercise proper management oversight." A charge that he was not granted an opportunity to defend himself against.
115. It was further submitted that for a termination of employment to pass the fairness test, the employer must demonstrate that there was present, procedural and substantive fairness in the termination. To buttress this point, reliance was placed on the case of *John Munyao Musiku v Athi River Mining Limited* [2018] eKLR. In his view, his dismissal employment lacked substantive fairness. He was not in charge of receiving invoices and had not been made aware of the requirement to investigate invoices or carry out trade checks. Further, the client, Cape Suppliers Limited, was the responsibility of the Relationship Manager, who in this case exercised extreme diligence in his dealings with them, to the extent that he discovered the fraud and potential loss. Reasonably, he couldn't be summarily dismissed from employment on the account[s] he was.
116. The Court is urged to consider the considerations set out in Section 49 (4) of the Act while determining the damages appropriate for the unfair termination.

### **Respondent's Submissions**

117. The Respondent submitted that the Claimant is not entitled to 12 months' salary as compensation for unfair termination under Section 49 (1) (c) as the reason why he was terminated from employment was valid and justified. They state that the Claimant was terminated from employment since he was found to have failed to exercise proper management oversight in respect of risk and control matters, thereby exposing the Bank to losses of USD 20,000,000. Further, the Claimant admitted that he was the Head of Medium Enterprises tasked with overseeing/supervising some Relationship Managers including Aristarchus Weru, who was in charge of Cape Suppliers Limited.



118. It was further submitted that the said Aristarichus Weru informed the Claimant and the Bank that Cape Suppliers Limited had presented fraudulent invoices to the Bank. The discovery of the fraud was therefore made by the said Relationship Manager, not the Claimant. Where a Relationship Manager failed in discharging their duties, the Claimant was accountable.
119. On trade checks, the Respondent submitted that it was standard practice for Relationship Managers and the Claimant to carry out trade checks prior to a facility being advanced. This was confirmed by the email dated 17<sup>th</sup> July 2015 which shows that the Claimant and his team attempted to carry out trade checks on Cape Suppliers Limited in 2015.
120. The Court was urged to disregard CW2's evidence since he has an active suit against the Bank. In 2011, the Claimant was issued with a formal final warning. Considering the circumstances under which it was issued, it will be safely concluded that the Claimant did not routinely perform his duties diligently.
121. The Respondent argued that the Claimant was afforded an opportunity to be heard at the disciplinary and appeal hearings. However, he did not absolve himself of blame.
122. The Respondent insisted that due process was followed by placing the Claimant under suspension on 15<sup>th</sup> November 2015 to allow for further investigations; his statement was taken on 17<sup>th</sup> November 2015 on the charges; inviting him to attend a disciplinary hearing vide the letter of invitation dated 12<sup>th</sup> January 2016; subjecting him to a disciplinary hearing on 19<sup>th</sup> January 2016 and preparing a report after due consideration of the Claimant's representations; terminating him vide the letter dated 7<sup>th</sup> March 2016; inviting the Claimant to attend the appeal hearing on 22<sup>nd</sup> March 2016; holding an appeal hearing on 31<sup>st</sup> March 2016; and communicating the outcome of the appeal to the Claimant on 3<sup>rd</sup> June 2016. The Respondent relied on the case of *Kenya Union of Commercial Food & Allied Workers v Kisii Bottlers Limited* [2021] eKLR to buttress their submission on due process.
123. Having followed due process and the dismissal having been influenced by a fair and valid reason[s], the dismissal was fair and lawful. The Respondent concluded.
124. The Respondent submitted that the Claimant is not entitled to service pay, as under his Contract of Employment, he was a member of the Respondent's pension scheme. Under Section 35 (6) of the *Employment Act* 2007, he is precluded from pursuing the benefit.
125. Further, the relief sought, the employer's contribution towards the Claimant's pension, cannot be availed to the Claimant as he has not demonstrated that he has attained the retirement age to qualify for his pension. Second, he has also not applied to the relevant person/entity for the same. Additionally, it has not been shown that if there was such an application, the same was declined.
126. The Respondent stated that under the Scheme, it is a sponsor, not its administrator. Any claim relating to matters of the scheme should be made to the Scheme Administrator. The Administrator has not been made a party to this suit. Furthermore, under the Retirement Benefits Authority Act, this court has no jurisdiction to consider the claim.

### **Issues for Determination**

127. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties and authorities in support thereof. I distil the following two principal issues for determination: -
  - a. Was the summary dismissal of the Claimant from his employment fair? And
  - b. Whether the Claimant is entitled to the reliefs sought.



