



REPUBLIC OF KENYA



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Kinyanjui v Equity Bank Limited (Employment and Labour Relations Cause 1411 of 2018) [2024] KEELRC 2418 (KLR) (2 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2418 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1411 OF 2018**

K OCHARO, J

OCTOBER 2, 2024

BETWEEN

JOHN NGURI KINYANJUI CLAIMANT

AND

EQUITY BANK LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 1st October 2018, the Claimant sued the Respondent seeking the following reliefs: -
 - a. A finding that the reasons for and procedure of terminating the Claimant's services were wrongful;
 - b. A finding that the Respondent's action of continuing to withhold the Claimant's rightful terminal benefits and other unpaid dues is unlawful and untenable;
 - c. An order that the Respondent pays the Claimant his terminal dues as computed hereunder:
 - i. 12 months' salary as compensation for unfair termination Kshs. 3,780,000
 - ii. 1 month's pay in lieu of notice Kshs. 315,000
 - iii. Unpaid leave allowance for 16.5 days Kshs. 10,500
 - iv. Severance pay for 6 years Kshs. 945,000
 - d. Costs of this suit
 - e. An order for the Claimant to clear outstanding loan arrears at a preferential rate of 8% as at the time of his employment.



2. The Respondent resisted the Claimant's claim through a Statement of Response dated 29th March 2019. It denied that the Claimant's employment was terminated without adherence to procedural fairness and substantive justification, and his entitlement to the reliefs sought.
3. After hearing the parties herein on their respective cases, the Court issued directions for filing of written submissions. The Claimant filed his dated 15th May 2023, while the Respondent filed theirs dated 9th February 2024.

Claimant's case

4. At the hearing of this matter, the Claimant adopted the contents of his witness statement herein filed as his evidence in chief. The Claimant stated that he first came into the employment of the Respondent on or about October 2012, as a Project Manager, at a monthly salary of Kshs. 300,000/-. Later he served the Respondent as a Business Analyst.
5. He further stated that under Clause 6.4 of the Respondent's Human Resource Policy Manual (2007), he was eligible for a staff loan. On this premise, on or about 1st August 2014, he applied for and was offered a development loan by the Respondent against his land L.R. No. Ndumberi/Ndumberi/327225. On 25th August 2017, the Respondent gave him another facility, a preferential car loan.
6. Notwithstanding that he had at all material times, served the Respondent with diligence his employment was terminated on 2nd May 2018, for the reasons that he had been listed by the Credit Reference Bureau for non-performing loans and failed to provide a realistic plan of action for the settlement of listed loans.
7. The Claimant asserted that in response to the show cause letter, he wrote to the Respondent, explained his financial situation, and undertook to clear the loans within a month. Further, he had already taken steps to address the issue of listing with the affected Banks.
8. The Claimant further asserted that the loans the subject matter of the listing were those that he had taken from other Banks before joining the Respondent Bank. He stated further that the Respondent Bank gave him the two loans after it assessed his capability to repay and was satisfied that he was able to repay.
9. Through a letter dated 27th April 2018, by the General Manager, Human Resources, the Respondent invited him to a disciplinary hearing that had been slated for 30th April 2018. During the disciplinary hearing, the General manager was present. Because of her presence, the Claimant felt intimidated. She didn't give him ample time to explain himself.
10. The Claimant asserted that the termination was not justifiable per the Respondent's standards, the alleged infraction constituted a minor offence under Clause 14.4.1. of the Human Resource Policy Manual (2007). It too didn't sit well with the stipulations of Clause 18.11 of the Respondent's Code of Conduct and work ethics on financial management.
11. He further contended that the termination was unfair and wrongful as it was not founded on any justifiable reason. Further, the Respondent never allowed him to be heard contrary to the requirements of procedural fairness.
12. The Human Resources Manual that the Respondent has placed before this Court which formed the basis of the sanction that was visited on him, was never served on him. He wasn't aware of it.



