



**Wambua v Letshego Kenya Limited (Cause E397 of 2023)
[2024] KEELRC 2844 (KLR) (15 November 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E397 OF 2023
SC RUTTO, J
NOVEMBER 15, 2024**

BETWEEN

PAUL MUTUA WAMBUA CLAIMANT

AND

LETSHEGO KENYA LIMITED RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent with effect from 6th June 2019 and assigned the role of Assistant Manager-Credit Analysis. It is also not in dispute that the employment relationship came to an end on 18th January 2022 following the Claimant's termination from employment. According to the Claimant, his termination from employment was unjustifiable, unfair and unlawful. Consequently, the Claimant seeks the following reliefs against the Respondent:
 - i. Kshs.1,809,360/= being 12 months' gross salary compensation for unfair and unlawful termination of employment.
 - ii. Kshs.150,780/= being one month's salary in lieu of notice of termination of employment.
 - iii. Kshs.692,080.20/= being unpaid house allowance from 6th June 2019 to 18th January 2022.
 - iv. Damages for mental anguish and psychological torture endured by the Claimant due to the Respondent's actions.
 - v. Interest on items (i) to (iv) above at court rates from the date of termination of employment until payment in full.
 - vi. Costs of the suit.
 - vii. Such other or further orders as this Honourable Court may deem necessary to grant.



2. In response to the Claim, the Respondent filed a Statement of Response together with a Counterclaim. In its Response, the Respondent has denied the Claimant's assertions of unfair and unlawful termination. It is the Respondent's contention that the Claimant is not entitled to any compensation at all. With respect to its Counterclaim, the Respondent avers that the Claimant's tenure was replete with acts of negligence which occasioned losses in the sum of Kshs 1,664,476.78 to the Respondent; specifically, with respect to the borrowing by one Stephen Mutinda Ulu.
3. As a result of the foregoing, the Respondent has asked the Court to dismiss the Claim with costs and enter judgment against the Claimant for the sum of Kshs 1,664,476.78 plus interest at commercial interest plus costs.
4. In his Reply to the Response and Defence to the Counterclaim, the Claimant has denied the Respondent's averments and reiterated the contents of the Statement of Claim. The Claimant contends that he is not to blame and did not contribute in any way to Stephen Mutinda's default on the loan repayment. He has termed the Respondent's Counterclaim baseless, unmerited, an afterthought and an unwarranted reaction to his Claim. As such, the Claimant prays for the dismissal of the Respondent's Counterclaim with costs and judgment against the Respondent as prayed for in the Statement of Claim.
5. In its Reply to Defence and Counterclaim, the Respondent has reiterated the contents of the Counterclaim and has asked the Court to enter judgment in its favour as prayed in the Counterclaim.
6. The matter proceeded for part hearing on 24th April 2024 and subsequently on 1st July 2024 when the Respondent closed its case, thus marking the end of the trial.

Claimant's Case

7. The Claimant who testified in support of his case started by adopting his witness statement and supplementary witness statement to constitute his evidence in chief. He proceeded to produce the documents filed in support of his Claim, as his exhibits before Court.
8. It was the Claimant's testimony that his job entailed review of credit applications to the Respondent for completeness, credit risk, collateral and to make non-binding recommendations for approval, deferment or decline by the Respondent's Head Office Credit Committee (HOCC).
9. He averred that the HOCC is the Respondent's ultimate decision-making authority on all loan applications and its membership consists of the Head of Financial Inclusion, who is the chairperson of the Committee, the Chief Risk Officer Head of Finance, Head of Operations and Enterprise Risk Manager.
10. It was the Claimant's further evidence that in his position as Assistant Manager-Credit Analysis, he was therefore not a member of the Respondent's HOCC and did not vote to approve or reject any loan application presented before the Committee.
11. The Claimant averred that approval for loan applications by the Respondent follows the maker-checker principle and the Head of Credit, Head of Financial Inclusion and CEO are the checkers in the approval system. As a credit analyst, he was a maker and did not have approval powers on any loan application. He merely made recommendations to the HOCC for approval.
12. That on or around 9th March 2021, he received a loan application for Kshs.15,000,000/= by one of the Respondent's clients in the name of Papa Peters Gichana for review.



