



Kaguo v Equity Bank (Kenya) Ltd (Employment and Labour Relations Cause 480 of 2016) [2023] KEELRC 1379 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1379 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 480 OF 2016**

DN NDERITU, J

MAY 31, 2023

BETWEEN

DAVID MWANGI KAGUO CLAIMANT

AND

EQUITY BANK (KENYA) LTD RESPONDENT

JUDGMENT

Introduction

1. In a statement of Claim dated 5th December, 2016 and filed in court on 5th December, 2016 through D.K. Githinji & Company Advocates, the Claimant prays for: -
 - a. A declaration that the Claimants termination was unfair.
 - b. Salary for the months of March, April, May, June, August, September, & October 2016 Kshs.688,000.00.
 - c. 12 months' salary being damages for unfair termination Kshs.1,032,000.00.
 - d. House allowance at the rate of 15% of basic salary or the period of employment.(Kshs.12,900 x 130months) =Kshs.1,677.00.00
 - e. Outstanding leave days (19 for 2015 and 13 for 2016 = 32 days – 86,000/24x32) =114,656.00.
 - f. Certificate of Service.
 - g. Cost of this suit.
2. Together with the memorandum of claim, as expected, was filed a verifying affidavit by the Claimant and also his witness statement and a list of documents dated 5th December, 2016 and a bundle of the listed documents. A witness statement by the Claimant and another one by Daniel Kamau Ndong'u



(CW2) were filed on 6th October, 2017 and the Claimant (CW1) filed his further witness statement on 3rd December, 2021.

3. On 23rd December, 2016 the Respondent, through Mburu Maina & Co Advocates, entered appearance and filed a response to the claim on 18th January, 2017 alongside a bundle of documents. A further list and bundle of documents was filed on 29th May, 2018, and a second further list and bundle of documents filed on 14th October, 2021. A witness statement by Winfred Kyalo (RW1) dated 14th October, 2021 was filed on even date.
4. In its response to the claim the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. On 4th May, 2021 this cause was heard ex parte and a judgment delivered on 13th July, 2021 in favour of the Claimant. However, by consent, the said ex parte judgment was set aside on 5th October, 2021 and the trial court then, Wasilwa J, directed that the matter be heard by another court.
6. This cause came up for hearing in open court on 23rd February, 2022 when the Claimant (CW1) testified and on 18th May, 2022 when CW2 testified and the Claimant's case was closed. The Claimant produced as exhibits all the documents filed in the aforesaid bundles.
7. The defence was heard on 18th May, 2022 when RW1 testified for the Respondent and the Respondent's case was closed. This witness produced as exhibits all the documents filed by the Respondent in the three aforesaid bundles.
8. Counsel for both parties, by consent, addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Mr Githinji, filed his written submissions on 12th June, 2022 while counsel for the Respondent, Mr. Ojuo, filed on 27th July, 2022.

II. The Claimant's Case

9. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summed up as hereunder.
10. In his memorandum of claim, the Claimant pleaded that he was engaged by the Respondent, a bank, in 2006 and rose through the ranks to the position of relationship manager-operations. His last posting was Kabarnet Branch.
11. In or about October, 2015 the branch manager was transferred and the Claimant assumed that position in an acting capacity. However, no documentary evidence has been availed by either party in support of that proposition.
12. On 23rd March, 2016 the Claimant was summoned to the head office, Nairobi, by the general manager operations. At the head office he was questioned by the security officers in the security department about purported irregular loans that had been advanced at Kabarnet Branch, where he was the acting manager. Upon conclusion of the interrogation the Claimant was served with a letter of suspension to pave way for investigation into the alleged irregular loans or advances.
13. The letter of suspension was worded as follows –

Our Ref: EBKL/HR/03/16/0/PE 1274

March 21, 2016

Mr. David Kaguo Mwangi



CO Equity Bank(K) Limited

Kabarnet Banch

Dear Mr. Mwangi,

SUBJECT: Suspension

This is in regard to the case of irregular loans involving you at Kabarnet Branch and whose details you are well aware of.

In order to facilitate further investigations, the bank has suspended you with effect from March, 23rd 2016 until the conclusion of this case. During this period of suspension, you will cease to draw any benefits and allowances from the Bank.

Please handover to the General Manager – Operations before you leave. You will also be required to stay out of the Bank’s premises until you are contacted.

