



**Rotich v National Bank of Kenya Limited (Cause E046 of 2021)
[2023] KEELRC 1563 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1563 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E046 OF 2021
DN NDERITU, J
MAY 25, 2023**

BETWEEN

JAPHET KIPKURUI ROTICH CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. In a Memorandum of claim dated 20th August, 2021 and filed in court on 25th August, 2021 through Muli & Company Advocates, the Claimant prays for: -
 - (i) A declaration that termination of the Claimant's employment is unlawful, wrongful and unfair.
 - (ii) Damages for unlawful and unfair dismissal
(Kshs.366,516 x 12 months) - Kshs.4,398,192.00
 - (iii) Service Gratuity (366,516 x 1.5 x 7.5) –Kshs.4,123,305.00
 - (iv) Costs of this cause
 - (v) Interest on (ii) to (iv) from the date of filing suit to the date of payment in full.
 - (vi) Any other relief this Honourable Court may deem fit and just to grant.

2. Together with the Memorandum of claim, as expected, was filed a verifying affidavit by the Claimant and also his witness statement, a list of documents dated 20th August, 2021, and a bundle of the listed documents. The Claimant filed a supplementary list of documents of even date with one document attached.



3. On 23rd September, 2021 the Respondent, through Munyao, Muthama & Kashindi Advocates, entered appearance and filed a response to the claim on 4th October, 2021 alongside a bundle of documents. A witness statement by STEPHANE OBONG'O (RW1) dated 17th January, 2022 was also filed alongside a supplementary list and bundle of one document dated 12th January, 2022.
4. In its response to the claim the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. The Claimant filed a reply to the response to the claim on 2nd November, 2021 but the same was withdrawn later on when the matter came up for hearing and the same does not, therefore, form part of the pleadings or the court record.
6. This cause came up for hearing in open court on 23rd May, 2022 when the Claimant (CW1) testified and closed his case.
7. The defence was heard on 12th July, 2022 when RW1 testified for the Respondent and the Respondent's case was closed.
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 Muli, filed his written submissions on 2nd August, 2022 while counsel for the Respondent, Mr. Aringa, filed on 29th September, 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 2013 in the position of Relationship Manager in the corporate banking division. His last station was Nakuru Branch where he worked as Senior Relationship Manager in Agribusiness section.
11. The Claimant pleads that he worked hard with a clean record until 1st March, 2021 when he was served with a letter of suspension from duty for 30 days on allegations that he had shared confidential information with a client and that he had conducted himself unprofessionally while dealing with a customer who had applied for a bank facility. The suspension was intended to pave way for investigations to be carried out. The said suspension was later on extended for a further 30 days. Bizarrely, the letter extending the suspension is also dated 1st March, 2021.
12. For avoidance of doubt, the two grounds of suspension stated as follows –
 1. You shared confidential information through images of customer facility in the Credit Management system (CMS) in violation of employee code of conduct regarding data and information confidentially.
 2. The Bank also received a tip off through whistle blow regarding unprofessional conduct in dealing with the Bank Customer in supporting them secure Bank facilities.
13. On 12th April, 2021 the Respondent issued the Claimant with a show-cause letter in the following terms –

Rotich, Mr. Japhet Kipkirui



Staff No 1003210

Corporate

Dear Japhet,

Re: Show Cause Letter

We refer to our suspension letter issued to you dated 1st March 2021 regarding confidential customer information you shared through images of customer facility on the Credit Management System (CMS) in violation of employee code of conduct regarding data and information confidentiality and also the information the Bank received regarding a tip off through whistle blow on unprofessional conduct in dealing with the Bank Customer in supporting them secure Bank facilities.

We are satisfied that you acted in breach of Banks expected code of conduct with regards to data and information from the Bank.

In view of the above, you are required to give an explanation in writing.

1. Why you shared screenshot containing confidential Bank information with the customer in breach of the data and information confidentiality?
2. Why by your action you exposed the Bank to reputational Risk.
3. Why disciplinary action should not be taken against you for sharing confidential Bank information with the customer?

On the matter regarding a tip off through whistle blow on unprofessional conduct in dealing with the Bank Customer in supporting them secure Bank facilities, the investigations are ongoing and you will be contacted to provide further information once the investigations are completed.

Your response should reach the undersigned by Wednesday, 14th April, 2021.