13. The loan application, was referred to him by the Respondent's Chairperson to the HOCC, who also acted as the borrower's Relationship Officer for purposes of the loan since the borrower refused to be handled by anyone else.
14. He reviewed the loan application, noted and documented that the borrower had six non-performing loans, which he highlighted to the HOCC in writing; that he was a litigious person, which he communicated to the HOCC verbally; and that he had political connections, which made him a Politically Exposed Person, which he also highlighted to the HOCC in writing.
15. On 12th March 2021, at a virtual meeting of the HOCC via Zoom, he tabled for deliberations and decision, his Loan Application Summary dated 9th March 2021 highlighting the above-mentioned concerns about the borrower with a recommendation that there was a need for a tripartite agreement on assignment of rental income as a condition and security for the loan.
16. The Claimant averred that prior to the said HOCC meeting, he had meetings with the Head of Financial Inclusion and the Chief Risk Officer at which he expressed his discomfort about lending to the said Papa Peters Gichana.
17. At the HOCC meeting, he clearly stated that he did not support the borrower's loan request but he was advised to make his presentation on the application for the decision by the HOCC.
18. Upon its protracted deliberations on 12th March 2021, the HOCC resolved to approve the borrower's loan disregarding the concerns he had highlighted as well as his recommendation on the tripartite agreement on assignment of rental income.
19. According to the Claimant, this happened after the Chairperson to the HOCC explained and convinced the Committee that the borrower had an elaborate system of rent collection and that in case of non-payment, he would take personal responsibility. The HOCC resolved that it would rely on the borrower's rental income from his properties to be held as collateral.
20. Further, the HOCC subjected its approval to conditions namely, valuation, first charge, fire and peril and an affidavit confirming that Peterson Onyiego Gichana and Papa Peters Gichana refer to one and the same person.
21. Consequently, and as was the procedure, the HOCC ordered appropriate changes on his Loan Application Summary dated 9th March 2021 to reflect its resolution on the borrower's loan.
22. Following the decision of the HOCC, the borrower's property was valued and his properties were charged as recommended by the HOCC. Thus, the Respondent processed and disbursed the loan to the borrower.
23. The Claimant further stated that on 19th August 2021, the borrower wrote to the Respondent stating that he was not able to service the loan due to the adverse economic effects of the COVID-19 pandemic. He proposed that the Respondent sell his property as the security for the loan to clear the outstanding loan and arrears thereon.
24. He is also aware that on 24th August 2021, the Respondent's Legal Officer reviewed the matter and wrote to the Respondent's Chief Risk Officer on the status of the loan as of that date, attempts at recovery of the loan and made appropriate recommendations on the recovery of the outstanding amount. The Respondent ignored recommendations and instead blamed him for the borrower's default.



25. None of the recommendations by the Respondent's legal advisor called for his disciplinary action or otherwise implicated him for any negligence or wrongdoing in respect of the borrower's defaulted loan.
26. The Claimant further averred that prior to the borrower's default, the Respondent had not questioned, investigated or otherwise blamed him for any negligence, act or omission on any processes prior to the approval of the borrower's loan by the HOCC.
27. That on 31st August 2021, he received a show cause letter accusing him of neglecting to subject the borrower's loan facility to the tripartite agreement on assignment of rental income and neglecting to disclose the borrower's numerous non-performing/written-off loan accounts.
28. He was also accused of exposing the Respondent to a potential loss of Kshs.15,371,791.85 and of contravening unspecified "Company's Policies and Procedures and the Company's Code of Conduct."
29. On 31st August 2021, he wrote back to the Respondent requesting for the audio recording of the HOCC proceedings of 12th March 2021 at which the borrower's loan was approved to enable him sufficiently respond to the allegations against him. The Respondent declined, refused and/or neglected to avail the audio recording.
30. On 1st September 2021, he responded to the show cause letter denying the Respondent's allegations against him, highlighting the fact that his recommendation on the tripartite agreement on assignment of rental income had been overruled and dropped by the HOCC. He also reminded the Respondent that it had denied him the benefit of the HOCC meeting audio recording resulting in unfairness/disadvantage in his defence.
31. According to the Claimant, all virtual meetings of the HOCC were audio recorded and the records kept. He contended that this was the standard procedure and the HOCC meeting of 12th March 2021 was not an exception.
32. The Claimant averred that on 3rd September 2021, the Respondent invited him to a disciplinary committee hearing via Zoom attended by the very same members of the HOCC who had, by their decision of 12th March 2021, approved the borrower's loan, and who were now sitting to interrogate the consequences of their decision by blaming him for it.
33. At the said meeting, he requested for the HOCC meeting audio recording. The request was ignored and/or declined by the Respondent's disciplinary committee. The committee became evasive and defensive with the Chairperson of the HOCC stating that the disciplinary hearing was not about the HOCC meeting audio recording/minutes.
34. In his view, the Committee was not ready to avail the audio recording or was of the misguided view that he did not need it.
35. Ultimately, he was forced to proceed with the hearing without the recording thus denying him necessary and crucial material he needed to defend himself against the Respondent's allegations.
36. The Claimant further stated that an hour after the disciplinary committee hearing, and without any basis in its policy, the Respondent directed him to proceed on compulsory leave to await the outcome of the disciplinary committee. This subjected him to untold mental anguish and psychological torture.
37. He was aggrieved by the manner in which the Respondent had conducted the disciplinary committee hearing and on 5th September 2021, he wrote the Respondent's parent company, Letshego Holdings Limited through the Group Chief People and Culture Officer communicating his grievances and



