



**Ojiambo & 2 others v Diamond Trust Bank (Cause 1608 of 2017)
[2024] KEELRC 2735 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1608 OF 2017
JK GAKERI, J
NOVEMBER 6, 2024**

BETWEEN

EVANS EDY OJIAMBO 1ST CLAIMANT

AUGUSTINE MUVEA MUNYOKI 2ND CLAIMANT

KENNETH FELIX OLONDE 3RD CLAIMANT

AND

DIAMOND TRUST BANK RESPONDENT

JUDGMENT

1. The Claimants commenced the instant suit vide a memorandum of claim dated 28th July, 2017 alleging unfair dismissal from employment.
2. The 1st Claimant alleges that he worked as a stores officer of the Respondent bank in the procurement department at the Head Office at Kshs.20,000.00 per month under a Senior Manager, one Shaffik Murandali, where the Claimant would receive and issue stationary to branches and departments and process requisitions among other duties and was accused of stealing cartridges in collusion with the 2nd and 3rd Claimants, was issued with a notice to show cause on 12th September, 2014 accusing him of lack of due diligence and negligence in discharging of his duties.
3. That he was subsequently suspended from employment for 2 weeks for purposes of investigation, refused to resign as requested and received a summary dismissal letter on 25th November, 2014 dated 18th November, 2014.
4. The 1st claimant alleges that after reconciliation, the Ministry of Labour recommended his reinstatement without loss of benefits.
5. The 2nd Claimant avers that he joined the Respondent on 2nd March, 2009 as a messenger at Kshs.18,000.00 per month inclusive of house allowance.



6. The 2nd Claimant avers that he received a notice to show cause on 12th September, 2014 accusing him of lack of diligence which led to loss of bank resources and received a summary dismissal letter on 18th November, 2014 and was given a certificate of service.
7. The 2nd Claimant avers that he made requisitions in the Respondent's on-line system (Dynamics) as an in-putter, and the authoriser was the Branch Manager and was not the in-putter from January, 2014 to August 2024 when cartridges got lost.
8. That the conciliator recommended his reinstatement without loss of benefits.
9. The 3rd Claimant, Mr. Kenneth Olonde avers that he joined the Respondent as a Junior Administrative Trainee equivalent to a messenger and posted to the Buruburu Branch vide letter dated 24th January, 2010 and confirmed effective 1st August, 2011 at Kshs.18,000.00 per month and was subsequently promoted from MLG 2 to MGI at Kshs.22,500 per month from 1st January, 2014
10. That he received a notice to show cause on 29th September, 2014 and subsequently was suspended from employment at half pay and was summarily dismissed vide letter dated 18th November, 2014.
11. That after conciliation the Ministry of Labour recommended his reinstatement to enjoyment without loss of benefits.
12. The Claimants avers although they were not members of the union, they ought to have been remunerated according to the CBA between the union and Kenya Bankers Association since the Respondent is a member of the Association.
14. The Claimants have relied on the CBA in computing their claims for the items prayed for.
15. The 1st, 2nd and 3rd Claimants pray for;
 - i. Declaration that termination of employment was substantively and procedurally wrongful/unfair.
 - ii. While the 1st Claimant prays for re-engagement, the 2nd and 3rd Claimant seek reinstatement to their former positions, without loss of benefits.
 - iii. 12 months compensation for unfair dismissal.
 - iv. The 2nd and 3rd Claimant pray for salaries lost for all the time they have been out of employment to date.
 - v. Underpayment of basic salary and house allowance.
 - vi. Annual leave days.
 - vii. Annual leave allowance.
 - viii. Overtime pay.
 - ix. One month's salary in lieu of notice.

Total claim

1st Claimant Kshs.10,068,654.00

2nd Claimant Kshs.4,355,726.00

3rd Claimant Kshs.4,582,908.00



- x. Adjustment of terms and conditions of service as per the CBA.
- xi. Costs of the claim.
- xii. Any other relief the Court may deem just and necessary to award.

Respondents Case

- 16. By a Reply filed on 5th April, 2019, the Respondent avers that Claimants employment was exclusively covered by the Letters of Appointment dated 23rd June, 2006, 9th March, 2009 and 24th January, 2010 respectively and the Respondents Human Resource Policy and Procedures Manual.
- 17. It admits having reviewed the Claimants salaries and that there was a CBA between the Association and BIFU but adds that the Claimants were not unionised during the currency of their employment and could not benefit from the CBA.
- 18. It is the Respondent's case that is conducted investigations which revealed the 1st Claimant a store officer had absolute access rights to input and authorise procurement of consumables and carry out end to end activities of the same at the Head Office and branches.
- 19. That the 2nd Claimant was suspended following the theft of printer cartridges at the Parklands branch that occasioned financial loss to the Respondent, as a total of 33 cartridges had been procured.
- 20. According to the Respondent, the 3rd Claimant, a Junior Administrative Assistant was responsible for making requisitions of printer cartridges at the Westgate Branch before moving to the Diamond Plaza branch. That investigation showed that he requisitioned a total of 144 cartridges for the period under review for the branch which was considered high and for 3 printers yet the branch had one functional printer and availed altered requisition forms.
- 21. That the investigators concluded that the Claimants colluded with one John Keya in the theft of cartridges.
- 22. The Respondent avers that the Claimant's attended a disciplinary hearing on 22nd October, 2014 and were accorded an opportunity to be heard, having been requested to be accompanied by a representative but declined, informed the charges, made representations which were considered and they were summarily dismissed.
- 23. It is the Respondent's case that termination of the Claimant's employment was conducted fairly and lawfully and their suit ought to be dismissed with costs.

