



**Bengi v Co-Operative Bank of Kenya Limited (Cause 1511 of 2015)
[2024] KEELRC 2498 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2498 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1511 OF 2015
M MBARŪ, J
OCTOBER 3, 2024**

BETWEEN

EDWARD BENGI CLAIMANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The hearing in this case was completed on 28 November 2022. Due to the transfer of judges, parties were directed to file written submissions and to take a mention date at the registry. Parties mentioned the matter at Nairobi on 26 July 2023 and agreed to close the filing of written submissions and mention on 31 July 2023 and the judge at Nairobi directed the file be placed before me for judgment on notice.
2. The claimant filed written submissions dated 15 January 2023. There are no written submissions by the respondent. The file was placed before me on 18 August 2023 and on checking the record, several records are missing particularly all even pages of the respondent's witness statements in the bundle filed on 25 February 2019.

Claim

3. The respondent employed the claimant on 16 July 2001 as a telecommunications engineer at a salary of Ksh.1, 090,896 per annum and other allowances. A letter dated 22 August 2001 posted the claimant to the Information Technology Department (IT) as a telecommunications engineer.
4. On 27 January 2010, the claimant was appointed acting head of the infrastructure unit. On 2 July 2010, he was appointed to a managerial Grade 9 where he performed well and earned a 14% bonus of Ksh.457, 128. On 23 April 2012, the claimant was awarded a 13% bonus of Ksh.437, 210. On 11 September 2012, the claimant was appointed to the position of senior managerial Grade 8. In 2013, the claimant earned a 15% bonus of Ksh.585, 473.



5. On 14 March 2014, the claimant was appointed to the special projects team. He was awarded a 13% bonus of Ksh.289, 614 on 24 March 2014.
6. On 29 May 2014, the respondent suspended the claimant and a show-cause letter on allegations of negligence. No particulars of the allegations were given.
7. On 5 June 2014, the claimant responded to the allegations of negligence made against him based on the available information. He also requested to be supplied with the necessary documents through a letter dated 20 and 24 June 2014 to no avail.
8. Through a letter dated 29 May 2014, the respondent barred the claimant was accessing the bank offices rendering him unable to access vital records for his representation and defences.
9. Through a letter dated 22 August 2014, the respondent terminated the claimant's employment through summary dismissal on allegations that he was negligent in his duties leading to loss to the bank when he failed to provide proper guidance during procurement of the Bank's ICT infrastructure equipment.
10. Through a letter dated 10 September 2014, the claimant filed an appeal which was not addressed as required under the respondent's disciplinary Policy and Procedures.
11. The claim is that there was a violation of Sections 43, 45, and 49 of the *Employment Act* (the Act), in which the respondent failed to prove reasons for termination of employment, leading to unfair termination of employment. Hence, compensation should be awarded under Section 49 of the Act. The claim is also that there is a violation of Article 35(1) (b) and 47 of *the Constitution* where the claimant was denied the right to access information relating to his termination of employment and fair administrative action.

The claimant is seeking the following;

- a. A declaration that his employment was unfairly terminated contrary to Articles 35 and 47 of *the Constitution*;
 - b. An order of compensation for the remainder of the years until retirement;
 - c. An order for payment of general and aggravated damages for unfair termination of employment;
 - d. 12 months compensation;
 - e. An order of reinstatement;
 - f. Severance pay;
 - g. Costs of the suit.
12. The claimant testified in support of his case that upon employment by the respondent, he worked diligently and performed exceptionally well and was promoted and earned a bonus each year. On 27 January 2010, he was appointed the acting head of the infrastructure unit with duties of maintaining the ATM uptime, maintaining the system uptime including servers, data centres, network management and IT telephony system and related functions.
 13. The claimant testified that on 11 September 2012, he was appointed manager Grade 8 and due to his good performance was transferred to the Special Projects team.



