



Gathoni v Airports Savings & Credit Co-operative Society Ltd (Cause E588 of 2020) [2024] KEELRC 2716 (KLR) (5 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2716 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E588 OF 2020
JK GAKERI, J
NOVEMBER 5, 2024**

BETWEEN

ELIZABTH GATHONI CLAIMANT

AND

**AIRPORTS SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LTD RESPONDENT**

JUDGMENT

1. The Claimant commenced the instant suit by a statement of claim filed by 20th September, 2020 alleging unfair and wrongful termination of employment by the Respondent.
2. It is the Claimant’s case that she joined the Respondent in November 2011 and rose to become the FOSA Supervisor and later Finance Manager and served diligently until termination of employment in 2020.
3. That sometime in 2013 the Claimant noticed loopholes on the Sacco Financial System and ATM Control which were susceptible to exploitation by insiders and reported the same to the then Chief Executive Officer (CEO) and IT Personnel for necessary action but no action was taken, not even the email dated 1st October, 2018 copied to the CEO, Account Officer and Assistant Account precipitated action and as a consequence the Respondent lost Kshs.9,647,404.93 through one Dorothy Waeni, the Account Officer who was privy to the communication to the CEO.
4. That at the Claimant’s initiative she ascertained that the ATM Control Account could not balance because Dorothy Waeni had created a fictitious account using a relative’s name and pilfered funds and both the CEO and the chairman were informed.
5. That the Account Officer was responsible for receiving and banking cheques and after reporting to the police, Dorothy Waeni was charged and the criminal case is pending.



6. The Claimant avers that she was suspended on 28th October, 2019 allegedly to pave way for investigations, issued with a notice to show cause dated 7th February, 2020 on the cheque numbers 271006 and 27007 which were neither received nor banked.
7. That by letter dated 30th March, 2020, the Claimant was invited for a disciplinary hearing slated for 7th April, 2020, but was issued with another notice to show cause dated 6th April, 2020, responded to all issues comprehensively and hearing took place on 24th April, 2020, and was dismissed from employment vide letter dated 29th April, 2024, but minutes of the hearing were not availed even after a formal request that she appealed the dismissal but the decision was affirmed.
8. The Claimant faults the dismissal on the grounds that the Respondent used a flawed procedure, provided generalized allegations, absence of good faith and sanctions imposed.
9. The Claimant prays for;
 - a. Declaration that termination of employment was unlawful, unprocedural and unfair.
 - b. Declaration that the Respondent had no valid reason to terminate her employment.
 - c. The sum of Kshs.50,282,788.63 comprising;
 - i. Three (3) month's salary in lieu of notice Kshs.512,057.10.
 - ii. Kshs.43,012,796.40 as loss of expected earnings to expected retirement.
 - iii. 12 months compensation Kshs.2,048,228.40.
 - iv. Employer pension contribution of 10% of Kshs.173,922.96.
 - v. Half salary from November 2019 to termination.
 - vi. Certificate of service.
 - vii. 33 days salary in lieu of leave days Kshs.187,434.27.
 - viii. Gratuity at 25% Kshs.913,262.90.
 - d. Costs of this suit and interest at court rates from date of filing till payment in full.
 - e. Certificate of service.

Respondent's Case

10. By an amended Memorandum of Defence dated 24th February, 2023, the Respondent admits that the Claimant was its employee until 29th April, 2020 when she was summarily dismissed from employment.
11. The Respondent avers that a board meeting held on 23rd October, 2019, which the Claimant attended discussed issues affecting the finance department and in particular losses suffered owing to lapses in the Department and the board was not satisfied with the explanation given and an audit was recommended and a cash deficit of Kshs.9,647,404.93 was unearthed and the Finance Manager was responsible for reviews and/or reports and a show cause letter was issued on 7th February, 2020 and response required by 14th February, 2020, who admitted the loss occasioned by one Dorothy Waeni.



12. That the Respondent found the explanation unsatisfactory and investigated the issue and had to postpone the hearing to accord the Claimant time to respond to the findings of the investigation, which she did, attended a hearing and was dismissed from employment thereafter.
13. The Respondent's case is that the dismissal was valid and fair as the Claimant failed to account for monies received and held on behalf of the Respondent and was negligent and the provisions of Section 44(4)(c) of the *Employment Act* were applicable and prays for dismissal of the Claimant's case with costs.
14. The Claimant's response to the amended memorandum of response dated 20th June, 2023 raised no new issue other than the Respondent's failure to appreciate that she had raised the issue of the loophole in the company's system which remained unaddressed for a long time.