### Was the summary dismissal of the Claimant from his employment fair?

128. From the onset and before I delve further into this issue, I find it imperative to state that the circumstances of this matter demand that I consider not only whether the Respondent's decision to terminate the Claimant's employment was fair, but also whether there is a revelation that it acted with equity and in a just manner. This will involve the task of considering whether there was any sufficient evidence that was placed before this Court, to explain the roles of the various departments that were mentioned in the evidence of the parties; the interplay between the Departments, if any and more particularly on matters Invoice Financing Facilities; the role of Relationship Managers vis a vis that of the Head of Medium enterprises; the procedure and practice as regards Invoice Finance Facilities at the material times; and what the "new changes" spoke to.
129. This Court will not hesitate to state that the Respondent, more specifically when one looks at its witness's statement, turned evidence in chief, failed to elaborately and with sufficiency speak to these aspects which I hold were crucial in the circumstances of the instant suit. I note that her evidence under cross-examination, though not in much detail, agreed with the position taken by the Claimant on some of these aspects.
130. Section 45 (1) and (2) of the [Employment Act](#) 2007 defines unfair termination. The section provides that:
- “(1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employees conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated by fair procedure.”
131. No doubt, for the termination of an employee's employment or summary dismissal of an employee from his or her employment to be considered fair, there must be two statutory aspects present, procedural fairness and substantive justification. Procedural fairness, speaks to the process leading to the decision to terminate or dismiss, while substantive fairness to the decision itself. See [Pius Masafu Isundu v Lavington Security Guards Limited](#) [2017] eKLR.
132. Section 47[5] of the [Employment Act](#) 2007 imposes an initial burden on the Claimant [employee] to prove that an unfair termination or wrongful occurred. Only then, shall the evidential burden shift to the Respondent [employer] to justify the termination or dismissal.
133. Under the provision, the employee is supposed to establish prima facie that an unfair termination or wrongful dismissal occurred. Considering that the whole unit of fairness embodies the two aspects mentioned above, I have carefully considered the events leading to the dismissal of the Claimant from his employment, including the factors that informed the decision on his appeal against the Respondent's decision, his evidence and that of his witness on his role in matters invoice facility



financing as they related to the transaction[s] the subject matter of the disciplinary process vis a vis that of the Respondent's witness, and hold that prima facie the Claimant established that an unfair termination of employment occurred.

134. Having found as I have hereinabove, I now turn to interrogate the presence or otherwise of procedural fairness in the summary dismissal of the Claimant.
135. Section 41 of the [Employment Act](#), 2007 provides for procedural fairness, setting a mandatory procedure that must be adhered to by the employer contemplating terminating an employee's employment or dismissing an employee from employment summarily. However, it should be kept in mind that the provisions of the section should not be read in isolation from other legal stipulations to wit, Article 50 [right to fair hearing] and Article 47 [right to fair administrative action] of the [Constitution](#), the stipulations of the Fair Administrative Actions Act, and the tenets of natural justice, where the circumstances of a matter demand.
136. Under Section 41 of the Act, the employer considering the termination, or dismissal, must explain to the employee, in a language the employee understands, the reason for which the employer is considering termination, or dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation, the employer must hear and consider any representations which the employee make, and the employer must consider those representations while making a final decision.
137. There is no dispute that through the letter dated 15<sup>th</sup> December 2015, the Claimant was placed on an investigatory suspension. The letter read in part;

“Following the discovery of various fraudulent/fake invoices financed under our Export Invoice Finance [EIF] product on account of several clients in your portfolio, the Bank considers these incidents very serious and under the circumstances, you are hereby suspended with immediate effect [15<sup>th</sup> December 2015], as the Bank carries out further investigations.”
138. Further, through its letter dated 12<sup>th</sup> January 2016, the Claimant was invited to a disciplinary which was slated for the 19<sup>th</sup> January 2016. The letter indicated the subject matter of the hearing as the discovery of fraudulent/fake Export Invoice Finance [EIF] invoices processed on account of Clients under his portfolio, expressed that he was at liberty to be accompanied to the hearing by a colleague and call a witness into the hearing to support his case. The members of the Panel could be Simon Bugingo, George Mutua, and Munyori Evans.
139. The Respondent contended that the process contemplated under Section 41 of the [Employment Act](#) was adhered to, as the Claimant was notified of the charge[s], he was heard on the charge[s], and accorded the right of accompaniment. A superficial look at the Respondent's witness's evidence will lead to a quick agreement with the Respondent's position. However, a deeper look at the matter will reveal that the compliance was not duly.
140. Procedural fairness requires the employer to with clarity set out the infraction[s], alleged to have been committed by an employee, in my view, not only in a language that the employee understands but also in a manner, that makes clear sense, that enables easy and duly understanding of the accusation[s], to enable him or her prepare to and defend himself or herself. Therefore, generalities must be avoided, and specificity and clarity must be embraced.
141. Where specificity and clarity aren't embraced, the employee's right to a fair hearing will be compromised, the requirement for a hearing under section 41 will be rendered valueless, and the



employer will take an undue advantage to wander without boundaries and level against the employee accusations during the disciplinary hearing, without care that he or she wasn't prepared to answer the same.