13. Contrary to the requirements of the *Employment Act* and the stipulations of his employment contract, the termination was not preceded by a notice or pay in lieu thereof. Without reason, the Respondent failed to pay him his terminal dues, inclusive service pays.
14. He asserted that he devotedly served the Respondent for 10 years. At his exit from employment, his salary had risen to KShs. 315,000.
15. The Claimant asserted that the Respondent intends to unjustifiably vary the preferential interest rate of 8% on the two loans to the current market rate, and list him with the Credit Reference Bureau. Ultimately, the Respondent intends to repossess land parcel No. Ndumberi/Ndumberi/3272 and Motor Vehicle Registration Number KCM 277B and will deal with them in a manner that is contrary to the Claimant's interest and Clause 6.8 of the Respondent's Human Resource Policy Manual (July 2007 Edition).
16. Cross-examined by Counsel for the Respondent, the Claimant testified that he was employed by the Respondent for the very first time in 2005 and worked up to 2008 when he left for Safaricom Ltd. He later got re-employed by the Respondent Bank in 2012 in the position of Project Manager. In his position, he was reporting to a manager of a higher rank.
17. The warning letter that had earlier on been issued to him, just like the show cause letter was written by the General Manager of Human Resources.
18. At the time of separation, his salary was Kshs. 315,000. However, he didn't have any document presented before the Court to show that this was the salary and not the one shown on his letter of appointment, KShs. 300,000.
19. In practice, communications to staff within the Respondent enterprise was by Memo. The memo dated 8th March 2017 tendered in evidence by the Respondent was to all staff. The notice to show cause was issued a year after this memo. However, throughout that period he wasn't aware of the memo.
20. Clause 15.0 of the Disciplinary Procedure Manual produced in evidence sets forth infractions falling under the category of "major offences". One of the offences falling thereunder was that of pecuniary embarrassment. This policy took effect on 8th March 2017, according to the memo.
21. Further cross-examined the witness stated that his first listing by the Credit Reference Bureau was in June 2014 for an amount of KShs. 300,000. The second listing, on 17th August 2016, and lastly at some point in 2018, at the instance of the Respondent Bank. In total, he had five non-performing loans.
22. The letter of offer dated 25th August 2017, for the loan facility, didn't expressly indicate that the facility was tied to his employment with the Respondent.
23. He accepted that he was invited to a disciplinary hearing and that indeed he attended the same. At the hearing, he was allowed to defend himself, and he made representations against the accusations. After termination, his right of appeal within 14 days was expressed to him.
24. In his evidence under re-examination, the Claimant contended that the circular didn't revoke the earlier Manual. If the earlier Manual were to be amended, the amendments could be carried in an appendix to the same. The Manual that the Respondent has attempted to place reliance on is not on a letterhead of the Respondent Bank.
25. Court seeking clarification, the Claimant stated that repayment of his loans with the Respondent was through a check-off system from his salary.