Claimant's evidence

15. On cross-examination, the Claimant catalogued all her duties as the Respondent's Financial Manager and admitted that finance was crucial to any SACCO, that she had three supervisees including the Accounts Officer and the FOSA Supervisor and it was her duty to confirm their reports and raise issues whenever variances were noted.
16. The Claimant admitted that challenges in finance begun before she joined the Respondent and continued thereafter and all were reported to the CEO and IT as evidenced by email dated 1st October, 2018.
17. The witness admitted that she was the Finance Manager when Quality Inspection Ltd opened a FOSA account without relevant documents but denied that she was the one incharge of account opening and recorded a statement with the police on it.
18. That she was aware of a complaint by a customer, and according to the Claimant the CEO of the Respondent used to change the payee from the account holder to himself.
19. That the treasurer approved a dividend of 15% which was paid in lieu of 13% approved by the Annual General Meeting.
20. That her investigation in September 2019 implicated Dorothy Waeni, the Account Officer and the same was reported to the CEO, Chairman and the Treasurer who directed that it be reported to the police which the Claimant did and the criminal suit was pending in Court.
21. The witness admitted that she did an email on the weaknesses of the control system.
22. The Claimant further testified that the suspension was too long and attended the board meeting on 23rd October, 2019 but was not present when her issue was discussed by the board of directors. That she attended board meetings on invitation by the board to report on the issues raised and reported to the Finance Committee of the Board of Directors.
23. The Claimant confirmed that the chairman appeared for the disciplinary hearing virtually but it was not recorded and was present for the appeal hearing as a member of the panel.
24. That the minutes did not cover all the issues discussed at the meeting and was given an opportunity to use a laptop to access evidence at the hearing.
25. The Claimant testified that although the letter of termination of employment mentioned negligence, it did not provide particulars. That she was not paid anything after dismissal from employment save what she had saved with C.I.C (insurance) under the pension scheme.



26. Our re-examination, the Claimant testified that she discharged her duties as per her job description and those reporting to her could not report fraud to her as the supervisor and when she discovered the fraud, she reported the same to the CEO, Chair of the Board and the Treasurer.
27. That Dorothy Waeni's fraud through a FOSA account led to the loss of over Kshs.9.6 Million and was aware and had raised the issue of non-reconciling ATM Account verbally and later via email to the CEO and IT and an email was done to the service provider to rectify the same. That Dorothy exploited a loophole in the system and the same remained undiscovered until September, 2019 and the Claimant filed a report on it and the matter was reported to the police and prosecution commenced.
28. That the Quality Inspectors Ltd's FOSA Account was opened by Customer Care who reported to the FOSA Supervisor who reported to the Claimant.
29. That the CEO was changing payees of cheques to himself and he gave instructions on the dividend pay-out but in her written response states that it was an error.
30. The Claimant testified that she used to check accounts at different times, some daily, others monthly and anomalies could only be noticed on review. That the suspension was too long and thus unfair as it was for over 6 months and the Respondent did not issue a notice of extension.
31. That the minutes of the disciplinary were incomplete and were not availed.

Respondent's Evidence

32. RWI, Lucy Sachngor confirmed that an audit was conducted in October 2019 but the minutes made no reference to the audit report as it was concluded in November, 2019.
33. The witness was unsure of the duration of suspension testifying that it was 3 months and a few days but confirmed that the Human Resource Manual provided for 2 months unless extended.
34. The witness confirmed that there was no report on the alleged lost funds and the witness could not trace it.
35. That the Claimant provided updates on Dorothy's case as the supervisor and was unaware of who recorded a statement on behalf of the Respondent in Dorothy's case and the internal auditor was not sanctioned for the loss of funds as the accounts were balancing and the Claimant was charged with the loss of Kshs.9.6 Million.
36. That the Claimant's email dated 1st October, 2019 raised issues noted in the internal audit report.
37. The witness confirmed that the notice to show cause dated 7th February, 2020 had only two charges while the one dated 6th April, 2020, had many.
38. That the investigation report had no annexures and the Claimant did not ask for them and it was the basis of the charges.
39. The witness denied that the Chairman of the Board attended the disciplinary meeting and had no apologies but admitted that the Claimant was not given a copy of the minutes of the meeting, a written request notwithstanding.
40. The witness conceded that FOSA accounts were approved by the FOSA Supervisor and she was the Supervisor when Quality Inspectors Ltd account was opened, leading to the loss of Kshs.9.6 Million facilitated through the account. The witness admitted that she was not sanctioned and the Claimant was blamed for the loss.