14. Owing to the below-target financial performance in the year 2013, the respondent initiated cost-cutting measures across the business at the beginning of the year 2014. The managing director appointed the Chief Manager in charge of business change management (BCM) as the head of cost cost-cutting committee with the mandate to identify and drive cost-cutting opportunities in the bank. This information was circulated to all employees and the claimant was allocated the duty of renegotiating various support contracts within the ICT department. He was invited to the cost-cutting review meeting on 11 March 2014 at the training centre in Nairobi. The agenda was to review ICT contracts, non-ICT contracts, Assets stock take, and other deliberations. The claimant's role was to lead discussions to review contracts in the various units. Present at this meeting were all ICT units including property and supplies, finance, BCM, and special projects.
15. The claimant testified that during the meeting, the BCM directed the head of the property and supplies department to terminate the support contract for the Netapp Storage systems. This system was critical to infrastructure that stored critical data including all ATM transactions and Mobile banking transactions. The claimant noted that this direction was shocking since the vendor had just been issued with a letter of award a few days earlier and he had commenced discussions on the delivery of critical components that had failed in the period that contract negotiations were ongoing between November 2013 and March 2014. The claimant noted to the team that the respondent risked the loss of ATM and mobile transaction data since 3 disks of the 5 maximum allowable had already failed and required immediate replacement.
16. The claimant was informed that the Board of Management had already decided to terminate the vendor. He had not been privy to such a decision to share the risk exposure. The claimant tried to address the issue with his immediate supervisor to stop the termination of the Netapp contract, on 12 March 2014. The vendor responded to the cancellation of the contract by indicating that they had already acted on the award letter and had already informed the suppliers in good faith and on the cancellation they would suffer a loss of \$330,000.
17. The claimant testified that upon receipt of the letter from Netapp, the head of cost-cutting wrote to the managing director indicating that some employees were colluding with vendors to defeat the cost-cutting exercise. In an email dated 13 March 2014, the claimant was transferred to the Special Projects Team. He was directed to hand over to his deputy and to move to a new location without a new job description of targets.
18. The claimant testified that on 30 May 2014, he was suspended pending investigations. He was also issued with a show cause notice on allegations that he was negligent. There was an audit at the property and supplies department and it revealed that the claimant had willfully and negligently caused the respondent bank loss of Ksh.15, 358,040 on various dates from October 2012 to February 2014 through voice cabling of 19 branches and an IP telephony project. The claimant was called to respond to these issues but was not provided with the documents with the particulars and despite asking for the same, these were not provided. The claimant noted that he was not responsible or accountable under the property and supplies department nor was he required to receive reports from the department. He did not initiate requests for supplies as procured. The audit team conducting investigations did not consult him to get his responses during the inquiry.
19. The claimant testified that he was invited to the disciplinary hearing and the notice set out 7 new charges that had not been brought to his attention in the notice to show cause. He had no chance to respond before the disciplinary hearing. This resulted in unfair termination of employment.



Response

20. In response, the respondent admitted that the claimant was employed as a telecommunications engineer, managerial Grade 12 on 22 August 2001 and rose through the ranks to the Special Projects Team and trained ICT advisor at the time of his summary dismissal.
21. The response is that the respondent equipped the claimant with the necessary skills in the performance of his duties and paid for his training. This included training at Alcatel University, UK from 12 to 23 May 2003. A training for Voice over IP at Dubai, First Lane Computer Consultancy 24 September to 12 October 2006.
22. The claimant was appraised in his role over time which was based on available information.
23. The claimant was suspended and informed of the reasons and that there were ongoing investigations. This was addressed following the human resources policy. The show cause notice was issued and addressed irregularities in procurement practices that necessitated disciplinary action against the claimant. The claimant was given a chance to address the allegations made against him on several occasions. He failed to give satisfactory responses. The respondent relied on an internal audit which had revealed that there were irregularities in procurement practices. Following investigations, the respondent had the right to amend the allegations made against the claimant and he was allowed the opportunity to respond accordingly.
24. The claimant's role was a trained ICT advisor and was required to advise the respondent on cost-effective means of acquisition of necessary items having been charged with the responsibility of providing technical advice on purchases of infrastructure equipment.
25. The claimant was required to carefully and properly perform his duties as per his job description. The claimant failed to do the following;
 - a. On various dates between October 2012 and February 2014, as head of the infrastructure department, the claimant caused the installation of a redundant voice network by failing to advise the property & supplies department to start installing only one network per station which caused an estimated loss of Ksh.14,611,000 million for the 19 branches opened in the year 2013;
 - b. The claimant failed to share the project plan with the property & supplies department to manage stock of the legacy system occasioning a loss of Ksh.747,040 as the department received 70 and 10 new Alcatel headphones on 4 October 2013 and 22 April 2014 respectively;
 - c. The claimant was negligent in the supervision of Dimension Data as a result 16 personal computers were condemned at the NBC branch as not working and thus replaced yet investigations by ICT had revealed that 8 of the condemned PC were working;
 - d. The claimant failed to ensure that Dimension Data had repaired numerous other computers that were lying idle on the respondent's premises;
 - e. The claimant failed to ensure that stock records were maintained in the respondent's trust basement;
 - f. The claimant failed to correctly advise the respondent on the correct PCs to purchase during the pre-incorporation of the South Sudan branch and as such the respondent procured Fujitsu computers instead of HP computers which were cheaper and had higher specifications;