Claimants Evidence

- 24. CWI, Mr. Ojiambo confirmed on cross-examination that he joined the Respondent on 23rd June, 2006 and signed a written contract as an Administrative Assistant. It was his testimony that he was underpaid as per the CBA on record dated 19th August, 2013 but admitted that he was not a member of the union because the CBA covered all employees and claims for underpayment for the entire duration of employment.
- 25. He confirmed that the CBA was for the duration 1st March, 2013 to 1st March, 2015 and there was no other CBA on record.
- 26. That as per the letter of appointment his leave entitlement was 24 days per annum, and 26 days as per the CBA, though it did not operate retrospectively and the 44 days claimed were under the CBA.



27. On overtime, CWI confirmed that his employment contract had no provision for overtime and although the excerpts of the alleged attendance register showed the time of reporting, it did not show when he exited the place or work nor the number of hours worked and related to the entire duration of employment.
28. According to CWI, the manager requested him to report early but had no evidence of the request. CWI confirmed that he had not seen the investigation report, though they had produced it as an exhibit and could not tell how his advocate on record secured it. The witness admitted that he was aware of the theft of cartridges at the Respondent bank. That from January to July 2014 he was stationed at the Head Office as an in-putter of requisitions, but immediately denied having been an in-putter and authoriser. In the Dynamic System of the bank; that he had no credentials as an in-putter but could make requisitions for all branches, although some branches made requisitions directly.
29. That he could only make requisitions in cases of emergency.
30. That requisitions came by way of telephone or email to him. He admitted that his co-Claimant gave evidence to the investigator.
31. The witness admitted that he was an in-putter of the system in procurement and was aware of the contents of the Respondents HR Manual.
32. He denied having had any meeting on 22nd October, 2014 and had not seen the minutes on record.
33. That his salary as at the date of termination was Kshs.80,000.00.
34. The witness admitted that the copies of pages of the attendance register he filed had not been authenticated by any official of the bank.
35. It was CWI's evidence that paragraph 11 of his witness statement did not identify requisition as one of his duties. In addition, he admitted that the investigation found that he had requested for cartridges and confirmed that he indeed made the requisitions and had authority to do so and had the rights.
36. He admitted that the Respondent had filed emails by staff requesting for requisitions by other staff such as Joshua.
37. The 1st Claimant testified that he was an officer in the store and could issue requisitions as and when they came.
38. The witness admitted that he initiated the requisition of cartridges for printers but could not confirm that the printers did not exist and the total number of cartridges requisitioned for the period of investigation was 745 valued at Kshs.3,574,526.39. The witness admitted that this was the basis of the suspension letter.
39. The witness further testified that the responded to the notice to show cause but was not invited for a disciplinary hearing or attend any hearing.
40. CWI testified that he used to receive Kshs.30,000.00 per month and had not taken all his leave days in 2014 at 2 days per month and could not have had 44 pending leave days as per the contract of employment .
41. The witness admitted that all the amounts claimed were predicated on the CBA.
42. On re-examination CWI testified that he was unionisable but not unionised. He alleged to have filed forms with the Respondent's HR as opposed to the union but was then in management but wanted to join the union and the last unionisable salary was Kshs.80,000.00



43. That he could make requisitions and the procurement manager would approve and upon issuance of items, the manager would sign off the requisition.
44. The witness testified that he was not interviewed by the investigator. That the investigation was triggered by loss of cartridges at the Parklands Branch and a messenger was caught on CCTV taking out a cartridge out of the bank.
45. That he had no right to authorise or in-put.
46. CWII Mr. Augustine Muvea Munyoki confirmed that he was employed in April 2009 as a messenger/ Junior Administrator and later promoted while at the Parklands Branch in 2012 to deal with stationery by in-putting LPOs for branches and the Head Officer for processing and the goods would be availed to the branch and the messenger/Junior Administration would confirm.
47. That he had no role in the store. The witness testified that there was an incident involving loss of cartridges taken from the store as the messenger was not checked and had disguised it trash.
48. The witness admitted having been questioned by the investigators at the Head Office and reported daily until he received the suspension letter on half pay.
49. That HR gave him an opportunity to resign or be dismissed without dues and was dismissed on the following day.
50. The witness admitted that he was not a member of the union. That attempts to join the union failed but it based the figures claimed on the CBA.
51. On cross-examination CWII confirmed that he did not pay any union dues but was claiming allowances and salary as a member of the union did not respond to the notice to show cause and did not attend a meeting purportedly held on 22nd October, 2014, and was unaware of the investigation report and did not appeal the termination of employment.
52. The witness admitted having received a certificate of service.
53. On re-examination CWII testified that the CBA applied to all employees of the bank.
54. The witness maintained that he was neither invited, nor participate in a disciplinary hearing or defend himself but admitted having been promoted and received annual salary increments.
55. CWIII, Mr. Kenneth Olonde testified that he was accused of theft of printer cartridges, negligence and failure to follow instructions from the supervisor, was called to the head office and recorded a statement on the lost cartridges.
56. That he was accused of ordering cartridges for non-existent printers.
57. That he received a notice to show cause but was not accorded a hearing even after writing an email to the Managing Director and was not invited for any meeting but was called by HR on 18th November, 2014 to collect the termination letter from the office.
58. The witness confirmed that he was transferred to the Diamond Plaza Branch from Westgate on 24th September, 2014 and completed the System User Right form. He admitted that the issue of ordering cartridges for the two branches arose and he was the only one ordering cartridges with Assif as the authoriser.
59. It was his testimony that debits cannot be effected on closed accounts.