Respondent's case

26. The Respondent presented its Senior Relations Manager, Wycliff Ontumbi to testify on its behalf in this matter. The witness adopted his witness statement herein dated 8th July 2022 as his evidence in chief. He further tendered the Respondent's documents filed in this matter as its documentary evidence.
27. The witness stated the Claimant was employed by the Respondent as a Project Manager on 8th October 2012 under a Letter of Appointment. It was a term of the Letter of Appointment that he would adhere to the Respondent's terms and conditions, including its Human Resource Policies, Processes and Procedures.
28. On 8th March 2017, vide an Internal Memo, put up by the Chief Human Capital Officer and addressed to all staff, the Respondent introduced new Human Resource Policies and revamped existing ones, and notified the staff including the Claimant, to familiarize themselves with the same. The same were to take effect on the same day.
29. The witness stated that part of the policies that were brought on board included the "Disciplinary Handling Procedures" which the Claimant was sufficiently aware of or ought to have been reasonably aware of being part of the Respondent's staff.
30. Most notably, under "Disciplinary Handling Procedures" (Clauses 13.0 – 16.0), various offences were listed and categorized as minor, major and gross, and punishments for each specified, including severe reprimand, dismissal/termination of employment, and even prosecution. In Clause 15.0 (j), the offence of pecuniary embarrassment was highlighted.
31. The Respondent's dissatisfaction with the Claimant began after a general financial background check which was carried out on 23rd April 2018, revealed that he was at the material time listed by the Credit Reference Bureau for various non-performing loan facilities and cards, an indication of poor financial management, contrary to the Respondent's Code of Conduct.
32. The Respondent contends that they issued the Claimant with a Notice to Show Cause dated 23rd April 2018 setting out the charges of pecuniary embarrassment and lack of financial integrity. The Claimant submitted a response on the same date, but the same was found to be unsatisfactory. The response admitted that he had loan accounts that were not performing at all. Considering the response, he needed to be invited to attend a disciplinary hearing. The invitation was made through a letter dated 27th April 2018. In the letter, he was informed of his right to be accompanied by a fellow employee. The hearing was slated for 30th April 2018.
33. On 30th April 2018, the disciplinary hearing was held. The Disciplinary Panel held that the Claimant was not forthright and living beyond his means. Further, he lacked a proper explanation of how he was to come out of the financial situation. The Panel recommended the termination of the Claimant's employment. Consequently, acting on the recommendation by the Panel, the Respondent issued the Claimant with a termination letter dated 2nd May 2018. The termination was effective on the same date.
34. In the letter, the Claimant was informed of his right of appeal against the Respondent's decision, within 14 days of the dismissal. Although the Claimant did indeed appeal, he did so out of time.
35. It is the Respondent's position that the termination of the Claimant's employment was not unfair or unlawful, but rather justified. The Claimant's terminal dues are only payable upon clearance, which the Claimant has refused to undertake.



36. The witness further stated that on 1st August 2014, the Respondent advanced a facility of Kshs. 3,000,000/- to the Claimant secured by a Charge dated 20th August 2014 over property known as Ndumberi/Ndumberi/3272; while on 25th August 2017, it advanced a facility of Kshs. 1,800,000/- secured by a Joint Registration and Chattels Mortgage over Motor Vehicle Registration Number KCM 277B. The agreed interest rate for both facilities was 8% per annum, but it was a term of the respective Letters of Offer that the interest would be charged at prevailing commercial rates without prior notice to the Claimant if the Claimant left the Respondent's employment.
37. The effect of exit from the Respondent's employment on the interest chargeable on the facilities extended to the Claimant was further amplified in Clause 7.7 of the Claimant's Letter of Appointment dated 8th October 2012; and in Clause 6.8 of the Respondent's Human Resource Policy Manual, save that the Human Resource Policy Manual provided for a six (6) month grace period after termination of employment, before the interest rate chargeable reverting to commercial rates.
38. The Respondent the six (6) month grace period lapsed. The Respondent is entitled to vary the interest rate from the preferential 8% to current commercial rates. On the facilities advanced to the Claimant, Kshs. 5,824,884.17 remain outstanding.
39. Cross-examined by Counsel for the Claimant, the witness stated that he was not aware of any matter filed by the Respondent in the Cooperatives Tribunal against the Claimant.
40. The witness stated that the core values of an enterprise change from time to time. They are documented and communicated to each employee.
41. There is no document tendered in evidence by the Respondent to show that it requested the Claimant to provide his financial position before it recruited him into employment. In his view, it is normal for one to have debts.
42. The CRB report, expressly states what it isn't for. It does not reflect the financial standing or insolvency of any party. Cross-examined further on the report, the witness stated that though the Claimant was to his knowledge born in 1974, the report indicates that the last payment was made on 1st January 1970. The report indicated that there were several of the Claimant's non-performing facility accounts.
43. The witness testified that the Claimant explained in his response to the show cause letter, that he got into the financial situation because of the ailment of his daughter who eventually passed on, and that of his mother, who ended up being airlifted to India for treatment. Further, his wife was sick and admitted to Karen Hospital. According to the Bank, the explanation was insufficient.
44. The witness further testified that under the 2.0 [g] of the Disciplinary Handling Procedure, tendered in evidence by the Respondent, the quorum for a disciplinary hearing is four [4] members. During the Claimant's disciplinary hearing, only three members were present. The minutes in respect thereof are a testament.
45. The witness testified that discernable from the minutes is the fact that the Panel asked the Respondent to give a plan on how he intended to navigate out of the situation. The Claimant asked for a review in October. He indicated that he was able to pay 1.9 million by June 2019, and the balance duly by October 2019. The source of funds for this would be his salary and land sale proceeds.
46. He made the proposal on 30th April 2018, and by 2nd May 2018, he had been dismissed. He was not allowed the time he had requested for, therefore. He was not given any final warning.
47. One of the reasons that was set out in the termination letter for dismissal was that he failed to provide a realistic settlement of his debts.