- g. The claimant allowed the inclusion of excess sizes of metal cabinets (42U) in all 19 branches between October 2012 and February 2014;
 - h. On 18 July 2013 the claimant misadvised the head of facilities and projects that everything in the structure cabling draft valuation had been delivered and installed yet various items had neither been supplied nor installed thereby causing the respondent a loss of Ksh.11,208,469.94;
 - i. The claimant misadvised Modern Data Centre that among the items the respondent needed from it were 2 Nexus 5548 switches and associated accessories and by doing this, he occasioned respondent a loss of Ksh.6,022,284.60 for the purchase of unnecessary switches because the respondent already had Nexus 5010 switches hence making the purchased Nexus 5548 redundant.
26. The referenced documents in support of the investigations were internal and confidential and others were within the claimant's possession. The claimant was issued a disciplinary notice dated 24 June 2014 and he attended and made his representations. The respondent acted fairly and within the law and did not violate the claimant's rights as alleged. The claimant was paid all his terminal dues and credited to his bank account No.0112500239100 and the claims made should be dismissed with costs.
27. In evidence, the respondent called Hannah Gichuki the human resources officer who testified that the claimant was issued with an email dated 2 July 2014 with an attachment of the list of the respondent's employees who had been separated from the bank in May 2014. The claimant was copied as part of the IT unit heads but was not part of the separation list for June 2014. The claimant produced the email and is a forgery since he was not included in the list of those to be separated. The claimant committed perjury having testified on oath to a false matter and producing a forged document. His employment was terminated through summary dismissal through a letter dated 1st September 2014 for negligence of duty.
28. The respondent called William Ndumia the director of business and retail banking who testified that at the time of the claimant's separation, he was the chairperson of the cost-cutting committee that was constituted in the year 2014 to look into potential areas for reducing operational costs and the claimant was a member of the committee. There were consultative meetings and a decision was taken to discontinue several contracts including one support contract for the Netapp storage systems in a bid to reduce costs. The claimant in his claim alleges that he objected to the discontinuation but the decision was unanimous. The respondent acted as recommended by the cost-cutting committee and terminated several contracts including that of Netapp.
29. Ndumia testified that the claimant was a member of the special projects team and was fully involved in its decision-making. Each member of the team was included to offer his expertise. For the claimant, his inclusion was a promotion and not a demotion as alleged. This was temporary and was allocated responsibilities in the team based on need and placed in charge of major banking components. This was not based on any disciplinary issue or victimization as alleged.
30. The special projects team was specialized and did not require a job description. On 29 May 2014, the claimant was issued with a notice to show cause based on irregularities raised by an audit which led to his summary dismissal.
31. The respondent called Martin Muroria the network engineer who testified that he is aware that the internal department carried out an audit on the property and supplies department which revealed several irregularities in procurement by different employees including the claimant. Through notice dated 30 June 2014, the claimant in response to the disciplinary letter of 24 June 2014 noted that



the store at Co-op Trust where ICT infrastructure active equipment and phones were stored. An audit revealed the procured ICT equipment's were received before being requested for by any staff or department. The store was meant to be a temporary place but most stored equipment's were there for long and became obsolete. On the delivery notes, the specifications are noted but the claimant as the head of the ICT failed to keep and maintain an inventory. If stocks ran out, there should have been a record of what had been procured.