Yours faithfully

Equity Bank (k) Limited

Signed

.....Ambetsa

General Manager – Talent Acquisition

Cc General Manger – Operations

Personal File

Acknowledgement of receipt of Letter

I, the undersigned acknowledge having received and understood the contents of this letter and the contents have been explained to me.

Name: David Mwangi Kaguo

Signature: Signed, DatE: 23.03.2016 TIME: 5;16p.m.

14. On 16th September, 2016 the Claimant was served with a show-cause letter in the following terms –

EBKL/HR/09/16/2961/PE.1274/lk September 16, 2016

David Mwangi Kaguo

C/O Equity Bank (K) Limited

Kabarnet Branch

Dear David

Subject: Show Cause Letter

This is in regard to the irregular loan approvals at Kabarnet Branch of which are well within your knowledge. You are therefore expected to show-cause as to why disciplinary action should not be taken against you for –

- a. Irregular approval of loans and overdraft facilities to Customers who did not qualify leading to non- performing facilities and potential loss of the Bank in the sum of Kshs.2,086,805.02 as detailed below.



Account Name	Disbursed Amount
1390265331536	288,000.00
110162647782	338,475.93
1390564502288	300,000.00
139056606552	223,818.33
1390265517387	355,139.10
1390565091642	300,000.00
1390264700357	381,125.15
0830197482386	300,000.00
0150190365515	300,000.00
1390165103573	20,000
1390566508914	120,000.00
Grand Total	2,926,556.41

- b. Irregular approval of overdraft facility to account Number 390264700357 jointly held by you and your family members without any disclosures of your interests to the Bank.

Your above actions were in contravention to the Bank's lending policies, Code of conduct and core values and your written response should reach the undersigned before close of business on September, 2016.

Yours faithfully

For: Equity Bank (k) Limited

Signed

Raimond Molenje

HR Manager-Employee Relations

CC. Personal File and BGDM - Kabarnet

Acknowledgment

NAME: David Mwangi Signature: signed

15. Vide a letter dated 20th September, 2016 the Claimant responded to the show-cause and denied all the charges and accusations against him, indicating that the receiving, evaluation, processing, approval, and disbursement of loans and other credit facilities to customers was done by the credit manager and the credit committee.
16. However, he admitted that in absence of a substantive manager at the branch he was the only holder of class "A" signature which was required in the approval and disbursement of loans, overdrafts, and other bank advances. He is the only one who had such rights in the branch as at that time and hence he admitted that he signed off for the said facilities.
17. Vide a letter dated 3rd October, 2016 the Claimant was invited for a disciplinary hearing. The said letter stated as follows –



Ref: EBKL/HR/10/16/3109/PE.1274/lk

October 3, 2016

David Mwangi Kaguo

C/O Equity Bank (K) Limited

Kabarnet Branch

Dear David

Subject: Invitation To Attend A Disciplinary Hearing

This is to invite you to attend a disciplinary committee meeting with regard to the show cause letter dated September 16th, 2016 and your response thereof.

The meeting is scheduled to take place at Equity Centre, Head Office on October 5th, 2016 at 09.00a.m. on 7th Floor Meeting Room. During the hearing, you are entitled to come with a witness who is a fellow employee but not a lawyer or an advocate.

Further, note that the outcome of this meeting could have an impact on your contractual relationship with the Bank and it is necessary that you take it seriously. Should you fail to attend, the Bank will proceed to make a decision, your absence notwithstanding.

Yours faithfully

For Equity Bank(k) Limited

Signed

Raimond Molenja

HR Manager – Employee Relations

CC: Personal file

Acknowledgement of receipt

Name in full.....david Mwangi Kaguo

Signature: Signed Date: 5/10/2016 Time: 11:50a.m.

18. The Claimant attended the hearing as invited and countersigned the minutes of the disciplinary proceedings which were produced in court as an exhibit by the Respondent.
19. The Claimant alleges that he was not given a fair hearing as the details of the concerned irregular loans and overdrafts were not availed to him.
20. On 18th October, 2016 the Claimant received a letter of dismissal effective the date of the letter. The said letter stated as follows –

Our Ref: EBKL/HR/10/16/3208/PF:1274/lk

David Mwangi Kaguo

BOX 75719-00200

NAIROBI

Dear David



RE: Summary Dismissal

We refer the show-cause letter dated September 16th, 2016 and the disciplinary hearing conducted on October 5th, 2016. Upon analyzing your written and verbal responses, the Bank has made a decision to summarily dismiss you from its employment effective October 18th, 2016 for irregular approvals of loan and overdraft facilities to unqualified Customers who have defaulted in payment, the outstanding balance being Kes.1,073,244.27 contrary to the Bank's lending policies & procedures.

