



REPUBLIC OF KENYA



**Chemwok v Kenya Commercial Bank Ltd (KCB) (Cause 262 of 2018)
[2023] KEELRC 18 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 18 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 262 OF 2018
DN NDERITU, J
JANUARY 19, 2023**

BETWEEN

FRANCIS K. CHEMWOK CLAIMANT

AND

KENYA COMMERCIAL BANK LTD (KCB) RESPONDENT

JUDGMENT

I. Introduction

1. In a Statement of Claim dated 22nd October, 2018 and filed in court on 24th October, 2018 through Mwakio, Kirwa & Co. Advocates the claimant prays for: -
 - a. A declaration that the termination of Claimants' employment on account of negligence was discriminative, malicious, unlawful, unfair, un-procedural and a fundamental violation of the rights of the Claimant;
 - b. A Declaration that the Claimant was discriminated upon.
 - c. The terminal dues as tabulated herein below.
 - d. A maximum compensation as per Section 49(c) of the *Employment Act*, 2007;
 - e. A certificate of Service as per Section 51 of the *Employment Act*;
 - f. Costs and interest of this suit;
 - g. Any other award as the Honourable court deems fit to grant in the circumstances of this case.Terminal Dues Calculations:
 - i. Pay in lieu of notice



Section 36 of the Employment Act

Calculations based on the Respondent's CEO's memo dated 20th April, 2017

The Claimant served the Respondent for 22 years.

190,703 x 3 months.....Kshs.572,109/=

- ii. Compensation for unfair termination Section 49(1) (c) of the Employment Act

The Claimant served the Respondent for 22 years

Gross pay x 12 months

Kshs.190,703/= x 12 months.....Kshs.2,288,436/=

- iii. Days worked in May from 1st May, 2018

to 10th May, 2018.....Kshs.63,567,66/=

- iv. Leave Prorate

From 1st January, 2018 – May, 2018

28 x 190,703 x 5 Months

12 30.....Kshs.74,162/=

- v. Damage for discrimination.

- vi. Severance pay

Calculations based on the Respondent's

CEO's memo dated 20th April, 2017.

months consolidated pay x years worked

1.5 x 190,703 x 22 years worked.....Kshs.6,293,199/=.

2. Together with the statement of claim was filed a statement by the claimant and a bundle of documents in support of the claim.
3. On 19th November, 2018 the Respondent through Mukite Musangi & Co. Advocates entered appearance and filed a memorandum of response dated 13th December, 2018 on 14th December, 2018. The Claimant filed a response to memorandum of reply to the claim dated 8th April, 2021 on 12th April, 2021. In their memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. This cause came up in court for hearing on 2nd February, 2022 when the Claimant (CW1) and Michael Kipkoror Chemwok (CW2) testified and the Claimant closed his case.
5. The defence was heard on 16th March, 2022 when JOseph Kibor (RW1) and Bramwel Simiyu MbirirA (CW2) testified and the Respondent's case was closed.
6. Counsel for the Claimant filed written submissions on 17th May, 2022 while Counsel for the Respondent filed on 25th May, 2022.