48. In his evidence under re-examination, the witness stated that all those employees listed as the Claimant were dismissed save those who placed forth plans on how to fully offset their liabilities, who got lighter sanctions- demotions.

Claimant's Submissions

49. The Claimant's Counsel identified the following issues for determination, thus; who bears the duty to keep records of an employee; whether the Claimant's employment was procedurally and lawfully terminated; and whether the Claimant is entitled to the remedies sought.
50. It was submitted that under Sections 74 and 10 (6) of the Employment Act 2007, the employer is charged with the duty to keep records of employee[s]. These employment records include pre-entry requirements or the demands that were made on the Claimant by the Respondent when he commenced his employment. Notably, there were no pre-entry requirements on financial soundness or periodic financial assessments before he joined the Respondent bank.
51. It was further submitted that the Claim placed forth in evidence and relied on a Human Resources Policy Manual, July 2007. The Respondent didn't adduce any evidence to challenge the inapplicability of the manual. The Disciplinary Handling Procedures document tendered by the Respondent is insufficient as it doesn't bear the date of its edition.
52. Submitting on the second identified issue, Counsel for the Claimant while relying on the Court of Appeal case of CMC Aviation Limited vs Mohammed Noor [2015] eKLR, stated that unfair termination involves a breach of statutory law. Fair termination requires that there be both fair reasons for terminating an employee's employment and adherence to the statutory procedure. The absence of both or any of the two could render the termination unfair.
53. The Disciplinary Handling Procedure produced in evidence by the Respondent under clause 2 [g] provides for the quorum for the Disciplinary hearing panel as four (4) members inclusive of HR representatives. Contrary to the stipulation, the Disciplinary Panel for the Claimant's case inexplicably had only three members. This breach of the Respondent's own procedure rendered the proceedings a nullity. To buttress this submission, reliance was placed on the decision in the case of Joshua Rodney Marimba vs Kenya Revenue Authority [2019] eKLR.
54. It was further submitted that the presence and participation of the General Manager of Human Resources IRENE CHERWON, in the disciplinary hearing was improper and tantamount to one being a Judge in his or her own case. She was the one who initiated the disciplinary process against the Claimant. She was therefore conflicted in participating in the proceedings. To buttress this submission, the Claimant relied on the case of Republic vs Kenya School of Law ex parte Thomas Otieno Oriwa [2015] eKLR.
55. On the reason for termination, the Claimant submits that the reasons cited by the Respondent, being lack of justification for a listing with the Credit Reference Bureau and failure to provide a realistic plan of action for the settlement of listed accruing loans, were not valid reasons for summary dismissal under Section 44 (4) of the Employment Act 2007. Further, the Employment Act doesn't make any of the alleged infractions a ground for summary dismissal.
56. Under the Respondent's Human Resource Manual, Clauses 14.4.1 and 18.11, pecuniary embarrassment was not categorized as a major offence. In any event, Clause 18.11 was merely advisory, rather than a penal clause. As a result, the sanction of summary dismissal was unwarranted. He further submitted that debts owed to 3rd Parties cannot be a valid reason for the termination of an employee's



employment. To fortify this submission, the case of Tyson Sangura Wanyama vs Pwani University [2018] eKLR was cited.