Your will be paid salary and outstanding leave if any net of any dues owed to the Bank up to and including October, 18th 2016 which is your last date of service and a certificate of service will be issued to you.

Please arrange to hand over any Bank property in your possession to the Business Growth & Development Manager-Kabarnet. In addition, ensure that you have cleared with all departments and hand over the duly completed clearance form to the Payroll Accountant, after which your final dues will be payable on the next payroll date.

Subsequently, you are liable to pay back the outstanding amount in the sum of Kshs.1,073,244.27/= and you are therefore advised to pay the same as part of clearance with the Bank.

Yours faithfully

For: Equity Bank (k) Limited

Signed

Raimond Molenje

HR Manager – Human Resources

Cc: Business Growth & Development Manager – Kabarnet & Personal File.

Acknowledgement

Name.....Signature.....Date.....

21. The Claimant appealed his dismissal through a letter that was forwarded to the Respondent attached to an email sent on 25th October, 2016.
22. The appeal was dismissed vide Respondent's letter dated 1st November, 2016.
23. The Claimant pleads that he was denied house allowance during the entire period of his employment and that as at the time of dismissal he had accrued 19 leave days for which he should be paid.
24. In his testimony in court, the Claimant adopted his two statements filed on record and produced the documents in the lists and bundles as exhibits. He insisted that he was not given a fair hearing alleging that he was not informed of the charges against him. He alleged that the bank lost no money as the concerned facilities were being serviced as at the time of his dismissal.
25. He alleged that he reported one of the defaulters who was a fraudster to the security department of the Respondent and even caused his arrest and prosecution. However, the Claimant did not produce any documents to prove the foregoing.
26. In cross-examination, the Claimant admitted that he was issued with a show-cause letter after the suspension and that he attended a disciplinary hearing after which he read and signed the minutes of



- the meeting. He admitted that he was later on issued with a letter of dismissal and appealed, which appeal was dismissed.
27. He admitted that he approved an overdraft for his wife, Mary Wanjiku Wachira, and the other persons named by the Respondent in its documents. He also admitted that as the only authorized person at the branch he approved and authenticated the withdrawal of the funds by the concerned customers. He admitted that the procedure at the material time was that, for a customer to withdraw funds (s)he must have signed a physical receipt and then another receipt was generated by the computer.
 28. The Claimant called Daniel Kamau Ndung'u (CW2), a former employee of the Respondent, as his witness. The two had worked together at the branch with this witness as the credit manager for about five months before he left the employment of the Respondent. The witness testified that loans and overdrafts are initiated, appraised, evaluated, and disbursed by a credit committee comprising of among others two credit officers, credit manager, operations manager, and the branch manager. He alleged that no one person could or should do all the above single handedly. He explained that it is the client who initiates the process by applying for a loan or an overdraft. He stated that it is the branch manager who executes the final part and authorizes disbursement of the funds. He stated that the branch manager cannot and should not initiate, process, and approve loans or overdrafts single handedly.
 29. CW2 stated that a customer should be able to access the funds within seven days of completion of the above process and the same is deposited into the account of the client. He testified that this process applies to both loans and overdrafts.
 30. In cross-examination CW2 stated that he has known the Claimant for long and that he is a person of integrity. He stated that a yellow-voucher is a document that allows a customer to withdraw funds from the account and the same should be signed by the customer and the operations manager or the branch manager before the customer accesses the funds. He admitted that before a newly opened account may be used to apply for a facility, may it be a loan or an overdraft, such an account should have been operated for about three to six months coupled with good credit rating for a customer.
 31. It is on the basis of the foregoing, that the Claimant is seeking for judgment against the Respondent in the terms reproduced in the introductory part of this judgment.
 32. The submissions by counsel for the Claimant shall be considered in the latter parts of this judgment alongside those by counsel for the Respondent.