- seeking an intervention and further investigations on the matter. Among other requests, he requested for the 3rd time, the audio recording of the HOCC meeting on 12th March 2021.
38. The Claimant was categorical that his request to Letshego Holdings Limited was not an appeal on any of the Respondent's decisions. That as at 5th September 2021, the Respondent's disciplinary committee had not communicated its decision after the hearing of 3rd September 2021 based on which he could lodge an appeal.
 39. He did not receive any decision from the Respondent's CEO following his disciplinary hearing on 3rd September 2021, and he could not therefore have lodged any appeal as at 5th September 2021 as the Respondent alleges.
 40. That in an apparent reaction to his request to Letshego Holdings Limited, the Respondent invited him to another differently constituted disciplinary committee hearing on 1st November 2021, which the Respondent purportedly considered to be a "Disciplinary Appeal hearing."
 41. On 17th January 2022, the Respondent unlawfully and unfairly terminated his employment effective 18th January 2022. In the termination letter, the Respondent implied that he had no right of appeal against the decision to terminate his employment.
 42. With respect to the Respondent's Counterclaim, the Claimant averred that the loan to Stephen Mutinda Ulu was subjected to consideration and received the requisite approval of the Respondent's credit committee.
 43. He maintained that the decision to lend to the said borrower was the Respondent's and not his. That at the time the loan application was made, he was supplied with Stephen Mutinda's valid identity documents hence any allegations that the borrower did not exist or that he is a phantom are baseless.
 44. The Claimant further averred that the disciplinary issue against him relating to Stephen Mutinda was subject to a disciplinary hearing and the disciplinary committee recommended a final warning against him which was an adequate sanction in the circumstances. In the Claimant's view, with the said punishment meted out, the matter stood closed and he legitimately expected that it would remain so.

Respondent's Case

45. The Respondent called oral evidence through Ms. Elizabeth Gicharu who testified as RW1. She identified herself as an employee of the Respondent, designated as the Head of People and Culture. Similarly, she started by adopting her witness statement to constitute her evidence in chief. She further produced the initial list and bundle of documents as well as the supplementary list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
46. RW1 stated that as the person entrusted with the actual due diligence on all loan applications, the Claimant's recommendations informed approval of all borrowings and it was expected that he would ensure all elementary requirements are met.
47. That the elementary requirements such as completeness of KYC (know your customer) documents, account statements and collateral verification were preserved for the sole scrutiny of the Claimant and it was expected that he would ensure that the Respondent would only lend to bonafide borrowers with the ability to repay the loan.
48. That further, the Claimant's role also served the purpose of ensuring that in the event of default by a borrower, the collateral would be realized expeditiously.