32. On 17 July 2013, Mr Chirchir sent an email to the claimant on structuring cables before it was concluded. The claimant replied and indicated that everything required had been delivered and installed and the respondent should proceed and settle with the vendor. However, regarding the component of the cabling – CCTV, BMS, data centre installation – the claimant had indicated everything was delivered but the BMS was not installed or structured cables. The recommendation to the respondent to pay the supplier cost the respondent Ksh.5, 714,366 for the BMS that was not done.
33. Muroria testified that the claimant indicated that he bought two switches to keep as spares but the data centre comes with a warranty and for any upgrade, the standard warranty expected from the vendor is required. To keep spares as part of the purchases defeated the purpose of the warranty because data centre equipment is not meant to be stored for long due to becoming obsolete. The practice by the claimant to keep spares in the stores was not justified. The respondent incurred costs for idle assets at a cost of over Ksh.6 million.
34. Muroria testified that the claimant recommended the purchase of Cisco IP phones and Alcatel phones but the problem arose that at this time, the respondent was fully IT upon migration to a cheaper system the phones were unnecessary costs. The UP battery costs were excessive and unnecessary.
35. By the year 2012, the respondent had 400 branches. The claimant procured batteries for the branches and ATM at 2000 units which was on the higher side and a waste of resources. Each branch had a router and active equipment required under the data centre with 21 new units but the claimant ordered 42 cabinets for the 21 branches leading to financial loss.
36. The claimant installed a voice network system that was redundant. The respondent had voice traffic and before there was cabling and data traffic was not linked. There was no need for the two connections and single cabling was enough. The decision by the claimant to order more led to a huge financial loss.
37. The respondent called Martin Muia Kiungua who testified that the respondent carried out an internal audit in the property and supplies department which revealed irregularities in procurement. The claimant was found to have facilitated a loss to the respondent of Ksh.14, 611,000 upon installation of a redundant voice network and also failed to share the project plan with the departments to manage the stock of the legacy system.
38. Kiungua testified that the responsibility for the procurement of ICT equipment rested with the property and supplies department and the claimant was not a party to the procurement. The equipment was in the ICT store under the custody of the claimant who was the head of infrastructure. Some of the equipment was found obsolete and had never been used despite the claimant being responsible but failed to address it to avoid financial losses.
39. The claimant negligently failed to supervise Dimension Data in their work and as a result, 16 PCs were condemned in the NBC branch as not working and replaced. On 25 October 2012, the claimant wrote to the property and supplies department giving his reviews on South Sudan tender analysis documents as part of his role in the structured cabling tendering and analysis process project. On 29 July 2011 the claimant reviewed the bills of qualities for structured cabling installations for the modern data centre and gave his revisions to the consultants on 18 July 2013 he confirmed that the data centre structured



cabling works were complete and hence could proceed and settle the final account. This confirmation indicated the claimant was fully involved in the design and implementation of structure cabling works in the bank.

40. On 5 August 2013, a communication was issued to the claimant from the properties and supplies department for the cabling of the Disaster Recovery site. His advice was required as the head of the infrastructure unit. Within October 2012 and February 2014, the claimant caused the respondent to install a redundant voice network despite the respondent investing in IP telephony. The claimant failed to advise the property and supplies department to start installing only one network point per workstation leading to a loss of Ksh.769, 000 in Marsabit branch. This being a standard branch, the total loss for the respondent was ksh.14, 611,000 for the 19 branches opened in the year 2013.
41. On 21 July 2011, the claimant reviewed the bills or quantities for CCTV installation for the modern data centre and he gave revisions. On 25 October 2012 the claimant wrote to the properties and supplies department, Ken Mugane and Tom Chirchir giving his reviews on tender analysis for the South Sudan project and on 18 July 2013 he confirmed that the data centre cabling works were complete and payments should be made in the settlement. As the expert, the claimant was fully involved and the respondent followed his expert advice.
42. Kiungua testified that on 5 August 2013, the claimant received communication that the proposed structured cabling for the Disaster Recovery site had been issued and was required to advise the respondent. He replied and confirmed and upon his response, the respondent paid for the same. This resulted in financial losses to the respondent.
43. All these matters were brought to the attention of the claimant through a notice to show cause and was allowed to respond and attend the disciplinary hearing. Due to gross misconduct and causing the respondent huge financial losses, the respondent issued the claimant with a notice of summary dismissal.
44. The respondent also called Lear Kerich the head of employee relations employed in December 2018 and hence was relying on the records and testified that on 14 March 2014, the claimant was transferred to the special projects team and following investigations, on 29 May 2014 he was suspended and issued with a notice to show cause. There was noted irregular procurement of goods. This is related to different projects. The claimant responded to the notice to show cause on 5 June 2014 and asked to be supplied with documents which were done following the human resources policy.
45. Kerich testified that during the period of suspension, the claimant was not allowed in the respondent's premises. Upon the claimant's request to be supplied with documents for his response, he was directed to liaise with the properties and supplies department to get them. There was authority given to access records.
46. In his responses, the claimant did not give specific answers to the allegations made against him. A new notice to show cause was issued on 12 June 2014 following ongoing audits on different projects necessitating the issuance of two sets of notices to the claimant.
47. The claimant was invited to attend a disciplinary hearing on 9 July 2014 scheduled for 20 August 2014. The panel addressed the issues relating to procurement and the loss suffered by the respondent due to the gross misconduct of the claimant leading to a recommendation for summary dismissal which the respondent issued through notice dated 22 August 2014.