41. The witness further admitted that he read the judgment in CMELRC No.577 of 2015 and the Claimant was blamed for the loss.
42. The witness testified that they relied on the SASRA Report which had inter alia noted that the SACCO had lent more than it was supposed to and the Claimant was blamed for it because she did not provide advise. The witness, however, confirmed that loans were approved by the Credit Department and the Credit Committee.
43. RWI, further confirmed that dividend was approved by the Annual General Meeting (AGM) but did not provide minutes of the rate approved by the AGM and other persons who sanctioned the payment were not penalized.
44. That the Claimant was found guilty of one charge as per the letter of dismissal.
45. The witness testified that before suspension, the Claimant had not been sanctioned by the Respondent.
46. On re-examination, the witness testified that the investigation report was a notice to show cause and the Claimant responded and had access to the documents referred to in the report.
47. According to RWI, the Chairman of the Society did not attend the meeting held on 24th April, 2020.
48. On dividend, RWI testified that it was testified that difficult to tell what rate was used as there was none and the Claimant admitted that it was an error.

Claimant's Submissions

49. On procedure for termination terminating the Claimant's employment, Counsel submits that it was unfair and relies on the decision in Matsesho V Newton [2022] KEELRC 1554 (KLR) to urge that the attendant steps were not complied with in that the Respondent did not avail the Claimant the reports it cited in the notice to show cause and the Claimant was not interviewed by the investigator and cites Stephen Chase Kisaka V Emirates Airline Ltd [2020] eKLR for the proposition that failure to provide the employee with relevant documents for purposes of preparing for his or her defense vitiates the process.
50. That in addition, minutes of the hearing were not availed despite a request by the Claimant and she contested the minutes. Reliance was made on the decision in Wachira V. East Africa Portland Cement Co. Ltd [2024] KEELRC 352 (KLR).
51. Counsel urges that the Respondent made excessive allegations against the Claimant which made it difficult to prepare for her defense and the allegations were a witch hunt, as some of them happened before she joined the Respondent.
52. Counsel, further urges that the Claimant's suspension was inordinately long and in contravention of the Respondents Human Resource Policy and thus unreasonable.
53. That the Respondent did not consider the Claimant's response to the notice to show cause thus denying her the right to fair hearing.
54. That the Claimant's employment was terminated on charges other than the ones she had responded to.
55. As regards the reason for termination of employment, Counsel submits that Claimant sufficiently responded to the allegations made and since the allegations were not based on any evidence, the Respondent had no reason to terminate the Claimant's employment. Counsel urges that the Respondent did discharge the burden of proof and the Claimant's dismissal was unfair.



56. On reliefs, Counsel urges that the Claimant is entitled to all the reliefs claimed.

Respondent's Submissions

57. On termination of the Claimant's employment, Counsel submits that the Claimant was negligent in paying incorrect dividend contrary to a resolution by the AGM, failed to detect improprieties by staff, and members of the SACCO lost money.
58. That the Claimant did not avail evidence of having raised the concerns to the Respondent.
59. Reliance was made on the decision in Kenya Revenue Authority V Reuwel Waithake Gitahi & 2 Others [2019] eKLR on the import of Section 43(2) of the *Employment Act* as well as the band of reasonable responses test in the Halsbury's Laws of England 4th Edition, Vol 16 (1B) para 642.
60. Reliance was also made in the decision in Agnes Murugi Mwangi V. Barclays Bank of Kenya Ltd [2013] eKLR and Galgalo Jillo Jarso V Agricultural Finance Corporation [2021] eKLR among others to urge that the Respondent had a reason to terminate the Claimant's employment.
61. On procedure, Counsel for the Respondent submits that the suspension was fair as the investigations were extensive and cited the sentiments of the Court in Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd [2024] eKLR.
62. Counsel submits that the Claimant was accorded a fair chance to respond to the allegations, the timing and number of allegations notwithstanding, and the process was fair.
63. On reliefs Counsel urges that none is due as it was a summary dismissal and fair and the Claimant was paid for untaken leave days.