49. The HOCC would then consider the Claimant's report in line with the Respondent's business strategy among others and approve or decline a borrowing.
50. It was RW1's testimony that at no time was the HOCC required to scrutinize every loan document as that would be a duplication of the work assigned to and done by the Claimant. That with the roles defined, any omission in the elementary requirements could only be as a result of negligence, incompetence and/or recklessness by the Claimant.
51. RW1 further stated that the Claimant's tenure as a Credit Analyst was bestrewn with repeated cases of negligence and disciplinary misconduct for which disciplinary action was instituted as follows:
 - a. A Notice to Show Cause dated 5th February 2020 was issued to the Claimant for laxity in the execution of his functions that violated the company policies. He was cautioned for the misconduct.
 - b. On 24th June 2020, the Claimant was issued with another show cause letter for insubordination, negligence and poor customer service. He submitted a response and was invited for a disciplinary hearing. After the hearing, the Claimant was issued with a warning letter.
 - c. On 16th April 2021, the Claimant was issued with yet another show cause letter for failing to undertake a thorough background check on the borrower thereby exposing the Respondent to potential loss of Kshs. 1,762, 612.59 being a sum advanced to one Stephen Mutinda Ulu. He was invited for a disciplinary hearing where he conceded that he had failed to undertake all the requisite diligence checks before advising for disbursements and this had exposed the Respondent to loss. The Respondent has never recovered the loan advanced to Stephen Mutinda Ulu who turned out to be a phantom. The loss suffered by the Respondent was occasioned by the Claimant's negligence and it seeks payment of the said sum by the Claimant.
52. According to RW1, the Claimant's contention that he was a diligent employee is therefore false as he had many disciplinary cases and warnings and the Respondent's trust and confidence in the Claimant waned over time. Despite being cautioned and warned repeatedly, the Claimant made no effort to mend his ways and to be diligent in his work.
53. That on or around 9th March 2021, a loan application was submitted by one Papa Peters Gichana. The application was processed by the Claimant who confirmed that all the documents required had been availed. Upon receipt of the Claimant's report, the HOCC approved the borrowing.
54. Soon after disbursement, Papa Peters Gichana fell in arrears and the Respondent commenced a review of the loan documents with a view of undertaking recovery.
55. Since the collateral for the loan was a residential block of apartments occupied by tenants, it was inconceivable that the borrower was in arrears yet the charged property was occupied by tenants who were paying rent.
56. RW1 stated that in such borrowing, it was a fundamental rule that needed no belabouring that a tripartite agreement on assignment on rent would be executed so that the rent could be utilized in paying the loan.
57. That a review of the loan documents for Papa Peters Gichana revealed that despite being fully aware of the source of repayment as rental income from the charge property, the Claimant omitted the requirement for a tripartite agreement on assignment of rent in the terms applicable to the loan. This was a fatal omission which had the result of the loan being in arrears despite the charge property



generating rental income. In her view, this was an inexcusable error for a Credit Analyst with the experience of the Claimant.

58. That on 25th August 2023, through email, the Chief Risk Officer sought an explanation from the Claimant as to why the application was exempt from the requirement of a tripartite agreement for assignment of rent. The Claimant replied stating that there was no reason for exemption other than the fact that the collateral was the source of repayment. The Chief Risk Officer further sought to know whether this was explicitly documented in the approval and the Claimant responded as follows; “No it is not. This was my consideration as the analyst.”
59. In RW1’s view, the Claimant as a Credit Analyst admitted to omitting a basic but crucial requirement in his sole capacity as an Analyst with the result being that the Respondent had a non-performing loan whereas the borrower had income that could be used to repay the loan but which income would not be accessed by the Respondent due to the Claimant’s omission.
60. RW1 asserted that the Claimant was fully aware that where such a fundamental requirement for a loan is to be exempted from the requirements, approval has to be sought from the Chief Executive Officer.
61. Consequently, a Notice to Show Cause dated 31st August 2021 was issued to the Claimant for this fatal omission among others. In response, the Claimant requested to be furnished with a recording of the HOCC for the particular borrowing.
62. He was informed that the recording could not be availed as HOCC meetings were never recorded. That in any case, he had earlier admitted that he omitted the requirement for a tripartite agreement in his analysis thus absence of the recording could not impede his defense.
63. By a letter dated 1st September 2021, the Claimant submitted a response in which he contended that he captured the requirement for a tripartite agreement in his write-up up but he was overruled by the HOCC. The write-up was never produced as the loan summary did not capture this requirement.
64. The Claimant was invited for a disciplinary hearing on 3rd September 2021. He attended the hearing and he waived his right to a witness.
65. On 5th September 2021, before the panel could render a decision, the Claimant wrote an email to the Group Level decrying an unfair hearing followed by suspension.
66. RW1 stated that at no time did the Claimant challenge the composition of the disciplinary panel during the hearing. His only grievance was that he was not supplied with the recording of the HOCC meeting.
67. That following his email to the Group Level, an appeal panel was constituted and the Claimant was heard on 1st November 2021.
68. According to RW1, this second hearing was for all intents and purposes an appeal since extensive reference was made to the first hearing. At the appeal hearing, the Claimant admitted that he omitted the requirement for a tripartite agreement for what he termed as human error.
69. He also admitted that he was aware that his analysis affected the whole approval process. After hearing the Claimant and considering his defense, a decision was reached to terminate his services.
70. A termination letter was issued to the Claimant and the reason for termination was clearly stated.
71. Upon termination, the Claimant cleared and he was paid his terminal dues and issued with a Certificate of Service.