III. THE RESPONDENT'S CASE

33. The Respondent's case is contained in the response to the claim and the oral and documentary evidence adduced through RW1 and the same is summarized as hereunder.
34. The Respondent's case is that the Claimant was fairly and lawfully dismissed for gross misconduct exhibited and evidenced by irregular and un-procedural approval, processing, and disbursement of funds to unqualified customers. It is alleged that the Claimant made loans and overdrafts to friends and relatives without disclosing or declaring the obvious conflict of interest.
35. The chronology of events leading and culminating in the dismissal of the Claimant is not disputed by the Respondent as enumerated and presented by the Claimant in his pleadings and evidence in court, as summarized in the preceding part of this judgment.
36. In its response to the claim the Respondent states that the Claimant was fraudulent in the irregular issuance and approval of loans and overdrafts and negligent in performance of his duties as acting branch manager at Kabarnet between October and March, 2016, contrary to his terms and conditions



- of service. It is alleged that the Claimant assigned himself the duties of approving those facilities single handedly without following the set-out credit appraisal, approval, and disbursement processes hence exposing the Respondent to the risk of heavy financial losses.
37. The Respondent is categorical that the Claimant was afforded a fair hearing before, during, and after the disciplinary process and that the dismissal was fair and lawful in the circumstances of the dispute. In any event, the Respondent pleads further, the Claimant admitted his gross misconduct during the disciplinary hearing.
 38. The Respondent pleads that a certificate of service is available for collection by the Claimant at his convenience but upon clearance.
 39. RW1 testified for the Respondent and produced all the documents filed as exhibits 1 to 20. No objection was raised by or on behalf the Claimant to the production of the said exhibits.
 40. The witness testified that the Claimant irregularly and un-procedurally approved and disbursed loans and overdrafts while acting as manager in the Kabarnet branch of the Respondent. She stated that upon investigations as per the report dated 6th September, 2016 the Claimant was found to have irregularly and un-procedurally approved and signed off various facilities to customers who did not qualify and or deserve the said facilities resulting in serious losses to the bank from non-performing facilities.
 41. She stated that the Claimant had his relatives and friends open accounts at the branch and instantly obtain loan or overdraft facilities and that the Claimant single-handedly approved and disbursed the funds to them. She stated that a newly opened account should have a waiting period of 6 to 12 months before approval of any facility to the customer. She added that before approval of any facility the financial health and turnover of the account should be considered and evaluated.
 42. Further, the witness testified that the Claimant abused the process by approving yellow-vouchers for withdrawal of the money advanced irregularly and un-procedurally.
 43. She stated that the Claimant owned up and apologized for his misconduct both in his statement to the investigation team and during the disciplinary hearing and he even undertook to clear the facilities that were not performing.
 44. She testified that if any dues were payable to the Claimant the same were to be assessed and or calculated upon him clearing with the Respondent which he has not done to this day. She stated that as per the letter of appointment the salary of the Claimant was consolidated and hence no house allowance was payable over and above the said consolidated salary. She stated that the Claimant was issued with a certificate of service as per the copy exhibited.
 45. In cross-examination the witness maintained the foregoing testimony and indicated that the teller who allowed the yellow-vouchers approved by the Claimant to be paid was also investigated and terminated.
 46. She stated that contrary to the Respondent's rules, regulations, and policies the Claimant failed and or refused to disclose his association and relationship with the persons for whom he approved and disbursed the monies.
 47. She testified that the Claimant was given a fair hearing and that the dismissal was fair and lawful, both in substance and procedure.
 48. It is on the basis of the foregoing that the Respondent is pleading and praying that the Claimant's cause be dismissed with costs. The submissions by counsel for the Respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimant.



IV. Issues For Determination

49. After a careful and thorough scrutiny of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for the both parties, this court identifies the following issues for determination –
- a. Was the dismissal of the Claimant by the Respondent wrongful, 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. The Termination