Analysis and determination

64. It is common ground that the at all material times the Claimant was the Respondent's Finance Manager, a SACCO having joined in November 2011 as FOSA Supervisor under a 3 year contract but the terms of engagement changed to permanent and pensionable effective 1st July, 2014 at a monthly salary of Kshs.130,000.00
65. It is equally not in contest that the Claimant rendered services diligently until she was suspended from duty on 28th October, 2019 for the loss of Kshs.9,647,4040.93 from the SACCO accounts. The suspension was intended to facilitate further investigation. She was placed on half pay and was to report to the CEO at 9:00am every business day.
66. The Claimant remained on suspension until she was summarily dismissed from employment vide letter dated 29th April, 2020, 6 months later, a duration she contested in these proceedings.
67. Equally, the Claimant received a notice to show cause dated 7th February, 2020 accusing him of negligence which had led to the loss of Kshs.9,647,404.93. She was also blamed for two KCB cheques that were neither received nor banked.
68. Notably, the notice to show cause lacks particulars of the allegation. For instance when was the Kshs.9,647m404.93 lost? Within what duration? How did it get lost? Who are the culprits and where did the cash go and who discovered the heist among other relevant particulars?
69. The Claimant responded by letter dated 12th February, 2020 stating that the loss was a consequent of fraud by staff not negligence, and the issue had been raised with the then CEO, chairman of the board and the treasurer.



70. The Claimant blamed the manual ATM account opening, she had reported earlier.
71. On the cheques, the Claimant testified that the cheques were received by the person whose duty was to receive cheques, signed for them and they were banked and the Claimant's role was to verify whether payment had been made and the Account Assistant, on request confirmed that there was no such account and the fraud was unearthed.
72. By letter dated 30th March, 2020, the Claimant was invited to a disciplinary meeting slated for 7th April, 2020 to respond to the charge of "negligence on duty" and was notified of the right to be accompanied by a colleague.
73. However, on 6th April, 2020, the Claimant was issued with another notice to show cause under reference "Investigation Report" intimating that the SACCO had lost Kshs.54,994,187.57 owing to the Claimant's poor performance and negligence for failure to observe the Human Resource Manual, Finance Manual, Credit Policy, SACCO Societies Act and SASRA Regulations.
74. The Court finds it necessary to capture the specific allegations as itemised to demonstrate the background of the Claimant's summary dismissal from employment on 29th April, 2020.
75. The notice to show cause catalogued nine (9) charges namely;
1. Bankers cheques NO. 156636 of Kshs.169,900.30 issued by Co-operative Bank dated 20th May, 2014 – unbanked.
 2. Failure to implement AGM resolution on Dividend in 2018 paid 15% in lieu of 13%.
 3. Cheque No. 452,838 Kshs.365,53, February 2016 banked in 1st March, 2016.
 4. Wrong postings in Suspense/Reconciliation account on 11th October, 2019.
 5. Purported loans to members disbursed to unknown account No.0000111144xxxx.
Loan Kshs.200,000 given to John Kembo member No. 372961 but the amount disbursed to another person's account on 19th June, 2013 and the scenario recurred in relation to Patrick Muhoho member No.374200 Kshs.250,000.00 on 11th April 2013.
 6. Excessive loans to Gideon Cheruiyout Kipsoi, Bernard Kemboi and George Karanja.
 7. Quality Inspectors Ltd, loss of Kshs.3,670,456.64, Civil case No. 577 OF 2015.
Account opened by Mukonya Muia with authority to Finance Manager to Queen Ndeti – No company search conducted.
 8. Bankers cheques No. 271007 Kshs.183,333 and No. 271007 Kshs.734,451.45 by KCB, cheques neither received nor receipted.
 9. Fraud by Dorothy Waeni Tom resulting in loss of Kshs.9,647,404.93.
76. The Respondent appears to be blaming the Claimant for all the challenges facing the Respondent including fraud by employees.
77. Notably, the notice to show cause highlights the document(s) relied upon by the Respondent, such as external Auditor 2019 for allegation No. 1, 2, 3, 4 and 8, internal records for allegations No. 5 and 7, SASRA Report 2015 allegations No.6 and the Forensic Audit Report for allegation No.9.
78. None of these documents was availed to the Claimant to enable her respond to the charges.



79. The Claimant responded vide letter dated 14th April, 2020 as the hearing was postponed.
80. It is unclear to the Court why the Respondent waited till the eve of the hearing to ambush the Claimant with numerous charges and avail no documentation from which they originated.
81. The Claimant had prepared to confront the charge of negligence but was bombarded with 8 others.
82. The Claimant's lengthy response addressed each issue specifically, for instance in the case of the cheques issued by the Co-operative Bank in 2014, the Claimant explained that under the Co-ops Sacco personal loans between the SACCO and the bank entered into in 2009/2010, the loans were not booked in the SACCO system nor documented by the SACCO. Only the bank had documents and the arrangement was made before the Claimant joined the Respondent and only Dorothy Waeni and the CEO knew how it worked, and the cheque was traced in Dorothy Waeni's old documents.
83. On dividend, the Claimant admitted that it was an error of commission and the excess was recoverable from member's future dividend or deposits.
84. On the wrong postings in the suspense/reconciliation account, the Claimant stated that the ATM control account had opening/closing balance challenges and had written an email to that effect in 2018.
85. As regards loans disbursed to unknown account the then CEO was the culprit.
86. On excessive loans the Claimant stated that she had notified SASRA in 2014 before it did an inspection which led to the suspension of the CEO.
87. That Quality Inspectors Ltd account was opened in 2013 by Customer Care without any directions and the criminal case was in court.
88. The Claimant's response appear to have been explanatory for most of the allegations except the loss of Kshs.9,647,404.93 as the dismissal letter mentions failure to account for monies received or held on behalf of the respondent and negligence.