60. The witness confirmed that his prayers were based on the CBA effective 1st March, 2013 to 1st March, 2015.
61. That he received a copy of the investigation report from the bank.
62. That he had the right to requisition cartridges for Diamond Plaza and no one else could do so at the branch.
63. The witness admitted at page 8 of the investigation report that the investigation found that cartridges were requisitioned for a non-existent printer.
64. That he did not respond to the notice to show cause and could not recall having attended any meeting to defend himself and did not appeal the summary dismissal.
65. That for the duration served he neither claimed overtime nor raise the issue with the employer.

Respondent's evidence

66. RWI, Mr. Peter Koome, confirmed that his witness statement did not mention any of the Claimants and did not attach the requisition forms adverted to or invoices of the cartridges.
67. It was his evidence that requisitions by branches would be forwarded to the head office, approved and the items ordered supplied. That CWI had in-putting and authorising rights and could thus do both and obtained the rights procedurally and no other person had such rights. According to RWI, Junior Administrators could also access the system.
68. That the Branch Manager of Parklands branch made no allegations against the Claimants but their wrong doing was discovered in the course of the investigation and John Keya was a Junior Administrator.
69. That he had filed the CCTV footage.
70. RWI confirmed that although in one instance CWI had indicated via email that the items requested were out of stock, the GP Dynamic showed that they in stock and CWI was in constant communication with the Junior Administrator, Mr. John Keya.
71. That Junior Administrators recorded statements but they were not filed.
72. The witness admitted that he had no evidence of superimposition of the authorisers signature. That CWI was aware of the stores procedure and the GP Dynamics was connected to all branches of the Respondent.
73. As regards the information relied on in preparation of the investigation report, RWI confirmed that it is stored and was printable and the investigation was carried out from February 2014 to August 2014.
74. RWI testified that after the disciplinary hearing, the Claimants were issued with the investigation report but could not tell when this was done.
75. The witness further confirmed that he interviewed the 2nd Claimant, Augustine Munyoki and he recorded a statement. That John Keya too was interviewed.
76. The witness further admitted that he had no documentation on the average usage of cartridges by the bank.
77. He confirmed that Wells Fargo, the Security Firm of the bank did not reveal that it had caught any of the Claimants with cartridges.



78. It was his testimony that although impromptu and spot checks were conducted at the branches, none of the Claimants was caught with cartridges and the Respondent may have lost Kshs.6,640,398,00.
79. On re-examination, RWI confirmed that Claimants had a copy of the investigation report when they filed their case and did not file a notice to produce or request for meta data or the requisitions as they were available.
80. That the Claimants had user rights for the GP Dynamics as follows:
 - 1st Claimant – right to input and authorize.
 - 2nd Claimant – right to input.
 - 3rd Claimant – right to input.
81. All the Claimants could thus make requisitions for their departments and branches and orders were prepared after authorization.
82. That the Claimants did not request for the CCTV footage.
83. RWI testified that although the 2nd Claimant was the in-putter at the Parklands Branch, the 1st Claimant could also do so.
84. That the 3rd Claimant who was based at Diamond Plaza after closure of the Westgate Branch requisitioned cartridges for the branch which the 1st Claimant authorised.
85. That the 3 Claimants colluded in their activities.
86. Finally, RWI testified that the Respondent's HR manual required the Claimants as members of staff to safeguard and protect the Respondents assets.
87. RWII, Yvonne Murichu confirmed that there was a CBA between the Union and the Kenya Bankers Association.
88. It was her testimony that not all subordinate staff were unionisable.
89. The witness admitted that the Respondent had not filed the letter of invitation to the disciplinary hearing, the minutes on record were unsigned and the numbering was erroneous.
90. That the letter of dismissal did not inform the Claimants that they had the right to appeal the decision as provided by the HR Manual.
91. That the Claimants were issued with the investigation report but the witness could not tell when it happened and none had been issued with a warning letter.
92. That the 2nd Claimant was non-unionisable and was not a member of the union.
93. That RWII did not attach the letter inviting the 2nd Claimant for the disciplinary hearing.
94. The witness testified that the minutes on record were recorded by the Secretary but could not tell who it was and admitted that none of the attendees signed the minutes.
95. RWII confirmed that the 3rd Claimant was not unionisable because his position of Junior Administrative Trainee was not but his job description was not provided.



96. That the 3rd Claimant was invited for a disciplinary hearing. On re-examination, RWII testified that the Respondent is a member of the Kenya Bankers Association and the Claimants were not members of the union and the bank was not involved in their recruitment as members of the union.
97. That the Respondent relied on the investigation report before the hearing as it recommended action against those implicated.
98. That the Claimants did not allege that they did not attend a hearing and none of them appealed the summary dismissal.
99. On over-time, RWII testified the Claimants were not entitled to any as they were not unionisable and payments for overtime required approval by the line manager and none was sought.