Determination

48. Through notice dated 22 August 2014, the respondent terminated the claimant from his employment by summary dismissal for irregular procurement practices leading to a financial loss. The respondent relied on the provisions of the Staff Manual and the applicable law, The *Employment Act*.
49. An employer is allowed to terminate employment by summary dismissal under its internal policy and by application of Section 44 of the *Employment Act*. That right is conditional upon adherence to the provisions of Section 41(2) of the *Employment Act*. The subject employee's rights must be secured and the employee issued with notice to allow him to address the allegations made against him and attend a hearing to make his representations that;
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.
50. The principles under Section 44 and 41(2) of the *Employment Act* are captured by the Court of Appeal in the case of *Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018)* [2021] KECA and by this court in *Gas Kenya Limited v Odhiambo (Appeal E006 of 2022 [2022] KEELRC* that although the *Employment Act* allows an employer to make regulations expanding the grounds that may constitute acts of gross misconduct over those set out in Section 44(4), the employer must formulate those additional grounds and bring them to the attention of the employee to allow him to respond and attend to make his representations before termination of employment.
51. Through a letter dated 29 May 2014, the respondent suspended the claimant from his employment to allow for investigations. The employer is allowed the prerogative to suspend an employee and to remain out of the shop floor for given reasons. In this case, the suspension was to allow for investigations.
52. In the case of *Inyani v Promasidor Kenya Limited (Employment and Labour Relations Cause E001 of 2021)* [2023] KEELRC the court held that a suspension is a preliminary decision based on preliminary inquiry, once addressed, the employee must be recalled back or issued with a notice to show cause and allowed a fair chance to respond to all the issues noted. This position is reiterated in the case of *Chrispus Ileli Kunuva v County Government of Kitui & another* [2020] eKLR the court held that the employer has the prerogative to suspend an employee as an administrative action to allow for investigations. Once an employee is placed on suspension it should therefore be seen as an administrative action imposed on an employee with stated reasons. Similarly, in the case of *Elizabeth Cheronu Kurgat versus Kenya Literature Bureau* [2014] eKLR the court in addressing the issue of sending an employee on suspension held as follows;
- ... The Claimant was suspended for being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. ...
53. The respondent, through a notice dated 24 June 2014 invited the claimant to show cause why disciplinary action should not be taken against him for the reasons that, following investigations and inquiry, there were noted irregular procurement practices. The following were noted;



- i. On different dates, the claimant had negligently recommended and supported the purchase of excess items without justifications;
 - ii. The claimant had negligently failed to supervise Dimension Data in their work leading to 16 PCs condemned in NBC not working and replaced;
 - iii. The claimant negligently failed to ensure that Dimension Data had repaired numerous other items that were lying idle in the bank;
 - iv. The claimant willfully or by negligence failed to ensure that stock records were maintained in the Co-op Trust basement stores to record the movement of stock items making it impossible for the removal of items from the stores to go unnoticed;
 - v. During pre-incorporation of Co-op Bank South Sudan, the claimant failed to correctly advise the respondent on the correct Personal Computers to purchase;
 - vi. On various dates from October 2012 to February 2014, the claimant allowed the inclusion of excess sizes of Metal cabinets (42U) in various branches occasioning the Bank a loss of Ksh.1,083,000 distributed through all 19 branches refurbished between the period; and
 - vii. On various dates between August 2012 and June 2013 the claimant being a member of the South Sudan set-up committee as an ICT infrastructure expert failed to exercise the requisite due diligence and duty of care by failing to confirm the requisite ICT infrastructure network as per the structured cabling designs in Juba head office renovations leading to a loss of \$59,305.
54. On 30 June 2014, the claimant responded and denied the allegations made against him. He noted each allegation with a response and further, he acted diligently upon request from each department and based on budgetary allocations.
- i. On the first charge, the claimant asked to be supplied with records of procurement of the excess items he was alleged to have procured negligently;
 - ii. On charge two, the claimant noted that Dimension Data had the discretion to condemn PCs and he requested documentation to show that 16 PCs were condemned and that the replacement of such a huge number should have gone through the procurement process for justification;
 - iii. On charge three, the claimant noted that the wear and tear of the system maintenance are driven by user need and these were escalated by the units or service provider through the Service Desk hence the respondent had a system ending with the claimant and a proper audit should have addressed the entire process;
 - iv. On the fourth charge, the claimant noted that the store management was a deliverable item for the properties and supplies department and not part of his job description;
 - v. On the fifth charge, the claimant noted that he was not involved in the project set up for South Sudan as regards procurement and hence requested supporting records where he acted negligently as alleged;
 - vi. On the sixth charge, the claimant noted that this function was with the properties and supplies department and he was not involved he requested for records where such matters were part of his job requirements.