Reason for termination

89. For a termination of employment to pass muster the law requires the employer to demonstrate that it had a valid and fair reason to do so and employed a fair procedure.
90. There must have been a substantive justification for the termination and procedural fairness as held in *Naima Khamis V. Oxford University Press (EA) Ltd* [2017] eKLR.
91. In the instant case the letter of summary dismissal states that the dismissal was on account of "failure to account for monies received or held on behalf of the Society and negligence leading to loss of the societies monies"
92. Whereas the invitation to the hearing dated 17th April, 2020 rehashed the contents of the 2nd notice to show cause save for the particulars and source of the allegation, the dismissal letter is silent on the particulars of the grounds.
93. Clearly, and as submitted by the Claimant's Counsel neither of the two notices to show cause dated 7th February, 2020 and 6th April, 2020 accuse the Claimant of failure to account for any monies she allegedly received or held on behalf of the society.
94. It was neither claimed or alleged nor testified that the Claimant received and/or held any amount of money on behalf of the Respondent.



95. An allegation grounded on failure to account is underpinned on the fact that the person liable to account received or held monies or assets on behalf of the other.
96. As the Finance Manager of the Respondent, the Claimant's job description did not include any receipt or holding of monies on behalf of the Respondent.
97. In fact, the Respondent availed no scintilla of evidence to show that the Claimant used to receive any monies in the ordinary course of her employment.
98. Perhaps this is the reason why the letter of summary dismissal is reticent on the amount received and/or held by the Claimant on behalf of the Respondent.
99. In the ordinary course of her work, the Claimant prepared financial and management reports participated in the budgetary process implemented the finance policy, addressed investments, identified loopholes and control systems and advised on accuracy of documents and receipts, provide information on pricing of FOSA products conduct stock take reviews and make recommendations among others.
100. None of the foregoing involved receiving and/or holding monies on behalf of the Respondent. Whereas a cashier may be called upon to account for monies received on behalf of the employer or organization, the supervisor cannot as their roles are different while a cashier receives and banks the money received, the supervisor ensures that the records he or she has reflects the true state of affairs and ensures that cashier does his or her work.
101. For unexplained reason the Respondent did not find it necessary or essential to identify how much money the Claimant received on its behalf or held and what was not accounted for, the absence of such particulars renders the ground of termination of employment hollow as it lacks specificity.
102. The Respondent availed no shred of evidence to demonstrate that the Claimant had previously received and/or held any amount of money on its behalf and had failed to account.
103. In the Court's view, the allegations set out in the two notices to show cause and the letter of summary dismissal are incongruous.
104. It is trite that an employee's employment cannot be terminated on grounds other than those previously brought to the attention of the employee and an explanation demanded as a different ground changes the texture of the dispute and is tantamount to condemning the employee unheard, a violation of one of the precepts of nature justice, audi allerum partem which is now a constitutional imperative.
105. The Court is in agreement with the submission of the Claimant's Counsel that the Claimant was not given an opportunity to answer to one of the charges on which her employment was terminated.
106. In the end, it is the finding of the Court that the Respondent has failed to prove that the Claimant refused, failed or neglected to account for any monies received or held on behalf of the Respondent.
107. This finding is informed by inter alia the basic principle of the law of evidence that he who makes an allegation shoulders the burden of proof as provided by the provisions of Section 107, 108 and 109 of the *Evidence Act*.
108. The absence of particulars as to when the alleged monies was given to the Claimant to hold or received it on the Respondent's behalf, including how much and when she refused to account for it renders the ground a mere allegation, bearing in mind that it was not identified by the notices to show cause dated 7th February, 2020 and 6th April, 2022 respectively.



Whether the Claimant was negligent and as a consequence the Respondent lost monies.