Claimants Submissions

100. On unionisability of the Claimants, Counsel submits that Section 2 of the *Labour Relations Act* defines who is unionisable and Section 59(3) is clear on incorporation of terms of the CBA in the contract of service and CWI had no job description.
101. Reliance was made on the sentiments of Mbaru J. in *Carolyn L. Musonye V Panari Hotel Ltd* [2017] eKLR as well as the contents of the CBA for the period 1st March, 2013 to 1st March, 2015 Counsel urges that CWII was employed as a messenger and his job description was provided and the duties were captured by the CBA on record as per its preamble.
102. Reliance was made on the sentiments of the Court of Appeal in *Kenya Chemical & Allied Workers Union V Bamburi Cement Ltd* [2017] eKLR, to submit that the 2nd Claimant was unionisable.
103. That the 3rd Claimant was employed as Junior Administrative Trainee, then as a Teller with no job description and was thus covered by the CBA on record.
104. Counsel argues that although the Claimants were not members of the union their job profiles and roles in the bank show that they were unionisable though not unionised.
105. As to whether the Claimants were remunerated contrary to the CBA Counsel submits that they were based on their job roles and the Respondent's averment that their employment was governed by the Letters of Appointment was untenable as there was a CBA in force whose terms the Respondent did not incorporate into the employment contracts contrary to the provisions of Section 59(3) of the *Labour Relations Act* and the Respondent did not disclose the existence of the CBA between BIFU and the Kenya Bankers Association as held in *Omondi Justus Ranganga & 2 others V KCB and BIFU* that it amounts to misrepresentation of facts and illegal.
106. Counsel urges that the Respondent ought to have disclosed the terms of the CBA to the Claimants by incorporating its terms in their contract of employment.
107. That the Claimants consent was obtained fraudulently as they were not paid as per the CBA and were underpaid.
108. Counsel submits that the Claimants should have been paid salary and house allowance as follows: 1st Claimant 2006 – 2014, 2nd Claimant 2009 – 2014 and 3rd Claimant 2010 – 2014.
109. As to whether the CBA operated retroactively, Counsel submits that it is trite that parties to a CBA can agree on the retrospective application of a CBA, and in this case parties had agreed to have the CBA apply retrospectively based on the scales for 2006 and cited the decision in *University of Nairobi V*



- KUDHEIHA & Another [2023] eKLR where the Court held that there was nothing to suggest that the parties had agreed that the CBA for 2013 – 2017 would apply retrospectively.
110. On termination of employment Counsel urges that it was unfair for want of a reason citing *Kenafric Industries Ltd V John Gitonga Njeru* [2016] eKLR, *Kefreight (EA) Ltd V Benson K. Nguti* [2016] eKLR and *Harry Kibet V Diamond Trust Bank*.
 111. That the Respondent did not attach copies of requisitions and invoices of cartridges allegedly stolen.
 112. That the 1st Claimant had in-putting and authorizing rights in the GP Dynamics.
 113. That the amount allegedly lost was not proved.
 114. Reliance was made on the sentiments of the Court of Appeal in *County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 6 Others* [2015] eKLR to urge that the computer print outs of requisitions from GP Dynamics on record were inadmissible for want of a certificate as required by law.
 115. Counsel maintains that based on the evidence on record, the Respondent had not shown that it had a valid reason to dismiss the Claimants from employment and cites *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR.
 116. On procedure, Counsel admits that the provisions of Section 41 of the *Employment Act* were not complied with and the Claimants suspension was wrongful and they were not invited for a hearing and the Respondent did not avail copies of the invitation letters.
 117. Reliance was made on the decisions in *Harry Kibet Teimuge V Diamond Trust Bank Ltd (Supra)* and *Kenfreight (EA) Ltd V Benson K. Nguti (Supra)*. Counsel submits that the alleged “minutes” of the disciplinary hearing were intended to mislead the Court and highlighted the similarities between the letters such as proceedings were conducted on the same date 22nd October, 2014.
 118. The decision in *Howard Andrew Nyerere V Kenya Airways Ltd* [2014] eKLR was also cited on the essence of having minutes signed that the summary dismissal letters made no mention of any disciplinary proceedings and had similar introductory sentence and made no reference to the right to appeal.
 119. On reliefs, Counsel submits that the Claimants were entitled to the prayers sought for unfair summary dismissal.

Respondent’s Submissions

120. On 18th April, 2024 the Court accorded the parties 30 days each to file and exchange submissions and the Claimant filed on 7th July, 2024.
121. The Respondent was accorded time to file and serve but by 19th September, 2024, it had not filed. On 8th October, 2024, the Respondent was accorded 5 days to file and serve submissions but had not done so by 28th October, 2024 when the Court retired to prepare this judgment.

Analysis and determination

122. It is common ground that the Claimants were employed by the Respondent on diverse dates between 23rd June, 2006 and 24th January, 2010, as junior staff.
123. The 1st Claimant was employed as a Trainee-Administration Assistant, the 2nd Claimant as a messenger and the 3rd Claimant as Junior Administrative Trainee.