Submissions

72. It was submitted on the part of the Claimant that the disciplinary hearing ran afoul of the provisions of procedural fairness in that the Respondent blatantly declined to furnish him with the audio recording for the HOCC meeting of 12th March 2021 and curtailed his opportunity to appeal the Respondent's disciplinary committee decision terminating his employment.
73. On substantive fairness, the Claimant submitted that the decision whether or not to approve any loan including Papa Peters Gichana's was by the Respondent's HOCC. It was his position that he was not a member of the HOCC, had no voting rights and did not approve Papa Peters Gichana's loan.
74. He further argued that both the HOCC and the checkers had the discretion, properly exercising their powers, to reject Papa Peters Gichana's loan application if any of the necessary conditions were missing.
75. The Claimant further argued that whether or not he recommended the dropping of the tripartite agreement on assignment of rental income as security for Papa Peters Gichana's loan, is immaterial and irrelevant as such recommendation was subject to approval or disapproval of the Respondent's HOCC and further to the checking and approval of the checkers.
76. The Claimant stated in further submission that the accusations set out in the show cause letter do not tally with the reason for the termination. According to the Claimant, the reason for termination should be derived from the accusations levelled against him. That in the absence of consistency between the accusations and the reason for the termination, it means that his termination was for reasons unrelated to the accusations against him.
77. On the Respondent's part, it was submitted that the absence of the audio recording cannot be termed as an unprocedural unfairness since the Claimant admitted to the omissions before the issue arose. The Respondent further argued that no law or policy was violated for failing to keep an audio recording of the HOCC meeting as contended by the Claimant.
78. With respect to the appeal, the Respondent posited that since the first disciplinary hearing was completely disregarded following a complaint by the Claimant, his right of appeal cannot be said to have been denied.
79. According to the Respondent, due process was followed before terminating the Claimant.
80. The Respondent further submitted that cogent evidence exists to demonstrate that the Claimant was a truant and negligent employee whose tenure as a Credit Analyst for the Respondent was untenable.
81. Placing reliance on the case of Kenya Power & Lighting Company Limited v Agrrey Lukorito Wasike (2017) eKLR, the Respondent submitted that since the evidence on record confirms that the reasons for termination were supported by a genuine belief of the Claimant's culpability for negligent discharge of his duties, it follows that valid reasons existed for his termination.

Analysis and Determination

82. I have considered the pleadings by both parties, the evidentiary material placed before me, as well as the rival submissions and isolated the following issues for determination:
 - i. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?



- iii. Is the Respondent's Counterclaim justified?
- iv. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

83. From the record, it is discernible that the Claimant was terminated from employment on grounds that he was negligent in exercising his duties. This can be drawn from the letter of termination dated 17th January 2022, which is partly couched as follows:

“You were negligent in exercising your duties in that you failed to follow the laid down procedure in seeking for exceptional approvals. It is also worth noting that this was your fifth appearance in a disciplinary hearing committee and as a result, the company has lost faith in you as an employee. You went against the Company's Code of Conduct.”