II. Claimant's Case

7. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of CW1 and CW2, and the written submissions by his Counsel, and the same is summed up as hereunder.
8. The Claimant was employed by the Respondent on 11th November, 1996 and confirmed on 1st March, 1999. By the time of termination on 9th May, 2018 the Claimant was designated as assistant business manager with a gross consolidated salary of Kshs.190,703/= per month. It is the Claimant's case that the said dismissal was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness.
9. The Claimant testified that he was terminated on allegations of irregularities in the performance of his duties as stated in the letter of termination but he denied all the allegations in the letter and dismissed the same as witch hunt and malicious. He testified that in the processing of applications for various facilities by clients his duties as assistant business manager included collecting customer's data, creating a file, and then forwarding that profile to the branch manager for evaluation and approval or disapproval. He stated that this is what he did in all the facilities affecting the customers named in the letter of termination and that he did so in accordance with his job description and established bank guidelines, procedures, and policies.
10. The Claimant vehemently denies that he was at any point involved in the evaluation and or approval of any of the facilities and that all the affected facilities were approved either by the branch manager with the assistance and or consent from credit managers, analysts, evaluators, and risk assessors from the head office at Nairobi. He is categorical that he had no powers and or authority of approving any facility and that he approved none of those listed in the letter of termination. He testified that the accusations and allegations against him were baseless as those responsible are well known to the Respondent but he was used as a scapegoat. He stated that he did not benefit from any of the facilities that were alleged to have been irregular and he further denies that there was anything irregular about the said facilities.
11. The Claimant testified that the Respondent has all the legal means of pursuing the defaulters in case a facility is not serviced and hence there is no way he should have been held to account for non-performing facilities. He denies exposing the Respondent to any risk or loss or acting in untrustworthy or unprofessional manner. He admits that he collected the primary data in regard to a facility for his brother CW2 and also for Cosy Holdings LTD, wherein the branch manager Abraham Kiptanui was a director, but denies any conflict of interest or misconduct in that regard.
12. He testified that upon what he considers to have been unlawful termination he was not paid his terminal dues hence his filing of this cause and the prayers set out above.

III. Respondent's Case

13. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions by Counsel, as summarized hereunder.
14. In the response to the claim the Respondent asserts that the Claimant was fairly and lawfully terminated and afforded both substantive and procedural fairness before and during termination. The Respondent argues that the Claimant engaged in misconduct and conflict of interest which made the Respondent to lose trust in him in a sensitive sector that is banking. The Respondent therefore prays for dismissal of the claim with costs.
15. RW1, the manager at Eldoret West Branch of the Respondent where the Claimant worked, testified that the Claimant acted on a loan application from one Roseline Mueni Kasyoki who is (was)



wife to former branch manager without disclosing that fact at the appraisal level. He alleged that such conduct amounted to conflict of interest on the part of the Claimant. He also alleged that the Claimant recommended approval of a loan for his brother Michael Kipkoror Chemwok(CW2) without disclosing that fact and that the said facility is non-performing and the bank is unable to recover the asset that was financed as the debtor has obtained court orders to stop the realization of the same to offset the debt.

16. On alleged falsification of documents by the Claimant RW1 admitted that the Respondent had not availed any such falsified documents in court during the trial. He admitted that while the Claimant could have recommended approval of a facility the branch manager had ultimate authority in approving or rejecting the facility and if in doubt the branch manager could still send such an application to the headquarters at Nairobi for consideration at the credit department level.
17. Further, RW1 admitted in cross-examination that it is the branch manager who ultimately approved the facility to his wife and to the brother of the Claimant. He also admitted that all the customers named in the termination letter were established customers of the Respondent who held accounts with the bank even before the Claimant joined the Eldoret West Branch and that they all qualified for the facilities that were advanced to each one of them. He also admitted that the Respondent has a procedure and means of realizing non-performing facilities.
18. When court sought clarification from RW1 on the exact role that the Claimant played in the credit facilitation to customers, he stated that the Claimant used to analyze and make recommendation to the branch manager but the final say was with the branch manager on whether to approve or decline any application for any facility and that if the branch manager was in doubt or saw the need he could always forward the application to the headquarters for evaluation by the credit department. He stated that Abraham Kiptanui, the branch manager at the material time, voluntarily retired before this cause came up for hearing.
19. RW1 admitted that there is no evidence that any terminal dues were paid to the Claimant upon termination.
20. RW2, an employee relations manager with the Respondent, alleged that the Claimant was terminated for violating various guidelines and policies and falsifying documents to enable unqualified customers to obtain facilities that they did not otherwise qualify for. He alleged that the Claimant was accorded both substantive and procedural fairness before, during, and after termination.
21. RW2 testified that the Claimant was informed of the charges against him, issued with a show cause letter, and invited for a disciplinary hearing that the Claimant attended along with a representative. He stated that the Claimant even signed the minutes taken during the disciplinary hearing.
22. In cross-examination RW2 admitted that the investigations report prepared by the Respondent did not find the Claimant at fault for failure by the clients to service the facilities but insisted that the Claimant was dishonest in his work. He stated that although the Claimant challenged the termination internally his appeal was dismissed.