109. This issue is critical as it was implied in the letter of suspension dated 28th October, 2019. Similarly, the 1st notice to show cause accused the Claimant of negligence of duty that her failure to exercise due care and attention caused a loss of Kshs.9,647,404.93 to the SACCO.
110. The charge was grounded on the activities of the Account Officer, one Dorothy Waeni who was the Claimant's supervisee and accuses the Claimant of having trusted her thereby enabling her to engage in fraudulent activities of misappropriation of SACCO funds which went unnoticed for a year.
111. The charge has no dates as to when the fraudulent activities commenced. In her response, adverted to in this judgment earlier, the Claimant explained that she had as early as 2013 noticed that there was a loophole in the Respondent's financial system (fine extreme) in respect of the ATM Control account where opening of the month/year was done manually resulting in reconciliation challenges as transactions of any particular month or year are reflected in the previous month and had to be posted manually and had raised the same with the CEO and Systems Administrator by word of mouth and later by email dated 1st October, 2018 copied to Elvis Maina and Dorothy Waeni & Flora Ongoche.
112. The Claimant's email leaves no doubt that the issue had been under discussion but was never resolved and suggested that the system provider resolved the same.
113. Similarly, Mr. Silvanus Mulli's email dated 23rd October, 2018 at 11:07pm to seven persons including the Claimant provided a summary of the systems issues, customization requests concerns and their status, evidence that the issue had been raised.
114. Finally, an email from Elvis Kariuki dated 29th January, 2019 at 3:06pm confirms that indeed the ATM control account had challenges which complicated reconciliation and raised audit queries.
125. Clearly, the Claimant had identified the issue and the same had been discussed before Dorothy Waeni took advantage of it.
116. Although it is unclear as to when the Claimant raised the issue with the CEO and the Systems Administrator, the Respondent led no evidence to deny that the issue had been raised.
117. Similarly, the Claimant explained how she unearthed the fraudulent activities of Dorothy Waeni of misposting during reconciliation by reason of the manual ATM opening.
118. The Claimant stated that she reported the issue to the CEO, Chairman of the board and the treasurer, evidence the Respondent did not controvert. It did not deny that Dorothy Mueni was charged and the Claimant and RWI recorded statements on the case.
119. It is unclear for how long the fraudulent activities of Dorothy Mueni continued before being unearthed by the Claimant.
120. Puzzlingly, the fraudulent activities were not spotted by the internal auditor or external auditor, if the Respondent had one.
121. The "Forensic Audit Report" referred to in the Respondent's notice to show cause dated 6th April, 2020 is undated and no copy was availed to demonstrate how the theft was orchestrated and when, to either corroborate or controvert the Claimant's evidence.
122. In the absence of such details the Claimant's evidence remains uncontroverted.



123. Notably, at its meeting on 23rd October, 2019, although Respondent's Board of Directors agreed that the ICT systems audit be conducted, no resolution to that effect was made.
124. Evidently, the Respondent's board appreciated that the system had challenges and corrective action was necessary.
125. On Dorothy Waeni's fraudulent activities, there is no gain saying that fraudsters hide their tracks as much as possible and as long as one account is debited and another credited it is difficult to detect the mischief unless or until a complaint is raised or an investigation conducted and thus takes time.
126. It is not the duty of a supervisor to discover fraudulent activities of supervisees unless it is so brazen that a reasonable supervisor ought to have noticed it.
127. As regards payment of dividend, the Claimant admitted the error which was a misposting and could be corrected and the excess dividend recovered and no evidence was adduced that any loss ensued.
128. Concerning Milimani CMCC No.577 of 2015, it is unclear as to when the FOSA account was opened and what documents Gladys Mukonyo Muia presented to Customer Care to open the account as the Claimant did not have then in Court.
129. During the hearing, the Claimant testified that she had no role to play in the opening of FOSA Accounts as it was the duty of the FOSA Supervisor to confirm the documentation and it was RWI. Customer Care ought to have conducted and Know Your Customer (KYC) and RWI ought to have confirmed that the documents presented were sufficient.
130. The Court is not persuaded that the Claimant was negligent in relation to the opening of the FOSA account and the loss occasioned by the Respondent was not attributable to her.
131. Flowing from the foregoing, it is the finding of the court that Respondent has failed to evidentiary demonstrate that the Claimant performed her duties negligently leading to loss of funds.
132. To the question whether the Respondent genuinely believed that it had reasonable basis to terminate the Claimant's employment consistent with the provisions of Section 43(2) of the *Employment Act*, the Court is not persuaded that it had notwithstanding the fact that the test is partly subject as held by the Court of Appeal in Kenya Revenue Authority V. Reuwel Waithaka Gitahi & 2 Others (Supra).
133. Applying the band of reasonable responses test in Halbury's Laws of England (Supra) captured by Lord Denning in British Leyland (UK) Ltd V. Swift [1981] IRLR 91, the Court is not persuaded that based on the grounds relied upon by the Respondent in this case, a reasonable employer would have dismissed the Claimant from employment.