84. Pursuant to Sections 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for an employee's termination and failure to do so, such termination is deemed to be unfair. There is more. Under 45 (2) (a) and (b) of the Act, an employee's termination from employment is deemed unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on the employer's operational requirements.
85. In this case, the disciplinary process against the Claimant commenced with the issuance of the show cause letter dated 31st August 2021 in which he was alleged to have been lax in exercising his duties as a credit analyst with respect to the loan application made to Papa Peters Gichana. In this regard, the Claimant was alleged to have neglected to subject the facility to the standard tripartite agreement on rental assignment as a condition as per the standard policy requirement for the product. He was further alleged to have neglected to present to the HOCC that the client had numerous written-off accounts and thus seek necessary exemptions to progress the application.
86. As stated herein, the reason for the termination of the Claimant's employment as captured in the letter of termination was failure to follow the laid down procedure in seeking exceptional approvals. The Respondent did not elaborate on this reason hence I will revert to the allegations contained in the show cause letter.
87. First off, it is notable that the Respondent did not exhibit a copy of its relevant Loan Policy or Procedure Manual stipulating the requirement of a tripartite agreement in the loan approvals as the one advanced to Papa Peters Gichana. This is notwithstanding RW1's testimony that the tripartite agreement was a fundamental requirement whose exception could only be sought from the CEO.
88. Indeed, if the requirement for a tripartite agreement was so fundamental, it is thus reasonably expected that the same would be contained in some Policy or Procedure Manual of the Respondent. As a matter of fact, it is notable that the Respondent did not make reference to a specific Policy or Procedure that had been breached by the Claimant.
89. I have carefully perused a copy of the Lending Guidelines Procedure Manual exhibited by the Claimant and apparently, there is no requirement for a tripartite agreement in such loan applications as the one in question.
90. In the absence of an express policy requirement providing for the tripartite agreement, this Court is not in a position to ascertain whether or not the Claimant failed to follow the laid down procedure in seeking exceptional approvals hence the validity and fairness of the reason for termination of the Claimant's employment.



91. Coupled with the foregoing, both parties did not exhibit copies of the minutes capturing the deliberations of the HOCC on 12th March 2021. Therefore, without the benefit of the said minutes, the Court is not in a position to discern whether indeed, the issue of the tripartite agreement was deliberated on in the first place and if so, the manner in which the HOCC resolved to address the same.
92. In support of its case, the Respondent exhibited copies of emails exchanged between the Claimant and the Chief Risk Officer on 25th August 2021 in which the Claimant stated that there was no other reason why Papa Peters Gichana's loan application was exempted from the tripartite agreement other than the fact that the collateral property was the Respondent's source of repayment.
93. This notwithstanding, in the absence of an express Policy provision requiring the execution of a tripartite agreement prior to approval of a loan application as the one for Papa Peters Gichana, the reason for the Claimant's termination cannot be assessed against the statutory requirements stipulated under Section 45(2) (a) and (b) of the Act.
94. With respect to the allegation that the Claimant neglected to present to the HOCC that Papa Peters Gichana had numerous written-off accounts and thus seek necessary exemptions, it is apparent from the Loan Application Summary exhibited by the Claimant, that he indicated the credit summary of Papa Peters Gichana. In this regard, he listed the loan facilities advanced to him and to the companies related to him as well as the status of each facility. Notably, five out of six of the said loan facilities had been written off while one was indicated as Active NPA.
95. The foregoing therefore discounts the Respondent's allegation that the Claimant neglected to present to the HOCC the borrower's numerous written-off accounts.
96. From the Loan Application Summary prepared by the Claimant, it is evident that the information presented with respect to Papa Peters Gichana, was adequate with respect to his credit worthiness hence the HOCC was well equipped with the relevant information to make a decision as to whether or not to approve the credit facility applied for.
97. It is also worth mentioning that the Terms of Reference of the HOCC included the following duties among others:
 - a. Considering credit applications for approval or disapproval as per the Respondent's Credit Policy;
 - b. Ruling on each application solely on the basis of a member's credit worthiness; and
 - c. Granting sound loans protecting the overall financial stability of the Respondent.
98. On the other hand, the Claimant's job description included among others; analyzing loan applications to ascertain client affordability documentation, loan purpose, credit history and securities in line with the credit policy and procedure and recommend approval by the relevant authorities.
99. Considering the Claimant's responsibilities against the duties of the HOCC, it is unequivocal that the ultimate responsibility with respect to loan approvals rests with the said Credit Committee.
100. As can be discerned from the record, the HOCC proceeded to approve the loan facility to Papa Peters Gichana despite the information relating to his credit worthiness. In so doing, they were well aware of the extent of the Respondent's risk exposure but still went ahead to approve the loan.
101. It is also notable that the membership of the HOCC was of a high caliber with the relevant skill and expertise to make a prudent decision in considering whether or not to approve the loan application by Papa Peters Gichana.