50. The terms and conditions of service of the Claimant are not in dispute. They are as alluded to in an earlier part of this judgment. As at the time of termination the Claimant was the Respondent's operations manager and also the acting manager in the Kabarnet branch. However, while both parties agree that the Claimant was the acting manager as such, no documentary evidence was adduced by either party to confirm that proposition. The pay-slip for December, 2016 indicates that the Claimant was on a monthly basic salary of Kshs.86,000/= as at the time of dismissal and his designation is operations manager.
51. It would then appear, and this court takes that view, that once the substantive Kabarnet branch manager was transferred in October, 2015 the Claimant who was then operations manager, the second in command, took over the role of the branch manager awaiting the appointment of a substantive branch manager. Either way, both parties agree that as at the time of dismissal the Claimant was substantively the operations manager and the acting branch manager.
52. The chronology of events leading to dismissal of the Claimant is not in dispute as the evidence by both sides agree on the same as enumerated above.
53. The jurisprudence on substantive and procedural fairness is now settled in a multitude of decisions from this court (ELRC) – See
- Mary Chemweno V Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno V Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro V Teachers Service Commission (2012) eKLR.
54. Substantive fairness is about an employer having and establishing lawful reason(s) for termination – See Sections 40, 43, 44, 45, 46, and 47 of the *Employment Act* (the Act).
55. Procedural fairness is about the reasonableness, fairness, and lawfulness of the procedure adopted and steps taken by the employer in taking the disciplinary action against the employee up to and including the termination in whatever form or manner – see Article 47 of *the Constitution*, the *Fair Administrative Action Act*, and Sections 35, 41, and 45 of the Act.
56. It is on the basis of the foregoing provisions of the law that the termination of the Claimant by the Respondent has to be viewed, weighed, and scaled in determining whether the same was substantively and procedurally unfair and unlawful as urged by and for the Claimant.
57. The reason for the termination of the Claimant as stated in the letter of termination is approval of loans and overdraft facilities to unqualified customers. It is the Respondent's case that the said customers subsequently defaulted in servicing the said facilities causing the bank substantial financial losses.



58. Contrary to what was alleged by the Claimant in his pleadings and oral testimony in court, the particulars and details of the concerned customers and accounts were provided to the Claimant by the Respondent during the investigations and the Claimant recorded a lengthy and detailed statement about the same on 22nd March, 2016, and this was before the letter of suspension was issued on 23rd March, 2016. Further, the details of the concerned accounts and customers were given in the show-cause letter of 16th September, 2016 to which the Claimant responded at length and in detail in his response thereto dated 20th September, 2016 in which letter he expressly acknowledged that he was fully aware of the details and particulars of the allegations, including the accounts concerned and the customers involved.
59. Further, during the disciplinary hearing on 5th October, 2016 the Claimant was questioned about each of the concerned customers and accounts and he responded to all the questions in details. He also owned up to his misconduct, apologized, and undertook to settle the balances in the non-performing facilities. In fact, he alluded that he had approached his family for help and that it had been agreed that a piece of family land be sold to raise money for him to clear those balances. If the Claimant, for whatever reason, felt that the details supplied to him, which he confirmed to have understood very well and responded thereto in detail, was not sufficient, nothing stopped him from seeking and even demanding for further or better details and particulars.
60. There is no doubt that specific and sufficient details should be supplied to an employee who is facing disciplinary action. However, where the employer, like it happened in this cause, has supplied details and particulars of the charges and allegations to an employee and the employee responds in equal detail and particularity, without any qualification, the employee cannot down the road allege that (s)he needed more details or particulars. In any event, what other and or further details and or particulars did the Claimant need? Why did he not demand for them to be supplied before, during, and even after the dismissal? In the opinion of this court this allegation by the Claimant is an afterthought with the sole intention of misleading this court.
61. It is not the duty of this court to substitute its opinion for that of the employer as regards the reason for termination. Section 43(2) of the Act requires the employer only to have a genuine belief that matters existing and subsisting as at the time of action are good reasons for lawful termination. This is a fairly subjective test that can only be viewed from the lenses of a reasonable man or bystander – See *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR.
62. It is common knowledge that banks trade in money or its liquid equivalent as their sole merchandise. For a loan or overdraft to be made, the officers of a bank have to pay attention to minor details as any irregular or un-procedural step may result in financial loss. This is what makes the banking industry very sensitive to procedures especially in ensuring that only credit-worthy persons are advanced money in whatever form or manner. Factors such as length of time a customer has been with the bank, hence age of the account, credit history and listing, provision of securities, and all other relevant and germane factors must be taken into consideration.
63. The evidence on record is that the Claimant as the operations manager and acting branch manager in consult with others at Kabarnet branch of the Respondent signed off loans and overdrafts without due care and attention. Several accounts were opened and money disbursed on the same day! The details of all the accounts and particulars thereof were produced in court by the Respondent without any evidence from the Claimant to rebut that evidence by the Respondent.
64. Section 47(5) of the Act places a burden upon an employee to prove that the dismissal or termination is wrongful and unlawful. The employer has a burden to justify the dismissal or termination – see Janet



Nyadiko V Kenya Commercial Bank (2017) eKLR and National Bank of Kenya V Anthony Njue John (2019) eKLR.