57. The Claimant gave a detailed account of how he ended up in the financial situation of indebtedness. His evidence on this was not disputed. Further, he reasonably explained how he intended to offset the liabilities. He wasn't given a chance to actualize the payment plan. The Respondent didn't have a reason to conclude that he had failed to offer a plan. The reasons for the dismissal were not fair and valid, therefore.
58. The Claimant's counsel concluded the submissions by stating that the totality of the circumstances of this matter reveal that the dismissal of the Claimant from employment lacked substantive justification and procedural fairness, and was therefore unfair under Section 45 of the Employment Act. Granting of the reliefs sought could be justified.

The Respondent's Submissions

59. The Respondent's Counsel proposed three issues for determination thus; whether the Claimant's dismissal from the Respondent's employment was fair, procedural and lawful; whether the Claimant is entitled to the reliefs and orders sought; and who bears the costs of the suit.
60. Counsel submitted that the dismissal of the Respondent from employment was fair and lawful. It passed the fairness test by fulfilling both the substantive justification and procedural fairness, contemplated under Section 45 (2) of the Employment Act 2007.
61. In determining fairness in the decision to terminate an employee's employment, the test is whether a reasonable employer could in the circumstances terminate. The reasonableness test. To support this point, reliance was placed on the case of British Leyland UK Ltd vs Swift (1981) I.R.L.R 91. It is the Respondent's submission that any reasonable employer in the banking industry would have dismissed the Claimant's employment on account of the infraction of pecuniary embarrassment.
62. Under his letter of appointment, the Claimant was bound to adhere to among others the Respondent's Human Resource Policies, Processes and procedures, which policies were subject to regular reviews and updates.
63. In the process of reviewing and updating its policies and procedures, on or about 8th March 2017, the Respondent came up with the Disciplinary Handling Procedure. The same came into effect on 8th March 2017. The Respondent's employees were notified of the document and that it had come into effect. The Claimant knew of the document or reasonably ought to have known.
64. It was further, submitted that as a financial institution, the Respondent relies heavily on qualities of, integrity, faith and trust. The Bank/Customer relationship is based on the utmost good faith demanding a certain standard of conduct from their employees.
65. It is not in dispute that the Claimant's five loan accounts were listed by the Credit Reference Bureau as non-performing, and four (4) others though performing, had a default history. In the circumstances, the Respondent had a valid reason to dismiss the Claimant.
66. Counsel submitted that in dismissing the Claimant from employment the Respondent duly complied with the procedural dictates of Section 41 of the Act. It issued him with a notice to show cause letter dated 23rd April 2018; invited him for a disciplinary hearing on 30th April 2018; issued him with a termination letter dated 2nd May 2018; informed him of his right to appeal through the same letter; and considered the Claimant's appeal despite it being lodged three (3) months outside the time stipulated in the Respondent's Disciplinary Handling Procedures.