IV. Issues for Determination

23. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered, and submissions by both counsel and identifies the following issues for determination –
 - a. Was the termination of the Claimant by the Respondent unfair and unlawful?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?



- c. Who meets the costs in this cause?

V. Termination

24. The terms and conditions of employment of the Claimant by the Respondent are not in dispute. As at the time of termination on 9th May, 2018 the Claimant was based at Eldoret West Branch of the Respondent holding the position of assistant business manager at a consolidated monthly salary of Kshs.190,703/=. It is also not in dispute that the Claimant was terminated vide a letter dated 9th May, 2018 with effect from that date.
25. As far as the court can discern from the evidence adduced from both parties the termination of the Claimant was commenced by way of a show cause letter dated 9th February, 2018 followed by an invitation to attend a disciplinary hearing dated 7th April, 2018
26. The Respondent listed the charges in the invitation letter as follows -
1. Why while appraising Cosy Holdings Ltd loan, you failed to disclose that the company was owned by the former Branch manager Abraham Kipruto and his wife Ms. Roseline Mueni Kasyoki? This violated the KCB Code of Conduct on disclosure of wrong doing.
 2. Why while handling facility appraisal for former BMs Wife, you irregularly/fraudulently duplicated the CQ entity without justifications enabling Ms. Roseline to qualify for a loan of Kshs.500,000/= as per CQ No.1194373? This violated the KCB Code of Ethical Business Conduct on Corruption.
 3. Why you violated the KCB Conflict of Interest Policy by your action of processing/granting an ABF and STA facility for your brother Michael Chemwok?
 4. Why you were involved in unethical conduct of concealing material facts known to you while processing facilities for your brother and the former Branch Manager?
 5. Why on several occasions, you irregularly rolled over an STA facility extended to your brother to conceal default against Bank policy?
 6. Why while processing a loan for Garden Education Centre, you failed to conduct KYC and processed the loan without obtaining any documentations from the customer exposing the Bank to risk of loss?
 7. Why you lied in your response dated 22nd February, 2018 that Michael Chemwok is not your brother?
 8. Why you exposed the Bank to potential loss of Kshs.3.5 by your action of irregularly granting an ABF facility to your brother which is now non-performing?
 9. Why disciplinary action cannot be taken against you for the above irregularities?
27. The above charges are the same as those raised in the show cause letter alluded to above.
28. The disciplinary hearing was to take place on 12th April, 2018. However, on the request from the Claimant, the hearing was rescheduled for 20th April, 2018. Both the invitation letter and the notice for the new hearing date were served upon the Claimant who duly acknowledged receipt thereof.
29. The hearing proceeded on 20th April, 2018 as per the minutes produced as exhibit by the Respondent and the Claimant was reminded of the charges that he faced and of his rights during the hearing. The Claimant came along with a representative, Alexius Sapari, a fellow employee.