124. All the Claimants were summarily dismissed vide letters dated 18th November, 2014.
125. It is equally not in contest that the Respondent and the Banking Insurance and Finance Union (BIFU) had a CBA dated 19th August, 2013 effective 1st March, 2013 until 1st March, 2015 which covered section Head (Supervisors), check clerks, clerical staff, copy typists, all technical staff and all subordinate staff, Head Messengers, watchmen, drivers, chauffeurs employed by the Employer and covered by the terms of the Recognition Agreement in force between the union and the Association.
126. Puzzlingly, the Respondent did not avail copies of the Claimants job description. However, the 2nd Claimant provided a copy of his job description.
127. Finally, it is not in contest that after the suspected theft of printer cartridges was reported by the Parklands Branch Manager, the Respondent commissioned an investigation which revealed occurrences in relation to requisition and delivery of cartridges from the store which implicated the 1st, 2nd, and 3rd Claimants and one Mr. Keya based at the Parklands Branch.
128. Evidence revealed that the 1st Claimant was both an in-putter and authoriser in the system (GP Dynamics) and requisitions and receipt of consumables was by a Junior Administrative Assistant which made the system susceptible to manipulation and the 1st Claimant did so and colluded with the junior administrative staff to inflate or order cartridges for non-existent printers.
129. That whereas the 2nd Claimant made 5 requisitions for the Parklands Branch, the 1st Claimant made 4 for the Branch and appeared to be in collusion with Mr. John Keya as he was the one in charge of requisitions.
130. At the Westgate Branch, the investigators found that the 3rd Claimant, a junior Administrator made requisitions and received orders. That he explained weaknesses in the system.
131. That all requisitions for the Diamond Plaza Branch, 88 printer cartridges were made by the 1st Claimant while the 3rd Claimant ordered and received a total of 144 cartridges under the Westgate profile and many were ordered for non-existing printers.
132. None of the Claimants contested the findings of the investigation although only the 3rd Claimant admitted that he received a copy of the investigation report from the Respondent.
133. The issues that commend themselves for determination are;
- i. Whether the Claimants were unionisable and could benefit from the CBA dated 19th August, 2013.
 - ii. Whether termination of the Claimants employment by the Respondent was unfair and unlawful.
 - iii. Whether the Claimants are entitled to the reliefs sought.
13. On the 1st issue, while the Claimants Counsel submitted that the Claimants were unionisable but not unionised, the Respondent did not address the issue despite having averred that the Claimants were not unionised.
134. Significantly, Section 2 of the [Labour Relations Act](#) provides that:
- “unionisable employee” in relation to any trade union means the employees eligible for membership of that trade union.



135. Instructively, and as submitted by the Claimant's Counsel, the Respondent neither alleged nor averred that the Claimants were not unionisable.
136. Equally, Section 59(1)(b) of the Act provides that;
- (1) A collective agreement binds for the period of the agreement -
 - (a) ...
 - (b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement.
 - (2) ...
 - (3) The terms of a collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
137. It is clear that the Claimants were all very junior employees of the Respondent. While the 1st Claimant was a stores officer, the 2nd Claimant was employed as a messenger and was a front officer at the Parklands Branch having been a Junior Administrative Officer and the 3rd Claimant was a Junior Administrative Officer whose duties included requisitioning and receiving consumables.
138. In August, 2009, the 2nd Claimant's duties included making and serving tea/coffee if called upon, messengerial, filing, assist at the switchboard, collection of mail/deliveries from post office, Head office and other branches and lunch time relief for receptionist, if need be.
139. In February, 2012 he was a Teller and his duties included; receiving and paying cash from/to customers, debit/credit vouchers, back up Western Union and Money Gram Teller and check point, marketing and cross selling of bank products among others.
- Section 26(2) of the *Employment Act* provides that;
1. ...
 2. Where terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law decreed by any judgment, awards or order of the Employment and Labour Relations Court are more favourable to an employee than the terms provided in this part, and part VI, the such favourable terms and conditions of service shall apply.
140. Similarly, Section 13(5) of the *Employment Act* provides that;
- A statement under subsection (1) may refer the employee for a change in either of the matters specified in Section 10(3)(e) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.
141. Needles to emphasize Section 13(1) of the Act requires the employer to notify the employee by written statement a change in any of the particulars under Sections 10 and 12 of the Act. The statement must set out the particulars.
142. Since the Respondent is a member of the Kenya Bankers Association, it was privy to the CBA dated 19th August, 2013 and which applied to the Claimants as they were unionisable and was thus required to notify the Claimants in writing that there had been changes in their terms of employment.



143. The Respondent adduced no scintilla of evidence to prove that it informed the Claimants of the changes or where they could reasonably access the CBA.
144. Relatedly, Section 26(2) of the *Employment Act* is clear on which terms of employment ought to apply.
145. Guided by the foregoing provisions of the *Labour Relations Act* and the *Employment Act* it is the finding of the Court that the Claimants were not only unionisable but the Respondent was bound by the terms of the CBA and ought to have not only informed the Claimants in writing about the changes but incorporated the terms of the CBA into their contracts of employment as they were more favourable to them.
146. However, contrary to the Claimants claim and their Counsels submission that the CBA operated retroactively, the Court is not so persuaded as no credible evidence of an agreement to that effect was availed. The duration of the CBA on record is explicit.
147. Clause A2 of the CBA is unambiguous that “the duration of this Agreement shall be for a period of twenty four (24) months commencing on 1st March 2013...”
148. Clearly, any claim predating the CBA cannot be sustained under the provisions of the CBA.
149. Similarly, CWI confirmed on cross-examination that there was no other CBA on record.
150. CWI, equally confirmed that he was grounding his claim on the CBA as did the 3rd Claimant who admitted claiming for enhanced salary allowances and leave prior to the CBA.
151. In the Court’s view, claims that predate the CBA and are based on the terms of the CBA are a contradictory in terms and not enforceable.
152. As to whether the summary dismissal of the Claimants was lawful and fair, Counsel for the Claimants contended that it was substantively and procedurally unfair for want of a reason and procedural fairness.
153. While the notices to show cause accused the Claimant for lack of due diligence, the letters of summary dismissal accused each of them of negligence and failure to follow directions of their superiors.
154. According to Counsel the Respondent did not avail evidence of copies of the requisition forms and invoices it reviewed to prove its case against the Claimants. In any case, the Claimants were not suspected of theft prior to the investigation.
155. That the Respondent did not avail the CCTV footage or meta data from the system.
156. However, the contents of the investigations report, which none of the Claimants contested revealed how requisitions were made for non-existent printers and when cross-examined on 19th October, 2021, CWI, Evans Ojiambo admitted that he was an in-putter of requisitions but denied being an in-putter and authoriser.
157. However, on 16th December, 2021 he testified that requisition was not one of his duties as per his written statement but admitted having made requisitions as he had the right to do so in cases of emergency procurement but had evidence of any request from staff to requisition.
158. He admitted having requisitioned for cartridges for printers he was unaware of but was aware that the investigation was triggered by loss of cartridges at the Parklands Branch where an employee was caught on CCTV taking a cartridge out of the bank.