67. As regards the Claimant's contention that the presence and participation of Irene Cherwon in the disciplinary proceedings vitiated the process, Counsel for the Respondent submitted that the contention stands on quicksand. Irene Cherwon was the General Manager – Human Resources, and thus was instrumental to the Respondent's Human Resource Department which deals with disciplinary issues as a matter of general practice. It was on the premise that she chaired the disciplinary hearing of 30th April 2018. The accusation of conflict of interest makes no sense in the circumstances of this matter.
68. Submitting of the reliefs sought by the Claimant, Counsel submitted that the same cannot be availed to him. His claim for compensation for 16.5 days earned but unutilized leave days was not proved as he didn't place forth any sufficient evidence. Severance pay is paid in situations of redundancy under Section 40 of the Act. As the Claimant was not declared redundant, there cannot be a basis for the grant of the relief.
69. Clause 7.7 of the Claimant's Letter of Appointment dated 8th October 2012 expressly provided that preferential rates would cease to apply if the Claimant's employment ceased. The Letter of Appointment had a contractual effect. The Claimant and the Respondent were bound by the terms therein. To allow the Claimant's claim under this head shall be tantamount to reviewing the parties' contract. It is never in the business of Courts to re-write contracts for parties as was held in *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another* [2011] eKLR.

Issues for Determination

70. I have reviewed the pleadings, evidence, and their respective submissions filed by both parties and authorities in support thereof, and the following issues emerge for determination: -
1. Whether the dismissal of the Claimant from his employment was unfair.
 2. Whether the Claimant should be awarded the reliefs sought.

Whether the dismissal of the Claimant from employment was unfair.

71. It is trite law that for termination of an employee's employment or summary dismissal of an employee from employment to be considered fair, two statutory aspects regarding the process leading to the termination or dismissal and the decision to terminate or dismiss must be present, procedural fairness and substantive justification, respectively.
72. Section 45 (1) and (2) of the *Employment Act* 2007 speaks to this by providing 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 employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”



73. Section 41 of the Act provides for a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee from employment must adhere to. The procedure embodies three components; the information component, the employer must notify the employee that he or she intends to take action against the employee and the reason[s] stirring the contemplation; the hearing component, the employer must allow the affected employee adequate opportunity to prepare and defend himself or herself against the grounds. In this component, the employee's right of accompaniment is conjoined. The employer must allow the employee to be accompanied by a colleague of his choice [if not a member of a trade union] or a trade union representative [if the employee is a member of a trade union] during the hearing; and the consideration component, the employer shall consider the representations made by the employee and or the accompanying person before taking a final decision.
74. I have carefully considered the material placed before this Court, and not that the Claimant was issued with a show cause letter dated 23rd April 2018, which letter elaborately did set out the accusation[s] against him. It required the Claimant to respond by a certain date. On 25th April 2018, the Claimant made a detailed response. Further, through a letter dated 27th April 2018, the Respondent invited him for a disciplinary hearing that had been slated for 30th April 2018, the letter referred to the show cause letter and his response thereto. There is no dispute that the show cause letter expressed to the Claimant that he had a right to be accompanied.
75. It isn't denied that the Claimant attended the disciplinary hearing. Further, he was heard. The Disciplinary Panel considered his representations, considered the same, and recommended the termination of his employment. This coupled with the foregoing premises leads to a safe conclusion that the procedural cannons contemplated under Section 41 of the Act were duly adhered to.
76. However, this Court has time and again stated that the provisions of section 41 of the *Employment Act* should not be read in isolation from any relevant policies, at the workplace, the constitutional stipulations of, Articles 47 [right to fair administrative action], Article 50[right to fair hearing], the stipulations of the Fair Administrative Actions Act, and the tenets of natural justice.
77. The Respondent placed before this Court a Disciplinary Handling Procedures document which at its preamble provides its purpose inter alia, "it also ensures that any disciplinary matter is dealt with fairly, timely and consistently and steps are taken to establish the facts. Staff shouldn't be terminated, dismissed or subjected to disciplinary action without being provided with....."
78. The Claimant blew hot and cold over this document, on the one hand, he alleged that he was unaware of its existence, and or doubted its existence. On the other hand, he picked on some stipulations therein to bolster his case that the summary dismissal against him was both procedurally and substantively unfair. The Claimant cannot have his cake and eat it. It is by reason of this premise that I am convinced that as the Respondent alleged, the Claimant was aware of the documents and the contents thereof.
79. I have carefully considered the document's clause 2.0[g]. As the Claimant testified and submitted, it provides for the quorum for the disciplinary hearing panel. The panel duly constituted, must have four [4] members inclusive of the HR representative taking minutes. Further, at least two of them have to be staff of a higher rank than the staff facing the disciplinary proceedings.
80. Inexplicably, and I agree with the Disciplinary Panel was constituted of only three members in violation of the requirement of procedure document forestated. Human Resource Policies, procedures and practices at the workplace, bind employees as much as they do employers. An employer should not be at liberty and availed the luxury of choosing which policy, practice or procedure to follow and when.