30. The Claimant defended himself against all the charges as per the recorded minutes of the disciplinary hearing availed in court as evidence. He signed the minutes as did his representative as well along with the disciplinary hearing panel.
31. In a nutshell, the Claimant defended himself against all the charges. In regard to item 1 of the charges he stated that while he processed the facility application by Cosy Holdings Ltd and that he knew that the manager then Abraham Kiptanui was a director in the said company, he did not know that the other director Roseline Mueni Kasyoki was the wife of the said branch manager. He stated that the customer qualified for the facility and that the same was approved on the said basis by the manager. He stated that he did not approve the facility as he had no powers or authority to do so. He stated that like in all the other facilities he collected data and forwarded to the branch manager for approval and that there was no conflict of interest on his part at all.
32. The Claimant stated that it is on the foregoing basis that he also approved facilities to Roseline Mueni Kasyoki, Michael Chemwok, and Garden Education Centre, all of whom, according to the Claimant, fully qualified for the facilities applied for.
33. The Claimant admitted that Michael Chemwok is his brother but he stated that there was no conflict of interest as the client qualified for the facility. The Claimant stated that he did not benefit from the subject facilities and that he was only motivated by his professional duty to earn the Respondent commissions and interest in the facilities extended to the said clients. He denied exposing the Respondent to any loss or risk and stated that except for the facility to his brother all the others mentioned were serviced and paid in full. He testified that he is not to blame for his brother's failure to service the facility and that the bank has the legal means of recovering the facility.
34. While admitting that mistakes were made in the non-disclosure of the relations alluded to above, the Claimant pleaded that he be forgiven and be allowed to continue serving. As stated above, the Claimant signed for the said minutes and hence fully understood and confirmed having taken part in the hearing.
35. However, the Respondent was not convinced with the explanation offered by the Claimant and as such terminated the Claimant as expressed in the letter of termination dated 9th May, 2018 alluded to in an earlier part of this judgment. The reasons for termination as contained in the said letter are that –
 1. While appraising Cosy Holdings Ltd loan applications, you failed to disclose that the Company was owned by the former Branch Manager, Abraham Kipruto and his wife Ms. Roseline Mueni Kasyoki and proceeded to forward the applications to him for approval/recommendation for approval at SME Head Office. Approval or positive recommendation of the facilities by the former Branch Manager amounted to conflict of interest on his part and failure to disclose wrong doing on your part. By this action, you violated the KCB Code of Conduct on disclosure of wrong doing.
 2. You violated the KCB Code of Conduct on falsifying of Bank documents/records by your action of irregularly duplicating the CQ entity which enabled Ms. Roseline to qualify for a loan of Kshs.500,000/= as per CQ No.1194373.
 3. You violated the KCB Conflict of Interest guideline by your action of processing/granting an ABF and STA facility for your brother Michael K. Chemwok.
 4. You concealed material facts known to you while processing facilities for your brother Michael K. Chemwok and the former Branch Manager Abraham Kipruto.



5. You violated provisions of KCB Bank Credit Policy and Credit Manual by your action of irregularly rolling over an STA facility extended to your brother to conceal default on repayment of the facility.
6. While assessing a loan for Garden Education Centre, you did not adhere to the loan processing procedure by your failure to obtain and ensure safe custody of all the necessary documentations from the customer which exposed the Bank to risk of loss.
7. You were dishonest in your response dated 22nd February, 2018 that Michael Chemwok is not your brother yet information you submitted to the Bank confirmed otherwise.
8. You exposed the Bank to potential loss of Kshs.3.5Million by your action of irregularity granting an ABF to your brother which is currently non-performing.
9. Your conduct has cast doubt in your integrity and professionalism as a Bank employee hence rendering your continued employment with the Bank impracticable. As a consequence, the Bank has lost confidence in you and your services with the Bank are hereby accordingly terminated with effect from the date of this letter.

All moneys due to you including one month's salary in lieu of notice will be paid to you.

Please arrange to clear your indebtedness with the Bank (if any) and surrender any bank property in your possession, including the Bank's Identity and Medical Cards to us. Your loans shall be converted to public terms with effect from 31st May, 2018.

You are required to contact the Head of Credit Administration within 15 days of the date of this letter with a proposal on how you intend to settle your loan liabilities.

In the event of non-submission of a repayment proposal within 15 days of the date of this letter, the debt recovery procedure shall be engaged in line with the original letter(s) of offer issued and accepted at the onset of the borrowing.

Kindly sign the attached copy to acknowledge receipt of this letter.

Yours sincerely.