Procedure

134. The Claimant faults the procedure employed by the Respondent on the ground that she was not accorded a fair chance to controvert the issues, copies of the reports allegedly relied upon by the Respondent were not availed and was not interviewed for purposes of the investigation, which hampered her defence. In addition, copies of minutes were not availed, and the allegations were excessive.
135. It requires no gainsaying that the provisions of Section 41 of the *Employment Act* prescribes an elaborate mandatory process which an employer must comply with for a termination of employment to pass muster, as held in Pius Machafu Isindo V. Lavington Security Guards Ltd [2017] eKLR.



136. In *Postal Corporation of Kenya V. Adrew K. Tanui* [2019] eKLR, the Court of Appeal identified the salient elements of Section 41 of the *Employment Act*, as explanation of the grounds of termination in a language understood by the employee, the grounds on which termination of employment is being contemplated, entitlement of the employee to another employee of his choice when the explanation is made and hearing and considering the representation made by the employee and that other person.
137. In this case, the Respondent issued two notices to show cause dated 7th February, 2020 and 6th April, 2020 respectively.
138. The 1st accorded the Claimant 7 days to respond and the second had no specified duration. The Claimant Respondent vide letter dated 12th April, 2020. In either case, the Claimant had sufficient time to respond and did so in detail and for the hearing the Claimant was accorded 7 days to prepare for her defence.
139. However, for his defence, and as adverted to elsewhere in this judgment, the 2nd notice to show cause styled as Investigation Report had 9 charges and none of the documents clearly identified as the background of the charge was availed to the Claimant to facilitate preparation of her defense.
140. Having been suspended from employment in October 2019, pending further investigation, it behooved the Respondent to avail the investigation report and all the materials it relied on in drafting of the charges.
141. As the Claimant was already on suspension, with no access to documents or reports cited, the Claimant could only respond using the information at her disposal and based on her experience.
142. Clearly, the Respondent impeded the Claimant's constitutional right to fair hearing as avilment of information, materials and evidence to be relied upon by the decision maker is a legal right, not dependent on requests as provided by *the Constitution* of Kenya and Section 4 of the *Fair Administrative Action Act*.
143. The decision in *Stephen Chase Kisaka V. Emirates Airline Ltd* (Supra) cited by the Claimant's Counsel is spot on, that failure by the employer to furnish the employee with the relevant documents to facilitate preparation of her or his defence vitiates the process and renders the process flawed and unfair.
144. It is also essential to underline the fact although the Respondent suspended the Claimant from employment to investigate the allegations against her, she was not invited for an interview by the investigator if there was one and did not record a statement. Thus, the Respondent did not conduct a balanced investigation from which it drafted charges and it is unsurprising that most of the allegations were not based on sustainable facts.
145. The Respondent's resentful treatment of the Claimant is further manifested in the manner it conducted the hearing in that the Claimant was inter alia given the documents she needed at the hearing and was not accorded time to peruse them before the hearing yet the hearing was predominantly a question answering session for the Claimant who was not accompanied by a colleague.
146. First, the Chairman of the meeting Gyllian Kwamboka did not read out the charges the Claimant was facing or provide an explanation of the purpose of the meeting.
147. Second, the minutes are silent on who asked which of the 73 questions, and after the 73rd question, the chair did not ask the Claimant whether he had any question or representations to make.
148. It is the duty of the person presiding over the disciplinary meeting to accord the employee an opportunity to make his or her comments or remarks or ask questions.



149. Third, for unexplained reasons the Respondent refused to give the Claimant a copy of the minutes for perusal and confirmation of the record or in case she was desirous of filing an appeal as she did.
150. The Claimant testified that there were two apologies and they were not recorded.
151. Similarly, the Claimant alleged that the Chairman of the board appeared virtually, but RWI denied the allegation but could not explain why she did not avail a copy of the minutes as she attended the meeting as the Acting CEO of the Respondent.
152. In determining whether the termination of the Claimant's employment was procedurally fair the Court is guided by the sentiments of the Court of Appeal in *Postal Corporation of Kenya V. Adrew K. Tanui* (Supra) where the Respondent had declined to avail the investigation report to the Respondent.
153. The Court stated as follows:

...The board had in its possession the very document that formed the basis of the charges formed against the Respondent but kept it away from him. Even in criminal trials which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictments which could torpedo his entire career and destroy his future..."