Such will be a recipe for industrial disharmony, discrimination, inequitable treatment of employees, and lack of a standardized way of behaviour for similar situations and circumstances, at the workplace.

81. Conspicuously, the Respondent didn't adduce any evidence or submit on this point. The panel was improperly constituted and this cannot be stated to be a minor misstep. The disciplinary proceedings and the recommendation of the committee were a nullity.
82. The Respondent's failure to adhere to its own procedures with the consequence as hereinabove stated, prompts this Court to hold that the summary dismissal was procedurally unfair.
83. I now turn to consider the second aspect, substantive justification. There is no doubt that the Claimant's employment was terminated through the Respondent's letter dated 2nd May 2018. The termination took effect immediately, therefore, rendering it a summary dismissal. Section 44 of the Act governs summary dismissals as follows:

- “(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
 - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
 - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
 - (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
 - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
 - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to



obey, issued by his employer or a person placed in authority over him by his employer;

- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

84. Section 45 of the Act dictates that the reason for termination of an employee's employment must be valid and fair. A fair and valid reason is that which is capable of providing a legitimate basis for the termination of employment. Section 44[4] provides a catalogue of acts of omission or commission, on the part of the employee that can be considered gross misconduct and thus attract the sanction of summary dismissal. The list isn't exhaustive. Any act of gravity like those set out in the stated catalogue and for as long as it has or is likely to have the impact contemplated in section [44[3] can be described as gross misconduct.
85. There is no doubt that the Claimant had five non-performing loan accounts with the consequence that he was listed by the Credit Reference According to the Respondent, this situation amounted to pecuniary embarrassment, contrary to Clause 15.0 of the Procedure document mentioned hereinabove. The Claimant contended that according to the Human Resource [Policy of 2007](#), pecuniary embarrassment was categorized as a minor infraction, and therefore, one that couldn't attract a termination or summary dismissal sanction. Having found as I have hereinbefore that the Human Resource Procedure applied to the Claimant, and that he had knowledge of it, I am unpersuaded by this position he took.
86. Under the said clause 15, the infraction of pecuniary embarrassment is stated to be a major offence that would attract any of those sanctions set out in the clause, including summary dismissal.
87. The Claimant advanced an argument that the listing was in respect of loans that he had with 3rd parties and not the Respondent. Therefore, the Respondent couldn't use the listing as a reason to terminate his employment or summarily dismiss him. I got him to state that infractions committed outside of the workplace cannot be a basis for disciplining an employee.
88. The question that arises then, is as to whether an employer may discipline an employee for misconduct outside of the workplace. In my view, the general rule is that the actions and conduct of an employee outside of the workplace should be of no concern to his /her employer. However, I should be quick to add that the general rule isn't and shouldn't be cast in stone especially where the employee's conduct affects the employer's interests. Whether the conduct affects the employer's interests depends on each case's circumstances.
89. The conduct such committed has to have a bearing on the employment relationship, see the South African case of *Bigger v City of Johannesburg [Emergency services] [JS 232/09]2011] ZALCHB5; [2011]6BLLR 577[LC] 32 ILJ 1665* where the South Africa Labour Court stated;

“It should be noted that the labour courts have long acknowledged that disciplinary action may be taken against an employee for conduct committed outside the workplace if it



has a bearing on the employment relationship. In this instance, the animosity directed towards the applicant by some of his colleagues could not have boded well for their working relationship in emergency situations.”