159. Strangely, on re-examination, the 1st Claimant testified that he had no right to authorise and in-put, rights he admitted he had on cross-examination and the investigator found as much.
160. The rights CWI had in the GP Dynamics placed him in a position where he could determine requisitions at will by manipulating the system to ensure that the cartridges requisitioned were more than the requests made and did so for the Head Office, Parklands and Diamond Plaza branches and no emergency situations were demonstrated to justify the requisitions, as the branches had officers to do so, Mr. Augustine Munyoke (CWI) and Kenneth Olonde (CWIII) respectively, which would appear to suggest that the three were working in cahoots in the requisition of cartridges.
161. A review of the 1st Claimants evidence reveals that he was not entirely truthful in Court.
162. CWII was the in-putter at the Parklands Branch at the material time and confirmed the goods when supplied.
163. The witness confirmed that he often made requisitions for cartridges without verification and did not confirm the stationery received.
164. In essence the 2nd Claimant could not tell whether there was under or over requisitions of cartridges and worked in the same Branch with John Keya who was caught on CCTV taking a cartridge out of the bank.
165. Similarly, CWIII admitted that he was the only one ordering cartridges for the Diamond Plaza Branch after he was transferred from Westgate in September and his profile at Westgate was linked to Diamond Plaza but requisitioned cartridges for the Diamond Plaza but using the Westgate profile and cartridges were being requisitioned for non-existent printers, something CWIII admitted.
166. Although the Claimants Counsel faults the investigation Report for want of attachments or documents the investigator relied upon, the Court finds it help as it corroborates the evidence availed by the Claimants and provides insights on how the printers were requisitioned for the outside market.
167. The investigation report implicated all the Claimants in wrong doing as all were involved in the requisitioning of cartridges for non-existent printers.
168. In determining whether the Respondent had a valid and fair reason to dismiss the Claimants from employment, consistent with the provisions of Sections 43 and 45(2) of the *Employment Act*, the Court is guided by the provisions of Section 43(2) which provide that;

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

169. According to the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR
"...reason for termination are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in the contract. For example, poor performance, insubordination and lack of loyalty are some of the grounds..."



170. B. O. Manani J. expressed similar sentiments in *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR that;
- "...All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists..."
171. Finally, in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR the Court of Appeal held that;
- "The standard of proof is on a balance of probabilities, not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That is a partly subjective test".
172. The foregoing is fortified by the *Halsbury's Laws of England* (4th Edition) Vol 16(1B) paragraph 642 on the range of reasonable responses test as applied by Lord Denning in *British Leyland (UK) Ltd V Swift* [1981] IRELR 91 as follows:
- ...The correct test is, was it reasonable for the employer to dismiss him, if no reasonable employer would have dismissed him, the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view; another quite a different view....
- If it was quite reasonable to dismiss him then the dismissal must be upheld as fair though some other employer may not have dismissed him".
173. Guided by the foregoing provisions and proposition of law, the Court is persuaded that the Respondent provided sufficient evidence to prove that the Claimants were actively involved in the requisitioning of cartridges for non-existent printers and the theft was facilitated by one John Keah.
174. The investigator's evidence which was uncontroverted demonstrated that the Claimants were actively involved in the scheme.
175. In the Court's view, the Claimants conduct amounted to gross misconduct which entitled the employer to summarily dismiss them from employment.

Procedure

176. It requires no belabouring that the procedural precepts prescribed by section 41 of the *Employment Act* are mandatory for a termination of employment or dismissal to pass muster. See *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR.
177. Courts have isolated the elements of Section 41 of the Act, such as explanation of the grounds of termination in a language understood by the employee grounds of termination, entitlement to the presence of a colleague during the explanation and hearing and considering any representations made by the employee and the colleague (see *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR where the Council held that termination of employment or dismissal not conducted in accordance with the provisions of Section 41 of the *Employment Act* is irregular.
178. In the instant case it is common ground that the Respondent availed three (3) similar documents dated 22nd October, 2014 under the names of the Claimants as minutes of the disciplinary hearing. No other document was availed.