102. If I may say, RW1's assertions that the HOCC was not required to scrutinize every loan application document does not hold in this case. In as much as the members of the HOCC may not have been in a position to scrutinize all the loan documents, they were nonetheless required to consider and apply their minds to the Loan Application Summary submitted by the Claimant and specifically, the credit worthiness of Papa Peters Gichana, prior to approving his loan application. Certainly, their duty went beyond rubberstamping the Claimant's recommendations.
103. The net effect of the foregoing analysis is that the Respondent has failed to prove to the requisite standard that the Claimant was culpable of negligence thus availing it a valid and fair reason to terminate his employment.

Procedural fairness?

104. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 of the Act makes specific requirements with regards to the process to be followed by an employer in effecting termination of employment.
105. The record bears that the Claimant was issued with a show cause letter dated 31st August 2021 which he responded to. Subsequently, he was invited for a disciplinary hearing which took place on 3rd September 2021.
106. During the said disciplinary hearing, the Claimant requested to be furnished with the audio recording with respect to the HOCC meeting held on 12th March 2021. It was his position that he could not proceed with the hearing without the recording. Submitting on this issue, the Claimant has contended that he was forced to proceed with the disciplinary hearing without crucial material that he needed for his defence. That as a result, the Respondent curtailed his right to fair procedure.
107. From the record, RW1 addressed one Alex Nderitu, over the issue, in which she informed him that she had contacted Zoom on the availability of the audio recording who had in turn responded that if the meeting was not recorded, no recording was available.
108. The Claimant stated that from experience, all virtual meetings of the HOCC are audio recorded. The Claimant's assertions notwithstanding, it is not possible to ascertain that that specific meeting was recorded in audio form.
109. In any event, the Terms of Reference of the Credit Committee mandates the Secretary to maintain a record of the confirmed minutes of the Committee. There is no mention of maintenance of the minutes in audio form.
110. In the premises, it would be unreasonable to find that the Respondent acted unfairly towards the Claimant solely on account of failure to avail the said audio recording whose existence cannot be confirmed and further bearing in mind that it was not a requirement to maintain such a recording in audio form.
111. The other issue raised by the Claimant with respect to procedure is that he was not given an opportunity to be heard on appeal.
112. As stated herein, the Claimant appeared before the Respondent's disciplinary panel on 3rd September 2021. Seemingly, he was dissatisfied with the manner in which the said disciplinary hearing was conducted hence on 5th September 2021, he escalated the matter to the Respondent's Group Chief People and Culture Officer through email.



113. In his email, the Claimant requested the Group Chief People and Culture Officer to intervene and to undertake further investigations with respect to the matter.
114. It is not clear from the record what transpired in the intervening period.
115. However, it is evident from the record that on 1st November 2021, the Claimant appeared before another disciplinary committee where he presented his case. It was subsequent to this hearing that the Claimant was terminated from employment.
116. In the letter of termination, the Claimant was notified that the decision was final as he had exercised his right of appeal with his request to the Respondent's Group Head of People and Culture.
117. In the Claimant's view, the Respondent's declaration not only pre-empted but also made it unnecessary and nonsensical to mount any appeal against the Respondent's decision.
118. Worthy to note is that the heading of the minutes of the disciplinary hearing held on 1st November 2021, reads as follows: "Minutes for disciplinary appeal hearing..."
119. From the record, it is evident that the Claimant had not lodged any appeal. Indeed, by the time he escalated his grievances to the Respondent's Group Head of People and Culture, he had not been notified of the decision to terminate his employment. I say so noting that at the foot of the minutes of 3rd September 2021, there was a recommendation that the Claimant's employment be terminated. Be that as it may, no decision was conveyed to him.
120. What's more, the Respondent's Employee Discipline Policy stipulates as follows at Clause 11: "The Respondent has the right and opportunity to make a single appeal against the decision made following the disciplinary meeting. This appeal must be made in writing to the CEO."
121. In this case, the Claimant did not escalate the issue to the CEO. The escalation was to the Respondent's Group Head of People and Culture. As such, one wonders why the Respondent would consider the same as an appeal. Further, the escalation to the Group Head of People and Culture was a call by the Claimant for intervention and further investigations as opposed to an appeal. Indeed, I cannot help but question what grounds of appeal were being considered by the disciplinary committee on 1st November 2021 when there was no appeal in the first place.
122. In addition, there is no proof that the Claimant was notified ahead of the said disciplinary meeting that the said hearing was being considered as an appeal hearing. Therefore, it can very well be said that the Claimant was blindsided when he was notified thereafter that he had exercised his right of appeal.
123. All in all, my conclusion on this issue is that the Claimant was denied a right of appeal contrary to the Respondent's own Employee Disciplinary Policy. Consequently, the disciplinary process applied by the Respondent was flawed and was devoid of procedural fairness.