36. It is important to note that no evidence was adduced by the Respondent during the disciplinary hearing and there is no evidence to confirm, and this was not availed in court during the hearing, that Roseline Mueni Kasyoki was or is the wife of Abraham Kiptanui the then branch manager. The Claimant indeed admitted that Michael Chemwok is his brother.
37. Although a disciplinary hearing is not a trial the Respondent, as the accuser, has an obligation to establish a prima facie case against the Claimant, the accused, on a balance of probability.
38. The Respondent held that the Claimant was guilty of misconduct and accordingly terminated the Claimant as per the termination letter alluded to above. The Claimant was dissatisfied with the termination and appealed against it vide a letter dated 23rd May, 2018.
39. The Respondent considered the appeal through the appeals committee and the committee made a report dated 12th June, 2018 which was produced as an exhibit by the Respondent. The appeals committee maintained that the Claimant had failed to disclose wrong doing on the part of the former branch manager who had approved a facility to Cosy Holdings Ltd wherein he was a director. It is alleged that the Claimant also failed to disclose that the said branch manager, Abraham Kiptanui, had been blacklisted with the Credit Reference Bureau (CRB). The court notes that this charge of failure to disclose wrong doing is completely different from the original charge of conflict of interest.



40. Nonetheless the Respondent maintained that the Claimant was guilty of misconduct and that it had lost faith and trust in the Claimant and hence could not continue with him as an employee and accordingly the letter of termination was issued.
41. The appeals committee confirmed that of all the loans whose applications were processed by the Claimant only the facility advanced to his brother Michael Kipkoror Chemwok was not performing.
42. It is in the circumstances of the foregoing scenario that the Respondent terminated the Claimant. This court (ELRC) has to a large extent settled the law on what entails substantive and procedural fairness that must be met by an employer before terminating an employee – See the decisions in *Mary Chemweno v Kenya Pipeline Company Limited* (2014) eKLR, *Walter Ogal Anaro v Teachers Service Commission* (2013) eKLR, and *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR.
43. The banking industry is unique in that the employees are placed in a fiduciary position whereby they deal with confidential information on the finances and financial positions of customers and even that of the bank, the employer. It is an industry based on utmost good faith, trust, and honesty on the part of the employees who are expected to be honest and trustworthy in their dealings with customers and the bank. Lack of honesty, trust, and integrity are some of the most serious acts of misconduct that an employee may commit and face serious disciplinary sanction due to the sensitive nature of the industry.
44. Section 43 of the *Employment Act* (the Act) provides as follows -
 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair with the meaning of section 45.
 2. The reason or reasons or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
45. Sections 35, 40, 41, 43, 44, 45, 46, 47, and 48 of the Act provide for various aspects of substantive and procedural fairness in the various forms of termination including redundancy and summary dismissal.
46. In the present case the Respondent accused the Claimant of various acts of misconduct as enumerated in the invitation to disciplinary hearing and the notice of termination. It is not disputed that the Claimant processed the primary documents in a facility for Cosy Holdings Ltd wherein the branch manager and his wife were directors and yet he failed to disclose that fact in the documents. It is also alleged that the Claimant failed to disclose that the said branch manager had been blacklisted with CRB.
47. It is also alleged that the Claimant processed the application by his brother for a facility without disclosing that fact. The said facility is non-performing.
48. However, it is a fact that the Claimant was not the final authority in determining the fit of those applications. The final decision thereon rested with the branch manager and the credit department at the headquarter. Nonetheless, failure by the Claimant to disclose and note each and every material aspect of the application and the applicant, according to the Respondent, demonstrated lack of professionalism amounting to misconduct on the part of the Claimant and others involved, including the then branch manager. The Claimant had at first denied that Michael Chemwok was his brother but later on admitted to that fact.
49. In considering whether the termination was unfair each case must be considered in its own unique circumstances and characteristics – see *Kenfreight (EA) Limited v Benson Nguti* (2016) eKLR. It is in



the considered view of this court that considering the allegations made against the Claimant and the minutes of the disciplinary hearing and the appeal, the Respondent had reasonable and valid grounds upon which to terminate the Claimant.