65. Did the Respondent have any reason(s) for dismissing the Claimant as envisaged in law, and more particularly Sections 43 and 45 of the Act? Section 43(2) of the Act urges that the reason for termination or dismissal “are the matters that the employer at the time of termination of the contract genuinely believed to exist”. The Claimant admitted and owned up to his misconduct. He admitted approving and signing off for loans and overdrafts to his sister, wife, brother, and friends without disclosing the possible conflict of interest. He even approved and disbursed a facility to himself jointly with others.
66. In the entire circumstances of this cause, the evidence adduced, and the submissions by counsel for the parties, this court takes the considered view that the Respondent had genuine and reasonable grounds in law to dismiss the Claimant. The court agrees with counsel for the Respondent that the Claimant was either negligent, careless, and or reckless in performance of his duties or was fraudulent in his conduct. Section 44(4)(c)(g) of the Act provides that the foregoing are good and valid reasons and grounds for dismissal.
67. In terms of procedure, an employee is entitled to a fair hearing based on the rules of natural justice and the laws cited above. For the reasons that shall become clear in the following paragraphs of this judgment, this court is of the considered view that the Claimant was afforded a fair hearing in the procedure adopted by the Respondent.
68. Disciplinary process is an administrative action. However, the law does not envisage that an employer shall conduct the disciplinary process as if it were a court trial. It is the view of this court that so long as the process is in line with the general rules of natural justice a court of law should not interfere with the same. In this matter the Claimant was suspended and called for an interview with the investigation team whereby he recorded a detailed statement after being informed of the charges and allegations against him. He was issued with a show-cause letter that detailed and particularized the charges and allegations against him. He responded to this letter in detail and he was invited for a hearing which he attended and indicated that he did not need to attend with a representative or a co-worker. He was questioned and he responded to all the charges and allegations in detail. He read and signed the minutes of the disciplinary hearing. He was served with a letter of dismissal. He appealed the dismissal and was informed of the dismissal of the appeal.
69. Upon considering all the evidence and circumstances the Respondent arrived at the decision that the Claimant be dismissed. This court has carefully examined the procedure adopted by the Respondent and holds that the same was fair and lawful. The dismissal was lawful both in substance, form, and procedure and this court finds no reason for interfering with the same.
70. For all the foregoing reasons, the dismissal of the Claimant by the Respondent is declared to have been fair and lawful.

VI. Reliefs

71. Having held that the Claimant was fairly and lawfully dismissed, this court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
72. Prayer (a) is for a declaration that the termination of the Claimant by the Respondent was unfair and unlawful. This court has found in the foregoing part of this judgment that the dismissal was fair and lawful and it is so hereby declared.



73. Prayer (b) is for salary arrears for the months of March to October, 2016 amounting to Kshs.688,000/= . Counsel for the Claimant has submitted that during the period of suspension running from March to October, 2016 the Claimant was not paid his monthly salary and as such he is entitled to the same. Counsel has cited several decisions in support of the argument that an employee on suspension remains innocent unless and until otherwise found. He has cited Peter Mbuthia Gitau V Kenya Revenue Authority (2019) eKLR, Gregory Owuoth V Mumias Sugar Company (2016) eKLR, among other decisions on this rather obvious issue.
74. The claim for salary arrears is not denied by the Respondent. Counsel for the Respondent has submitted that the same was to be paid upon the Claimant completing the clearance process. It is also alleged that the Claimant owes some money to the Respondent by way of personal loan and mortgage arrears. However, it is important to note that the Respondent did not file or plead a counter-claim or set-off in this cause. The issue as to how much, if at all, the Claimant owes to the Respondent has not been pleaded and prosecuted for the determination by this court. It would be completely wrong and baseless for this court to make a finding or pronouncement on the same.
75. This court has in many a cause come across this allegation by employers that a dismissed or terminated employee is yet to clear with the employer and hence terminal dues cannot be paid before such clearance. This court holds and pronounces that an employee who has been terminated has no obligation to visit the employer for a process called clearance, whatever that may entail. The employer/employee relationship has been terminated by the employer and there is nothing else left to be cleared especially where and when the matter is filed in court and the court has made a judgment on the issues in contest. If an employer has any claim against the employee, such an employer is always free and has a right to seek a remedy on the same through the court process so that the court can settle the issues once and for all. It would not make any logical sense to send a dismissed or terminated employee back to the employer to go through a process called clearance, whatever that may entail. If the Respondent has any claims against the Claimant, subject to limitation in time, it is free to file the same in court and prosecute the same in accordance with the law to logical conclusion.
76. For the foregoing reasons, the Claimant is awarded the claimed salary arrears in the sum of Kshs.688,000/= as he remained in the employment of the Respondent until October, 2016. The produced pay-slip allegedly for December, 2016, long after the Claimant had already been dismissed in October, 2016 has not taken care of the said arrears. In any event, the said arrears are not denied or disputed by the Respondent.
77. Prayer (c) is for compensation for unfair and unlawful dismissal equivalent to 12 months gross salary. The court has held above that the dismissal was fair and lawful and as such no compensation is awardable or payable in the circumstances, and it is so held.
78. Prayer (d) is for house allowance in arrears in the sum of Kshs. 1,032,000/= for 130 months, that is about 11 years! Now, the primary document that created the employment relationship between the Claimant and the Respondent is the letter of appointment dated 1st February, 2006. The said letter is clear that the salary payable is consolidated and gross inclusive of the house allowance. The letter of promotion and transfer dated 18th March, 2014 does not mention any changes to the basic nature and structure of the terms and conditions of employment. While the salary of the Claimant must have increased subsequent to the appointment vide the letter of appointment above, there is no evidence that the Claimant was at any time during his employment paid house allowance as a separate item. It is the view and holding of this court that the basic structure, terms, and conditions of the Claimant's employment did not change at any time. It was incumbent upon the Claimant to prove such change of terms and conditions but no evidence was adduced to that effect.