142. I have carefully looked at the suspension and invitation to the disciplinary hearing letters, and conclude that the accusations against the Claimant were put forth in too generalized a manner, notwithstanding that the circumstances of the matter required specificity and clarity. One could not see how the Claimant was connected to the global charge.
143. In my view the summary dismissal was for reasons outside the one set out in the two letters referred to hereinabove. There was no adherence to procedural fairness as contemplated under section 41. To be specific, the hearing component of the process was compromised.
144. I now turn to consider substantive fairness. Section 43 of the Employment Act places a duty upon the employer to prove the reason[s] for the termination of an employee's employment or dismissal of an employee from employment. If there is a default in proof, the termination or dismissal shall be deemed unfair by dint of the provisions section 45[2] of the Act.
145. In some instances, procedural and substantive justification aspects are interwoven. One of those instances could be where an employee is dismissed from employment or an employee's employment is terminated on grounds that were not part of the pre-disciplinary hearing events like the exclusion of him or her from employment pending investigations, show cause notice, and or invitation to a disciplinary hearing. Such will speak to the lack of a valid, fair and genuine reason[s] on the part of the employer. Further, absence of equity and justice in the decision by the employer.
146. No doubt, the Claimant was summarily dismissed from his employment through the letter dated 7<sup>th</sup> March 2016. It read in part as follows:
- “We refer to the Group Disciplinary Policy and the disciplinary hearing held on 19<sup>th</sup> January 2016, regarding the discovery of fraudulent Export Invoice Financing (EIF) processed on account of clients in your Segment...
- During the hearing, you were found to have failed to exercise proper management oversight in respect of risk and control matters by not implementing sufficient and appropriate systems and controls to manage and reduce the potential impact of operational risks thereby exposing the bank to a potential loss of USD 20,000,000. This act contravenes our Group Management Responsibilities Policy and the Bank's Code of Conduct.
- The Bank considers this a serious failure on your part and consequently has taken a decision to terminate your employment with immediate effect under the provisions of your employment contract”
147. The suspension letter and the letter inviting the Claimant to the disciplinary hearing didn't not allege that he had committed the infraction of failing to exercise proper oversight in respect of risk and control matters by not implementing sufficient and appropriate systems and controls to manage and reduce the potential impact or operational risk[s] thereby exposing the Bank to potential loss of USD 20,000,000, an act which was in breach of the Respondent's Group Management Responsibilities Policy and the Banks Code of Conduct. To sanction the Claimant by way of a summary dismissal as the Respondent did on this ground, in my view was not just and with equity. Further, it makes the decision to acquire the character of one not based on a valid and fair ground. It creates the sense that the initiation of the disciplinary proceedings was without a genuine reason.