50. The Claimant failed to disclose material facts when processing the affected facilities. He failed to note and report that the branch manager was a director in Cosy Holdings Ltd along with his wife. He also failed to disclose that Michael Chemwok is his brother, and as it turns out the facility advanced to his brother has turned out to be non-performing. He also failed to disclose that the said branch manager had been blacklisted with CRB, a fact that he ought to have established when carrying out background check. Although the final decision to approve or deny the facilities did not lie with the Claimant, his failure and or refusal to note and report the above relevant facts amounts to serious neglect of duty, misconduct, or unprofessional conduct. Surely, the Claimant as an assistant business manager was not a conveyor belt for forwarding the documents without noting any anomalies and reporting every notable aspect to the next person in line for processing and approval of the subject facilities. For example, there is no explanation from the Claimant as to why the application for a personal facility by Roseline Mueni Kasyoki, wife of the branch manager, was received and processed at Eldoret West branch as opposed to the Eldoret main branch where the said customer held an account, and yet the Claimant did not note or comment on the application to that effect.
51. It is the considered view of this court that faced with the cumulative conduct of the Claimant as analyzed above the Respondent had reasonable grounds for terminating the Claimant on the basis of his misconduct. And therefore, as far as substantive justice is concerned the Respondent met the requirements of the law as provided for in Sections 43 and 45 of the Act.
52. In terms of procedural fairness, the Claimant was informed of the charges facing him in a letter dated 9th February, 2018 detailing his alleged misconduct. He was invited for a disciplinary hearing and the hearing proceeded as detailed in an earlier part of this judgment. The Claimant and his representative apologized for the misconduct but the Respondent arrived at the conclusion that the misconduct was so gross that the best option was to terminate the Claimant.
53. This court cannot fault the procedure adopted by the Respondent in arriving at the decision to terminate the Claimant. The Claimant was accorded a hearing and his rights, including that of inviting a representative, were explained to him. He appeared for the hearing and he was given an opportunity to explain his side of the story and to defend himself. It is not the duty of this court to substitute its own findings and reasoning for that of the Respondent and the decision that it made. The duty of this court is to examine the procedure adopted and consider if the Claimant was afforded a fair hearing.
54. It is the considered view and opinion of this court that the Claimant was afforded a fair hearing in line with Article 47 of *the Constitution, Fair Administrative Action Act*, and of course the Rules of natural justice. Further, this court finds that the Respondent, based on the circumstances of the case and the information presented to the Claimant, had reasonable grounds upon which to take the decision that it did in terminating the Claimant.
55. As stated elsewhere in this judgment, banking is an industry that is highly confidential and sensitive wherein the relationship between the employer and the employee is based on trust, integrity, and honesty. Where the employer has reasonable grounds for lack of trust, faith, and confidence in an employee, and such grounds are presented to the Claimant who is unable to satisfactorily defend the same, as it happened in this case, the employer cannot be faulted for taking a lawful action including termination.
56. For all the foregoing reasons, this court is of the considered view that the Respondent has proved that the reason for termination and the procedural steps taken in arriving at the decision were in accordance



with the law. The hearing of the appeal against the termination by the Claimant was not necessarily to be heard orally. There are records and minutes availed by the Respondent on the appeal procedure adopted and the hearing and this court cannot fault the same.

57. As noted elsewhere in this judgment, the Claimant in fact admitted to his mistakes during the disciplinary hearing and even apologized for the same and pleaded for a second chance.
58. While the Claimant was not the final authority in determining the approval or otherwise of the facilities concerned, his misconduct in failing to take note, and report all material aspects of the same exposed the Respondent to the risk of great financial loss and reputational damage. Although it turns out that the only one of the facilities concerned that is non-performing is that made to Claimant's brother, Michael Kipkoror Chemwok, this does not ameliorate or lessen the severity and effect of the misconduct and dishonesty on the part of the Claimant. The Claimant betrayed the trust bestowed upon him by the Respondent and the Respondent was hence justified in terminating the Claimant.