Yours faithfully,

Sammy Mathai

Ag. Sectionhead Agricultural Sector

Cc Director, Human Resources

Receipt acknowledged

SignatureDate

(Rotich Mr. Japhet Kipkirui)

14. Upon receipt of the show-cause letter the Claimant addressed an email to the Respondent on even date in the following terms –

From: Japheth K. Rotich <jkrotich@nationalbank.co.ke>

Sent: 12th April, 2021 16:20

To: Sammy O. Mathai <somathai@nationalbank.co.ke>

Cc: Leonard M. Kesekwa <jkesekwa@nationalbank.co.ke>; Stephine O. Obong'o <scobong'o@nationalbank.co.ke>



Subject Re: Show Cause Letter

Good afternoon Sammy,

I have received the emailed letter just now at 4.10 p.m. after I saw your WhatsApp message. I am not able to respond to this letter as I have not been supplied with any specifics as to the client or clients in question, evidence adduced in support of the allegations, the whistle blower report and other information that you may have in support of this.

Kindly avail to me the said information and documents to enable me make a comprehensive response.

Best Regards.

15. The Respondent did not supply the Claimant with the details and particulars that the Claimant sought in his above email but instead invited the Claimant for a disciplinary hearing vide a letter dated 30th April, 2021 in the following wording –

Friday, 30th April 2021

Rotich, Mr. Japhet Kipkirui

Staff No.1003210

Corporate Banking

Dear Japhet,

Re: Disciplinary Hearing Notification

We refer to the show cause letter issued to you dated 12th April 2021 and your response dated 29th April 2021 regarding confidential customer information you shared through images of customer facility on the Credit Management System(CMS) in violation of employee code of conduct regarding data and information confidentiality and also the information the Bank received regarding a tip off through whistle blower on unprofessional conduct in dealing with the Bank customer in supporting them secure Bank facilities.

You are hereby invited to a Disciplinary Hearing Meeting to be held from 10.00a.m. on Thursday 6th May, 2021 through Microsoft Teams – an online meeting platform to shed more light on the matter. The meeting will be held virtually in line with social distancing guidelines due to the circumstances brought by the Covid-19 pandemic.

You are entitled to be accompanied at the meeting by another employee (colleague). Please notify us your representative in advance to enable us to invite them on Microsoft Teams.

Kindly note that should you fail to join the online meeting, the Committee will review the evidence availed to them and make a recommendation on the matter and act as will be deemed appropriate, your absence notwithstanding.

Kindly acknowledge receipt of this letter by signing and returning a copy through the undersigned.

Yours Sincerely,

Signed

Rodgers – Mungumi

Director, Human Resources

Cc: Ag. Director, Corporate Banking



.....require/do not require a representative

(Delete as appropriate).

Name of representative if any;.....Branch/Unit

Receipt acknowledge by;.....Date:.....

16. On 29th April, 2021 the Claimant had written to the Respondent reminding and insisting that he had not been supplied with the details and particulars that he had sought in his email of 12th April, 2021. In the letter the Claimant stated as follows –

Rotich Japhet

29/04/2021

BOX 52-202010

Litein

Dear Sammy,

Re: Show Cause Letter

Your show cause letter dated April 12th, 2021 and my email response to the same on the same date refers
Like I stated in the email response, I am not able to respond to the show-cause letter as I have not been supplied with any specifics as to the client or clients in question, evidence adduced in support of the allegations, the whistle blower report, investigation report and other information that you may have in support of this.

Reference is also made to Ag. Director-Corporate email's dated April 16th, 2021 which suggest that business, who filed the complaint have no response as to the information and documents I asked for and his suggestion that we wait for outcome of the investigations.

This is to once again request that you avail to me the said information and documents to enable me to make comprehensive response.

Sincerely,

Signed

Rotich Japheth

17. The Claimant stated that he nonetheless attended the hearing but the details he sought were not availed. Further, the Claimant stated that no witnesses were called during the hearing and the investigation report which was subsequently filed in court by the Respondent was not availed to him. He states that during the disciplinary hearing he was accused of sharing confidential information with a client through unauthorized medium, WhatsApp, which charge was completely at variance with what was stated in the letter of suspension and the show-cause letter.
18. The Claimant is categorical that in the foregoing scenario, he was denied a fair hearing and that the entire disciplinary process was a sham and a charade with a fixed and predetermined outcome of terminating his employment with the Respondent.
19. The Claimant states that he did not violate any banking rules, procedures, policies, or regulations and that he explained as much during the disciplinary hearing, emphasizing that in any event no details or particulars of his alleged misconduct were supplied to him or proved. He states that he was denied a fair hearing.