79. Counsel for the Respondent has correctly submitted that a pay-slip does not constitute a contract of employment. He has cited Grain Pro Kenya Inc. LTD V Andrew Waitthaka Kiragu (2019) eKLR, Dennis Kipngetch Koech V MKPPA Kenya Limited (2018) eKLR, and Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR, among several other decisions to buttress his argument and the court agrees with him. It is in the opinion of this court that the alleged pay-slip for December, 2016 erroneously described the pay therein as basic instead of gross or global. That of itself did not change the basic terms and conditions of the employment as enumerated in the foregoing paragraphs.
80. In any event, the claim for house allowance going 10 years backwards is time barred under Section 90 of the Act. How did the Claimant work for the Respondent for over 10 years without payment of house allowance and did not raise a finger? This claim is clearly an afterthought only intended to unjustly enrich the Claimant. For all the foregoing reasons, this claim is denied and dismissed.
81. Prayer (e) is for outstanding 32 leave days in the sum of Kshs. 114,656/=. Sections 10 and 74 of the Act places a duty and indeed an obligation upon an employer to keep and present records of employment and employees whenever required to do so. The Respondent has not availed any records to dislodge this claim by the Claimant. Counsel for the Respondent suggests, erroneously, that the Claimant had an obligation to prove the number of leave days that he had not utilized. The above cited provisions of the law by implication places a burden upon the Respondent to avail the employment records to dislodge such a claim. In the circumstances, the Claimant is awarded the sum of Kshs.114,656/= as claimed.
82. Prayer (f) is for a certificate of service. Section 51 of the Act places an obligation upon an employer to unconditionally issue a departing employee with a certificate of service. The Respondent has exhibited a certificate of service in the name of the Claimant but it alleges that the same shall be released to the Claimant once he clears with the Respondent. The non-issuance and non-delivery of the said certificate is illegal and unlawful and the Respondent is hereby ordered to unconditionally issue and deliver the certificate of service within 14 days of this judgment.

VII. Costs

83. The Claimant has to a small extent succeeded in his cause and hence the court has made the awards as per the foregoing part of this judgment. For this reason, the Claimant is awarded only half costs of the cause.

VIII. DISPOSAL

84. In final disposal of this cause, this court issues the following orders: -
- a. A declaration be and is hereby issued that the dismissal of Claimant by the Respondent was fair and lawful.
 - b) The Claimant is awarded a sum of Kshs.802,656/= made up as follows -
 - i. Salary arrearsKshs.688,000/=
 - ii. Leave pay Kshs.114,656/=
 - TotalKshs.802,656/=
 - (c) The Respondent is ordered to deliver to the Claimant through his counsel a certificate of service within 14 days of this judgment.
 - d) The Claimant is awarded one half costs of the cause.



e) All the other claims are denied.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 31ST .DAY OF MAY, 2023

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DAVID NDERITU

JUDGE