179. The documents at pages 133, 140 and 152 of the Respondent's List and Bundle of Documents dated 5th August, 2019 lack authentication in the first instance and state that each Claimant had no representative and they each stated that they did not wish to have a representative.
180. The documents indicate that the same persons sat as members of the committee and none was designated as chair of the meeting.
181. The documents are identical in every respect save for the Claimants name.
182. Strangely, and as pointed out by Counsel for the Claimants, the numbering of the minutes in all of them is incorrect as it is Min. 1, 2, 3, 2, 3 and 5 and all end at minute 5 and have no time as to when the hearing commenced or ended.
183. For unexplained reasons, the Respondent availed to Court copies of documents that were unsigned. See *Howard Adrew Nyerere V Kenya Airways Ltd (Supra)*. Intriguingly, none of the Claimants signed the alleged minutes.
184. An unsigned document lacks authorship and authentication and is of nominal probative value, if any, as the Respondent did not avail evidence from any of the alleged committee members to confirm that a hearing took place on that day.
185. In sum, the documents lack credibility and are of no evidential value.
186. While minutes of proceedings show that a hearing took place and the employee was accorded an opportunity to defend him or herself, the right to be heard is more broader in that it encompasses availment of statements, materials or evidence to be relied upon by the accuser, presence of a colleague, invitation to a hearing and sufficient time to prepare for the hearing and clear charges.
187. The Respondent provided no evidence to demonstrate that it invited any of the Claimants for a hearing or availed the requisite time to enable them prepare for the hearing as well as the investigation report.
188. Only CWIII confirmed that he received a copy of the investigation report from the Respondent. CWI and CWII denied having been given a copy of the report. RWII could not confirm if and when copies of the report were issued to the Claimants.
189. The invitation notice was also supposed to inform the Claimants of the right to be accompanied by a colleague of their choice coupled with the right to adduce evidence and cross-examine witnesses.
190. CWI confirmed on cross-examination that he was not interviewed by the investigators or involved in the investigations, an allegation the Respondent did not controvert.
191. RWII confirmed that there was no invitation notice on record and minutes were not signed. Without any documentary evidence to prove that the Claimants were invited for a hearing and their attendant rights safeguarded, the Court lacks a basis on which to find and hold that the summary dismissal of the Claimants by the Respondent met the procedural threshold prescribed by Section 41 of the *Employment Act*, and thus fair.
192. Puzzlingly, the letter of summary dismissal made no reference to any invitation to a hearing or any hearing at all and RWI confirmed as much.
193. Similarly, the letter was silent of the Claimants right to appeal the Respondent's decision contrary to the provisions of the Respondent's HR Manual.
194. RWII confirmed as much during cross-examination and analogous to RWI, RWII could not recall when and how copies of the investigation report were availed to the Claimants.



195. Finally, on suspension, whereas CWI and CWII were suspended effective 12th September, 2014 the 3rd Claimant was suspended on 29th September, 2014 and the purpose of the suspension was to facilitate further investigations.
196. Paragraph 3.7.3 of the Respondents HR Manual provides that suspension could be resorted to in major disciplinary offences where investigation was required to facilitate the same and an employee on suspension would be paid ½ salary less deductions and no benefits or allowances and was required to report to the supervisor and sign a register once a week unless otherwise directed by the Unit/Managing Director, Chief Executive Officer or Human Resource Manager.
197. Suspension, interdiction or stepping aside pending investigation is integral to the disciplinary process and may be resorted to by an employer as held in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* [2014] eKLR.
198. It enables an employer investigate alleged misconduct and may be recalled for disciplinary proceedings or resumption of duty.
199. The foregoing is fortified by the sentiments of the Court of Appeal in *Charles Muturi Mwangi V Invesco Assurance Ltd* [2019] eKLR.
200. Contrary to the submissions of the Claimants' Counsel that the Claimants' suspension was unlawful, the Court is not satisfied that the Claimants have evidentiary proved its unlawfulness.
201. Flowing from the foregoing, it is the finding of the Court that the Respondent has failed to prove on a preponderance of probabilities that it conducted the summary dismissal of the Claimants in accordance with the provisions of the *Employment Act* on procedure.

Appropriate reliefs

i. Declaration

202. Having held that the summary dismissal of the Claimants fell below the procedural precepts of Section 41 of the *Employment Act*, the declaration that the dismissal was procedurally flawed and unfair is merited.

ii. Re-engagement or reinstatement

203. Bearing in mind that the summary dismissal, the subject matter of the instant suit took place in November, 2014 almost 10 years ago, neither re-engagement nor reinstatement would be an appropriate remedy as times have changed and both parties have moved on. More specifically, the Claimants adduced no evidence to prove that the positions they held were still available and re-engagement or reinstatement was practicable.

The prayer is declined.

iii. 12 months compensation

204. Having found that the summary dismissal was unfair for want of procedural fairness, the Claimants are entitled to compensation by dint of Section 49(1)(c) of the *Employment Act*, up to a maximum of 12 months gross salary.
205. Taking into account the fact that the Claimants were employees of the Respondent for 8 years and 5 months, 5 years and 8 months and 4 years and 4 months, respectively, which is not long, none had recorded cases of misconduct or warning letter as RWII confirmed on cross-examination, but



all substantially contributed to the summary dismissal by engaging in discreditable conduct, none of them appealed or express their wish to remain in employment but for the prayer of reinstatement, the equivalent of two (2) month's gross salary is fair.