Counterclaim?

124. As stated herein, the Respondent's Counterclaim against the Claimant is for the sum of Kshs 1,664,476.78. The grounds advanced by the Respondent to justify the Counterclaim is that owing to the Claimant's negligence, it approved and disbursed a loan to one Stephen Mutinda Ulu. That the said borrower later defaulted and it emerged that the collateral provided was registered in the names of Messrs. Nebatt Enterprises and Musoni Kenya Ltd.



125. The Respondent further averred that the purported contracts submitted by the borrower for credit scoring were not genuine and the Claimant had not taken any steps to confirm the authenticity of the said documents.
126. It is not in dispute that the Claimant was taken through a disciplinary process on account of the loan advanced to Stephen Mutinda Ulu. Following a disciplinary hearing which was conducted on 1st July 2021, the disciplinary committee recommended that the Claimant be issued with a final warning.
127. The Claimant has contended in his submissions that the Counterclaim is barred by estoppel. It was his position that by meting out a final warning over any other punishment, the Respondent legitimately created an expectation to him that it would not later seek to effect any other punishment on him.
128. I am inclined to agree with the Claimant's position that since the Respondent had taken disciplinary action against the Claimant for his alleged negligent acts with respect to the loan facility advanced to the said Stephen Mutinda Ulu, it would be double punishment to seek further relief against him over the same issue.
129. Indeed, the Respondent had the option of enforcing a recovery against the Claimant by way of a surcharge. Instead, it elected to issue him with a final warning. Therefore, by electing to issue the Claimant with a final warning, the Respondent effectively waived its right to enforce a recovery against the Claimant for the sum in question. I am fortified by the decision in the case of *Serah Njeri Mwobi v John Kimani Njoroge (Civil Appeal 314 of 2009)* [2013] KECA 501 (KLR) (26 June 2013) (Judgment), where it was held that the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence.
130. In light of the foregoing, I find no basis for the Respondent's Counterclaim. Accordingly, the same is declined.

Reliefs?

131. As the Court has found that the Respondent has failed to prove that there was a valid and fair reason to warrant termination of the Claimant's employment and that the procedure for his termination was flawed, he is awarded compensatory damages equivalent to five (5) months of his gross salary. This award takes into account the length of the employment relationship as well as the circumstances attendant to the termination. The Court has also taken note of the Claimant's testimony during cross-examination that he has since secured another occupation thus mitigating his losses.
132. The claim for notice pay is declined as it is clear that the same was paid to the Claimant as part of his final dues.
133. Equally, the claim for house allowance flops as it is evident that the Claimant's contract of employment provided that he was to earn a consolidated salary. Section 31(2) of the Act, envisages salary consolidation where then, the employer is not expected to pay a separate amount as house allowance. As such, it is clear that as per the Claimant's contract of employment, the component of house allowance was subsumed in his salary.

Orders

134. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent and he is awarded: -
 - a. Compensatory damages in the sum of Kshs 700,000.00 being equivalent to five (5) months of his gross salary.



- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
- c. The Claimant shall also have the costs of the suit.

135. The Counterclaim is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2024.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Malonza

For the Respondent Mr. Ndegwa instructed by Mr. Kiplagat

Court Assistant Millicent Kibet

Order

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

STELLA RUTTO

JUDGE