90. It is imperative to state that the nexus must exist between the employee’s off-duty conduct and the employer’s business. The link could take many forms, including misconduct negatively affecting the business, the loss of or potential loss of clients, or even prejudicing the enterprise’s name. I have considered, the industry space in which the Respondent operates, the whole purpose for which Credit ratings were made a statutory requirement; and that banks insist on clearances by Credit Bureaus before they advance facilities to their customers; the need for bank customers to have the comfort that the bank has employed, and therefore the customers are being served with, staff who aren’t suffering from impecuniosity. I see a nexus between the misconduct of financial embarrassment whether committed outside of the workplace or within, with the Respondent’s business in the banking industry. Any reasonable employer could dismiss on the ground and further considering the fact that the Claimant took more than six years without making good the non-performing state of his loan accounts.
91. In sum, I hold that the summary dismissal of the Claimant from employment was substantively fair but procedurally unfair.

Whether the Claimant is entitled to the Reliefs Sought.

92. The Claimant seeks 12 months’ salary in compensation for unfair termination; 1 month’s pay in lieu of notice; unpaid leave allowance for 16.5 days, severance pay for 6 years and an order for retention of the preferential interest rate of 8% on his loans.
93. Following my holding that the Claimant was summarily dismissed unfairly and that the disciplinary proceedings were a nullity, refusing to grant the Claimant one month’s salary in lieu of notice would be tantamount to rewarding the Respondent for its unlawful acts. I therefore grant this prayer.
94. I have carefully considered the Claimant’s claim for earned but unutilized 16.5 leave days and note that his evidence on the same wasn’t controverted by the Respondent. Nothing could have been easier for the Respondent as the keeper of records under Section 74 of the Act, to demonstrate either that the days weren’t earned, or that if they were earned they were taken, or that if they were earned and unused, compensation thereof was done. Thus, I find no difficulty in concluding that the Claimant did prove his entitlement to the relief under this head.
1. Severance pay is a relief available in Section 40(1) (g) of the Act, for redundancy situations. It should never be confused with service pay under section 35 of the Employment Act. As the situation in the instant matter wasn’t a redundancy, the relief sought by the Claimant, severance pay cannot be awarded.
96. Section 49 (1) (c) of the Employment Act 2007, bestows on this Court the power to grant a compensatory award for an employee who has successfully assailed his/her employer’s action of terminating his/her employment or summarily dismissing him/her from employment. The power is discretionarily exercised depending on the circumstances peculiar to each case. I have carefully considered; the circumstances of this matter in total; the fact that I have only faulted the Respondent on lack of procedural fairness; the fact that I have declared the disciplinary proceedings a nullity; the length of the service by the Claimant to the Respondent; the industry within which the Claimant was working; and that he in a way contributed to the dismissal, and award nominally, two months’ gross salary, KShs. 630,000.
97. In the upshot, judgment is hereby entered for the Claimant in the following terms: -



- a. A declaration that the summary dismissal of the Claimant from employment was procedurally unfair.
- b. The Claimant be paid;
 - i. One month's salary in lieu of notice Kshs. 315,000/-
 - ii. Compensation for earned but unutilized 16.5 leave days Kshs. 173,250/-
 - iii. Compensation for unfair dismissal
(Kshs. 315,000/- x months) Kshs. 630,000.
- c. An order for the Claimant to clear outstanding loan arrears at the preferential rate of 8% per annum.
- d. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
- e. Interest on (b) above at Court rates from the date of judgment until payment in full.
- f. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 2ND DAY OF OCTOBER 2024

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Amutala for the Claimant

Mr. Macharia for the Respondent