iv. Salary lost due to unemployment to date

206. The 2nd and 3rd Claimant adduced no evidence of entitlement to lost salary to date and the claim was not submitted on by Counsel.
207. Without an evidential and legal grounding, the claim is unsustainable and it is accordingly dismissed.
208. Needles to emphasize this is a claim for anticipatory earnings which lacks a legal basis as held in D. K. Njagi Marete V Teachers Service Commission [2020] eKLR.

v. Underpayment of basic salary and house allowance

209. Having found that the Claimants ought to have benefited from the more favourable terms of CBA dated 19th August, 2013, effective 1st March, 2013, the Claimants are awarded the difference between the amount payable to them under the CBA and the actual salary received from the Respondent for the duration 1st March, 2013 to 18th November, 2014, a duration of about 1 year 8¹/₂ months.
210. Counsels shall compute the same and file the same for adoption within 30 days.

vi. Annual leave days

211. None of the Claimants adduced evidence to prove the actual number of pending leave days and when they accrued.
212. All Claimants are however awarded 2 extra days for 2013/2014 and one (1) day for the 8 months in 2014 a total of 3 days as per the CBA.
213. The claim for 44 leave days by the 1st Claimant, 37 annual leave days by the 2nd Claimant and 32 days by the 3rd Claimant lack supportive evidence and is dismissed.

vii. Annual leave allowance

214. The Claimants are awarded the difference between the annual leave allowance paid in 2013 and November, 2014 and the amount payable under the CBA for the duration 1st March, 2013 to 18th November, 2014.

viii. Overtime

215. The 1st Claimant prays for overtime of 620 hours Kshs.950,001.00, 2nd Claimant 2664 hours Kshs.1,220,242.00 and 3rd Claimant 2254 hours, Kshs.1,469,293.00.
216. The days are computed for the entire duration of employment on the assumption that each Claimant worked extra hours every day of their employment which has not been demonstrated by evidence.
217. Clause 6 of the Letter of Appointment of the 1st Claimant entitled "HOURS OF DUTY" stated that the hours of work shall be:

Monday to Friday 8:30am to 1pm

2:00pm to 5:30pm



Saturday – 9:00am to 1:30pm

218. The Letters of Appointment of the 2nd and 3rd Claimant had similar a clause (clause 6).
219. The 1st Claimant alleged that he used to report to work at 7:00am and availed copies of the register they used to sign.
220. He also testified that he used to open the Bank.
221. CWI, however, admitted that the 25 pages filed only showed entry to the work place and no exit times and apart from the name of the supposed employee, day, date and time, the pages are not on the Respondents letter head nor authenticated by any official of the Respondent facts the Claimant admitted on cross-examination.
222. The 2nd Claimant and the 3rd Claimant filed no documentary evidence on overtime.
223. In the Courts view, the claim for overtime is difficult to sustain as none of the Claimants adduced evidence to prove when the hours accrued and/or how they were supposed to claim for the extra hours as none testified that the Respondent had a policy or procedure for claiming overtime or explain why they did not claim.
224. The provisions of Section 107,108 and 109 of the Evidence Act are unambiguous that the party that alleges any facts or facts is obligated to establish its or their existence.
225. Significantly, none of the Claimants testified on when the reporting time or exit time changed and at whose instigation since the Letter of Appointment was explicit on the reporting and exit times.
226. In Charles Ogola & 2 Others V Mansion Hart Kenya Ltd [2019] eKLR Onyango J. held thus
"overtime is a continuing wrong while underpayment is a right. It is therefore only overtime that would be statute barred as provided under Section 90 of the Employment Act...".
227. Makau J. expressed similar sentiments in James Kyama V Muthaiga Golf Club [2022] eKLR that
"The claim for overtime in my opinion is a continuous wrong contemplated under Section 90 of the Employment Act which claim must be made within 12 months of cessation thereof..."
228. In the instant suit, the Claimants employment ended on 18th November, 2014 and the suit was filed on 16th August, 2017 almost 3 years later.
229. By simple arithmetic, it is clear that suit was filed outside the 12 months window under Section 89 of the Employment Act and thus the claim is time barred as the cause of action arose on 18th November, 2014.
230. In sum, the claim for overtime is dismissed on account of want of particulars and being statute barred.

ix. One months salary in lieu of notice

231. Having found that the Respondent had a valid and fair reason to summarily dismiss the Claimants from employment in accordance with the provision of Section 44 of the Employment Act for gross misconduct, the claim for pay in lieu of notice is unmerited and it is disallowed.



x. Adjustment of terms and conditions of service as per the CBA

232. Having held that the Claimants prayer for underpayment, leave and leave allowance are merited as per the CBA dated 19th August, 2013, the prayer for the adjustment of terms as per the CBA is unmerited and is declined.
233. In the upshot, judgment is entered in favour of the Claimants against the Respondent in the following terms;
- a. Declaration that the summary dismissal of the Claimants by the Respondent was procedurally unfair.
 - b. Equivalent of 2 months gross salary as compensation.
 - c. The difference between the amount payable under the CBA and the salary and house allowance paid from 1st March, 2013 to 18th November, 2014.
Counsels to compute and file the same within 30 days for adoption.
 - d. Payment for 3 days annual leave each for the duration of the CBA.
 - e. The difference between the leave allowance paid in 2013 and November 2014 and the amount payable under the CBA. Counsels to compute.
 - f. Interest on the sum awarded at Court rates from the date of judgment.
 - g. 50% costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 6TH DAY OF NOVEMBER, 2024.

DR. JACOB GAKERI

JUDGE

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 has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *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.

DR. JACOB GAKERI

JUDGE