- vii. On the last charge, the claimant noted that cabling designs is a properties and supplies role and was at no point appointed a cabling designer, a works supervisor, a member of the tendering committee, a member of the negotiating committee member of a member of the approving committee.
55. In his response, the respondent invited the claimant to attend a disciplinary meeting and hearing on 9 July 2014. He was further advised to tender documentary evidence to support his case and to assist the committee in arriving at a decision.
56. The respondent also attached a schedule of charges made against the claimant. These included five (5) main allegations that he willfully or by negligence allowed or facilitated loss to the bank in recommending and supporting the purchase of excess items without justification, failed to supervise Dimension data in the purchase of PCs or to ensure there were repairs hence leaving PCs lying idle in the bank. The claimant allowed stocks to remain idle in the stores, allowed excess sizes of 42U cabinets and during the incorporation of Co-op Bank South Sudan, he failed to advise on the procurement of the infrastructure.
57. Through notice dated 31st July 2014, the respondent issued the claimant with another notice to show cause. This followed his attendance before the disciplinary committee on 10 July 2014 where further investigations were recommended. It was noted that;
- i. On 18 July 2013, the claimant misadvised the head of facilities and projects in the structured cabling valuation and the process, the respondent lost Ksh.11,208,469.94 and the subject details and particulars were outlined;
 - ii. That on 18 July 2013 the claimant misadvised the consultant Modern Data Centre that among the items that the Bank needed for the Modern Data Centre were two Nexus 5548 switches and accessories which were supplied but not installed since the respondent already had Nexus 5010 switches leading to a loss of Ksh.6,022,283.60;
58. The claimant was invited to show cause within 14 days and to attend a disciplinary hearing on 6 August 2014.
59. On 5 August 2014, the claimant replied to the second notice to show cause.
60. He requested to have the audit report on the investigation for him to address where he was found to have misadvised the respondent. He gave several particulars of the documents he required including the valuation certificates, payments to contractors the documents which he signed and his appointment letter for the project with his duties.
61. The claimant also responded and noted that on 18 July 2013 when he was alleged to have misadvised the consultant, to be able to respond, he required records on the data centre design, EMC approvals, delivery notes, Minutes of tender evaluation and communications with the consultant on the project to identify his alleged misconduct and address.
62. Ms. Kerich in evidence testified that the claimant was advised to liaise with the properties and supplies department to attend to and access the records and documents required for his responses. From the various communications filed by the parties, and an analysis thereof, the court finds no documents allowing the claimant to return to the shop floor to access any documents and records upon his suspension.



63. In this case, the claimant was barred from attending at the bank premises. I take it, that the respondent has several branches spread across the region including South Sudan, and the claimant was barred from attending any branch.
64. Upon suspension, the claimant had no access to the internal records of the respondent.
65. Even where the employer may have reasons to believe that an employee has committed misconduct or gross misconduct, the subject employee's rights must be protected. As submitted by the claimant In the case of *Indogo v Ankole Grill Limited* [2023] eKLR the court held that;

Many things were wrong with the procedure adopted by the respondent; first, the claimant was not allowed adequate opportunity to respond to the accusations levelled against him; second, he was not given a chance to face his accusers and third, he was not furnished with particulars of the accusations. ...