See also *Regent Management Ltd V Wilberforce Ojiambo Oundo* [2018] eKLR.

154. From the foregoing, it is decipherable that the procedure employed by the Respondent in the termination of the Claimant's employment fell below the threshold prescribed by the provisions of the *Employment Act* rendering the same flawed and unfair and the Court so finds.
155. For the foregoing reasons it is the finding of the Court that the termination of the Claimant's employment was unfair.
156. Whether the Claimant is entitled to the reliefs sought.

a. Declaration

157. Having held as above the declaration sought that termination of employment was unfair and unlawful is merited as is the declaration that the Respondent had no valid reason to terminate the Claimant's employment.

b. Salary in lieu of notice

158. The Claimants' letter of confirmation of employment dated 28th June, 2012 provided that as per the Respondent's Human Resource Manual either party could terminate the relationship by 3 months notice or salary in lieu of notice.
159. The transition of the Claimant from fixed term contract to permanent and pensionable did not alter the requisite termination notice.
160. The Claimant is awarded three months salary in lieu of notice Kshs.512,057.1

c. Loss of expected earnings till retirement

161. Needles to belabour, although the Claimant was serving under "permanent and pensionable terms" as per the letter dated 28th August, 2014, her employment was not permanent as it had on exit clause invocable by either party. See *Engineer Francis N. Gachuri V Energy Regulatory Commission* [2013] eKLR.



162. Similarly, the claim for Kshs.43,012,796.4 is a claim for anticipatory earnings for which no legal basis has been laid and as held in Elizabeth Wakanyi Kibe V Telkom Kenya Ltd eKLR, there is no legal provision on payment of compensation or damages till retirement.

163. See also D K. Njagi Marete V Teachers Service Commission [2020] eKLR.

The prayer for expected earnings till retirement lacks a legal basis, is unsustainable and it is accordingly dismissed.

d. 12 month's compensation

164. Under Section 49(1)(c) of the *Employment Act*, an employee whose employment is terminated or summarily dismissed unjustifiably, is entitled to compensation not exceeding 12 months gross salary.

165. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation.

166. In determining the level of compensation, the Court has considered that the Claimant had no previous warning letter or complaint, served for a period of 8 years and 5 months which is not long, appealed the dismissal and to some extent contributed to the termination of employment, the Court is satisfied that the equivalent of 4 months gross salary is fair Kshs.682,742.8

e. Employer pension contribution of 10%

167. Having been a member of the pension scheme, the amount claimed or due to the Claimant is recoverable through the pension administrator.

The prayer is declined.

f. Half salary from November 2019 till termination

168. Having found that termination of the Claimant's employment was unjustified the claim for the unpaid half salary is merited.

169. The Court finds this claim justified in that the inordinate suspension of the Claimant was unjustified as no investigation report was availed or given to the Claimant.

170. Significantly the Respondent could not explain why the suspension was 6 months although paragraph 14.4 of the HR Manual allowed the employer to extend suspension at its discretion, the Respondent provided no evidence of having extended the suspension after the prescribed 30 days.

171. The extended extension was not justified and the unpaid half salary is payable to the Claimant.

g. 33 days leave

172. The Claimant's evidence on record make no reference as to when the leave days accrued.

173. The claim lacks particulars and is declined.

h. Gratuity at 25%

174. The Claimant's prayer for gratuity of Kshs.913,262.9 is grounded on paragraph 9.4 of the Respondents Human Resource Policy 2011, which provides for three year contracts and it was payable at the end of the contract period.



175. However, although the Claimant joined the Respondent under a 3 year contract effective 1st November, 2011 and was confirmed effective 1st July, 2012, she transitioned to permanent and pensionable terms effective 1st July, 2014 thereby bringing to an end the fixed term contract employment.
176. In the Court's view, it would appear to follow that the Claimant was entitled to prorated gratuity up to 30th June, 2014, but as she did not enforce her right to the contractual gratuity within the prescribed duration, the same is unenforceable and it is declined.

i. Certificate of service

177. The Claimant is entitled to a Certificate of Service by dint of Section 51 of the [Employment Act](#).
178. In the upshot judgment is entered in favour of the Claimant against the Respondent in the following terms:
- a. Declaration that termination of the Claimant's employment was unjustified and unfair.
 - b. 3 months salary in lieu of notice Kshs.512,057.1
 - c. Equivalent of 4 months salary Kshs.682,742.8
 - d. Unpaid half salary for the entire duration of suspension.
 - e. Certificate of service.
 - f. Costs of the suit.
 - g. Interest at Court rates from the date of judgment till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5TH 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