VI. Reliefs

59. Having held that the termination of the Claimant was lawful and fair this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
60. Prayer (a) for a declaration that the termination of the Claimant by the Respondent was unfair and unlawful is denied for all the reasons stated above.
61. Prayer (b) is for a declaration that the Claimant was discriminated against. Discrimination in law connotes a disadvantage visited upon a person based on unconstitutional or illegal consideration(s) such as race, sex, marital status, social background or status, pregnancy, colour of skin, and such other aspects – See Article 27 of *the Constitution*.
62. In this cause the Claimant alleges that he was discriminated and it was thus upon him to demonstrate that he was treated unfairly, unlawfully, and or unconstitutionally based on the aspects provided for in law. In other words, the Claimant ought to have adduced evidence to illustrate and demonstrate that he was disadvantaged in the termination based on discrimination on any of the constitutional and legal provisions that prohibit and outlaw discrimination so as to shift the burden to the Respondent to prove that no such discrimination occurred – See Nairobi ELRC No. E618 of 2021 – Omondi Justus Rang'ang'a & 28 Others v KCB Ltd.
63. This court is of the considered opinion that no evidence was adduced by the Claimant to sustain or prima facie establish the discrimination alleged. There is no evidence adduced to the effect that any other person who was guilty of misconduct of the same or similar magnitude as the Claimant was given a lenient sanction. In any event, the termination was based on the grounds that were established as analyzed in an earlier part of this judgment.
64. The court has read submissions by Counsel for both parties on this issue. However, this court agrees with Counsel for the Respondent that none of those other employees faced the same or similar charges as the Claimant. In any event, the Claimant was the originator of the material documents and the deliberate mistakes and the non-disclosures therein. The Claimant, unlike any of the other mentioned employees, faced five charges and was found culpable in all of them.
65. This court holds that the termination of the Claimant was neither discriminative, excessive, or harsh in the circumstances of this cause and the evidence adduced. The claim for damages based on alleged discrimination is thus denied.



66. Prayer (d) is for compensation for unfair and unlawful termination. This court has held above that the termination was fair and lawful. Consequently, this court cannot award compensation for all the reasons stated in the foregoing paragraphs of this judgment.
67. Prayer (e) is for a certificate of service based on Section 51 of the Act. There is no reason given by the Respondent why it has not issued and delivered the said certificate to the Claimant. The Respondent is ordered to unconditionally issue and deliver the certificate within 30 days of this judgment.
68. In the tabulation of terminal dues item (i) is for payment in lieu of notice. The Claimant prays for three month's salary in lieu of notice allegedly based on a memo issued by the CEO of the Respondent on 20th April, 2017. However, this court notes that the said memo was only applicable to those who applied for the staff rationalization programme. There is no evidence whatsoever that the Claimant applied for consideration in the said programme and that indeed he was enrolled into that programme as provided for in page 2 of the said memo. In the circumstances the applicable notice on termination or payment in lieu thereof is clause 7 of the letter of employment which provides for one month's notice or payment of one month's gross salary in lieu thereof which equals Kshs.190,703/= less statutory deductions.
69. Item (ii) is for compensation for unfair and unlawful termination which has already been denied above. Item (iii) is for days worked for the month of May, 2018 in the sum of Kshs.63,567.66/= and the said sum is awarded subject only to statutory deductions. Item (iv) is for leave prorate in the sum of Kshs.74,162/=. There is no evidence that was adduced by the Respondent, as the custodian of employment records, to dispute that claim and the same is awarded subject only to statutory deductions.
70. No evidence was adduced by the Respondent to confirm that indeed the terminal dues as outlined in the payslip of May, 2018 was actually paid and indeed received by the Claimant and as such the court shall not take the sums therein as having been paid to the Claimant and the same shall not be deducted from the awards made in the foregoing paragraphs.

IV.Costs

71. The claim has succeeded to a small extent but failed in many aspects. In the interests of justice this court orders that each party meet own costs.

V. Disposal

72. In final disposal of this cause, this court issues the following orders: -
 - a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was fair and lawful.
 - b) However, the Claimant is awarded a sum of Kshs. 328,432.66 together with interest thereon from the date of this judgment less statutory deductions.
 - c) The Respondent is hereby ordered to issue and deliver a certificate of service to the Claimant within 30 days of this judgment.
 - d) All the other claims are denied.
 - e) Each party to bear own costs.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 19TH DAY OF JANUARY, 2023.



DAVID NDERITU
JUDGE