The motions of Section 43(2) of the *Employment Act* that;

- (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.
66. The provisions are qualified under Section 45(2) of the *Employment Act*. Having genuine reasons is not the only requirement. There must exist valid and fair reasons and the employee allowed due process.
- (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 termination is fair - ...
67. Where the respondent conducted investigations in the procurement practices and found the claimant culpable, the reasons therefore allowing the claimant to attend and make his representations gave a concomitant right to access records necessary for his response and representation.
68. In the case of *Dennis Nyamweya Sibota v Deeway Security Limited* [2022] eKLR the court held under the provisions of Section 41, 43 and 45 of the *Employment Act*, an employer must justify that there were fair and valid reasons to terminate the services of an employee and that such termination was undertaken in line with fair procedure.
69. In *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR where the fairness of termination from employment was summarized as follows;

Section 45 of the Act makes a provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was fair and that the same was related to the employee's conduct, capacity, compatibility or that the employer did not act following justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are built in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in deciding to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be



overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer

70. It is therefore not sufficient to hold or have genuine reasons but an employer must apply valid and fair procedures. In the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR, Civil Appeal No. 66A of 2017 where the Court of Appeal determined that the standard of proof in an employment and Labour dispute and that save for having reasons "genuinely believed to exist" causing it to terminate the employee's services, there is a concomitant duty to secure the employee through valid and fair procedures as held in the case of *Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital* [2019] eKLR.
71. Where the due process is flawed, this denies the employee fairness and impedes his rights under Section 41, 43 and 45 of the *Employment Act* as held in the case of *Andrew K. Tanui v Postal Corporation of Kenya* [2014] eKLR. Ultimately, the respondent failed the procedural test.
72. Despite having conducted investigations and issued the claimant with notice to show cause, he was denied the right to access vital records to prepare his responses and representatives during the disciplinary hearing. There is no justification for circumventing the due process. The intricate web of allegations set out by the respondent could not be addressed without the records the claimant had requested. Some allegations went back to the year 2011 when the claimant had been reviewed and found of excellent work performance. Such assessment was based on his record and those conducting his performance reviews should have noted any shortcomings. The claimant did not suddenly become negligent, if at all, as alleged. Alleged irregular procurement practices must take into account several actors. The claimant's responses to the notices to show cause on 30 June and 5 August 2014 highlighted the weak areas which the respondent opted to ignore.
73. This court is satisfied that the claimant's employment was terminated through summary dismissal unfairly.
74. The claimant is seeking compensation for the unfair termination of his employment and denial of his rights under articles 35 and 46 of *the constitution*. On the findings that there was unfair termination of employment contrary to Section 45 of the *Employment Act*, the court is allowed to award compensation under Section 49 of the *Employment Act* as held by the Supreme Court in *CMC Aviation Limited v Mohammed Noor* [2015] eKLR.
75. In the notice terminating employment dated 22 August 2014, there are general allegations. The terminal dues paid included;
 - a. accrued leave days Ksh.181,385.95;
 - b. leave allowance accrued Ksh.9,051.85;



less deductions.

76. Without due process, the claimant is entitled to notice pay in terms of Section 35 of the Employment Act based on his last salary at Ksh.358, 570 per month.
77. On the findings that there was unfair termination of employment, the claimant worked diligently for the respondent from the year 2001 to 2014 with a clean record. This fact is corroborated by the respondent's witness Ms. Kerich that the claimant had a clean record. At the time of termination of employment, the claimant had accumulated letters of excellent work performance and earned bonuses. For the 13 years, the court finds an award of 10 years' salary award as appropriate and justified for the constitutional and legal breaches committed by the respondent against the claimant. On a salary of ksh.358, 570 x 10 total due is Ksh.3, 585,700 in compensation.
78. On the claim for an order of reinstatement, the cause of action arose in the year 2014 and the claimant moved the court on 21 August 2015 soon after the termination of employment. He cannot be blamed for the time taken to conclude these proceedings save, the primary reliefs of compensation addressed, and such addresses the violations outlined above.
79. On the claim for severance pay, this was a case of unfair termination of employment through summary dismissal. Severance pay does not apply. Save, the claimant is entitled to his costs of the suit.
80. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that employment was unfairly terminated;
 - b. Compensation Ksh.3,585,700;
 - c. Notice pay Ksh.358,570;
 - d. Costs of the suit.

DELIVERED IN VIRTUAL OPEN COURT AT MOMBASA ON THIS 3 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