148. Assuming for a moment that I am wrong on the foregoing conclusion, I will still hold that the summary dismissal was substantively unfair for the reasons hereafter. The Respondent was emphatic in the above stated letter that the Claimant breached the its Group Management Responsibilities Policy and the Banks Code. I have carefully gone through the evidence presented by the Respondent's witness, first, the instrument[s] was not placed before this Court, second, the witness didn't mention at all that there was breach of the stipulations of the policy and code, and the specific clauses thereof which were breached. I have further keenly considered the minutes of the disciplinary hearing, and take the view that this instrument[s] and or their specific stipulations did not feature. To draw an analogy, the situation here is like to charge a person with an offence "breaching the Penal Code", without stating the offended section[s] thereof, and hope to secure a valid conviction.
149. In the summary dismissal letter, the Respondent charged that the Claimant failed to implement sufficient and appropriate systems and controls to manage reduce the risks. Implementing, in my view denotes that there were systems and controls in place an antidote to incidents such as the one that was concerning the client, Cape Suppliers Limited, for the Claimant to effectuate at all material times. The Respondent's witness didn't testify on the specific controls, and systems and how the Claimant failed to implement or ensure implementation of the same. In fact, in her evidence under cross examination, the witness admitted that there were systemic lapses in the subject product, the systems and controls were not proper and sufficient. Further, that the systems and control measures were put in place after the incident, and dismissal of the employment.
150. This Court has not lost sight of the fact that before passing their verdict, the disciplinary panel stated under the Back-Ground Comment's Section of the disciplinary hearing minutes: -
- “..... The Panel, having listened to the above took time to interview several other people to shed light into the dealings of the two companies. These were:
- Joseph Waweru Mburu, who is a Senior Credit Manager, Commercial Banking: He shared the views on the responsibilities of dealing with such a facility. He recognized that there may have been product lapses but the responsibility of due care lies with a Relationship Manager. In these two cases the Relationship Managers were actively involved in the preparation and or monitoring of the Business Credit Application [BCA] and were therefore ultimately responsible to the execution of the covenants.
- Michael Gicuru, Trade Product Manager also shared his views on the product, Export Invoice Financing [EIF] Line. He recognized that there may have been issues with the product line on the process of receiving customer instructions as well as appropriate handshakes; this is being fixed in a new PPG approved in January 2016.
- Jane Chege Legal Counsel shared with the panel on her dealings with Weru when the issue of drawing a proper domiciliation letter for when the letters for Tata and KenGen were prepared and presented to the Bank.”
151. Looking at what these Managers stated, it amounted to an acknowledgment that there were systemic deficiencies the product, which in my view had nothing to do with the Claimant. Further, they exonerated the Claimant from blame. I hold, in the circumstances, no reasonable employer could summarily dismiss its employee in the situation and position of the Claimant.
152. It is unfair, and an inequitable for an employer to summarily dismiss an employee from employment on account of matters fermented by its own systemic lapses, without evidence that under its practices



and or instruments it was the responsibility of the employee to innovate and put in place systems and control measures, as was in this case.

153. By reason of the premises, I come to the inescapable conclusion that the summary dismissal was both procedurally and substantively unfair.

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

154. Having held that the Claimant was indeed unfairly dismissed, I now consider the matter of the reliefs sought.

155. Section 35 (5) and (6) of the *Employment Act* 2007 provide as follows”:

“(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

“(6) This section shall not apply where an employee is a member of—

- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund.”

156. It is evident from the Clause 5 of the Claimant’s Appointment Letter dated 10<sup>th</sup> February 2010 that the Claimant was a member of the Standard Chartered Kenya Staff Retirement Benefit Scheme 2006 which is duly registered under the *Retirement Benefits Act*. I hold that being such a member, and by didn’t of the cited provision, the Claimant is precluded from, asserting that he is entitled to, and pursuing, service pay.

157. In my view, the Claimant didn’t put forth evidence that can inform a decision by this Court to award the “Pension [Employer’s Contribution]”. He didn’t demonstrate that he sought for release of the funds from the Scheme, and that his application was denied. Having said this, I have however, not lost sight of the fact that the Scheme is a separate and distinct legal entity from the Respondent. As such, any application for pension can only be made to the manager, administrator, custodian or trustees of the scheme and if aggrieved by their decision made, prefer an appeal to the Chief Executive Officer of the Retirement Benefits Authority as per law provided. I decline to make the award under this head.

158. Lastly, the Claimant sought for a compensatory relief under Section 49 (1) (c) of the *Employment Act* 2007, for unfair dismissal. An award of this relief is discretionarily made, depending on the circumstances peculiar to each case. I have carefully considered; the length of the Claimant’s service to the Respondent; this Court’s considered view that he was condemned when in fact he shouldn’t have; the fact that the dismissal suffered from destituteness in substantive justification and procedural fairness; and the industry within which the Respondent operated and the possible impact created out of the dismissal on his professional career, and hold that he is entitled to the compensatory relief and to the extent of 6 months’ gross salary.



159. It is trite law that per Section 51 of the *Employment Act* 2007, a Certificate of Service of service is a right for an employee. It should be issued to the Claimant.

160. In the upshot Judgement is hereby entered in favour of the Claimant in the following terms: -

- a. A declaration that the summary dismissal was unfair and wrongful;
- b. The Claimant shall be paid compensation for unfair termination equivalent to six (6) months' gross salary, KShs. 4,226,712.00.
- c. The Claimant shall be issued with a Certificate of Service within 30 days of this Judgment.
- d. Interest on (b) above at court rates from the date of this Judgment until payment in full.
- e. Costs of this suit to be borne by the Respondent.

161. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**OCHARO KEBIRA.**

**JUDGE**

**In the presence of:**

Mr. Githinji for the Claimant

No appearance for the Respondent

Order

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

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

.....

**OCHARO KEBIRA.**

**JUDGE**