20. On 12th May, 2021 the Claimant was issued with a letter of dismissal purportedly on the following grounds –
1. That, by your admission, you shared confidential information with a customer through WhatsApp, without following the due process and using unauthorized channels.
 2. You exposed the Bank to reputational risk in the event that the information shared through unauthorized channels. – WhatsApp landed in wrong hands/unintended recipient.
 3. You failed to consider the Bank’s policies and procedure(s) in handling matters of disagreement/grievance where the customer felt aggrieved. The decision to share confidential bank information was a failure on your part to handle and manage customer relationship as expected of you as a Senior Relationship Manager.
21. Vide a letter dated 19th May, 2021 the Claimant appealed the decision to terminate him reminding that he had not been supplied with the details and particulars that he had sought before the disciplinary hearing and insisting that he had been denied a fair hearing.
22. On 20th May, 2021 the Respondent wrote to the Claimant informing him that his termination had been upheld and his appeal dismissed.
23. The Claimant’s oral testimony in court was predicated on his pleadings and the filed witness statement in line with the foregoing paragraphs. The Claimant also produced the bundle of documents filed as exhibits 1 to 21. He denied any misconduct and vehemently denied sharing any confidential bank information with any client or person. He stated that even what was alleged to have been shared with the client was not availed to him before or during the disciplinary hearing. He testified that what he shared with the client was normal and ordinary information concerning a facility that the client had applied for and that in any event the Respondent failed and or refused to supply him with the details and particulars of the alleged confidential information that he had allegedly shared. He stated that the alleged client was neither named in the letter of suspension nor in the show-cause letter which made it impracticable for him to raise and prepare his defence to the allegations made against him.
24. In cross-examination, the Claimant maintained the foregoing position.
25. It is on the basis of the foregoing, that the Claimant is seeking for judgment against the Respondent in the terms reproduced at the introductory part of this judgment.
26. 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

27. 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.
28. The Respondent’s case is that the Claimant was fairly and lawfully terminated for misconduct for failing to follow banking rules, regulations, guidelines, and policies and hence violating Respondent’s confidentiality policy as well as the code of conduct for employees. The Respondent alleges that the misconduct had been reported by a whistleblower.



29. The Respondent pleaded that the Claimant joined the Respondent as a relationship manager on 14th October, 2013 and rose through the ranks to the position of senior relationship manager at a gross monthly salary of Kshs.320,000/= as at the time of termination on 12th May, 2021.
30. The events and circumstances before, during, and after the disciplinary hearing are not in dispute and the Respondent to a large extent agrees on the same as analyzed above in the case for the Claimant.
31. However, the Respondent alleges that after the Claimant was suspended investigation was carried out culminating in a report that established that the Claimant had shared confidential information through images of a customer facility on the Credit Management System (CMS) in violation of employee code of conduct regarding data and information confidentiality. The report exonerated the Claimant from any misconduct in dealing and supporting customers securing bank facilities.
32. It is admitted by the Respondent that the Claimant was not supplied with the details and particulars that he sought in the aforementioned email and letter to the Respondent as outlined in the foregoing part of this judgment.
33. It is also admitted by the Respondent that the confidential information that the Claimant is alleged to have sent to the client via WhatsApp was not obtained as when contacted the client said that she had already deleted the same from her phone. It is admitted by the Respondent that the data and or information that was shared by the Claimant with the client was and concerned a facility that the said client had applied for with the Respondent.
34. As for the failure by the Respondent to supply the Claimant with the details and particulars of the charges as requested for in the email and the letter in response to the show-cause letter, the Respondent alleged that it did not supply the same as the Claimant was aware of the same.
35. RW1, in his oral testimony admitted that the Claimant was not served with the particulars and the details of the charges that he sought and that he was not served with the investigation report. The witness insisted that the charges against the Claimant remained the same, being dissemination of confidential information and hence exposing the bank to reputational risk.
36. In cross-examination, RW1 admitted that the affected client had not recorded a statement during investigation and that the director thereof was not a witness in this cause. He also admitted that the confidential information that the Claimant is alleged to have shared with the client is not available and that he had not seen the said confidential information. He admitted that confidential information is not defined in the Respondent's manuals and policies. He alleged that the problem was with both the contents of the message and the medium used to communicate with the client. He also admitted that the client concerned was neither named in the letter of suspension nor in the show-cause letter. He admitted that the alleged confidential information was not presented to the Claimant. He accepted that the minutes of the disciplinary proceedings and the resolution were not signed by the panelists except one notwithstanding that the dismissal was based on that report.
37. He alleged that the Claimant admitted to the charges and even apologized for his misconduct.
38. It is on the basis of the foregoing that the Respondent prays that the cause be dismissed with costs insisting that the termination was fair and lawful both in substance and procedure.
39. The submissions by Counsel for the Respondent shall be considered alongside those by counsel for the Claimant in the succeeding parts of this judgment.



IV. Issues For Determination

40. 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 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. The Termination

41. 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 Respondent's senior relationship manager but the parties do not agree on his last gross monthly salary. The Claimant alleges that his monthly salary as at the time of termination was Kshs.366,516/=. The Respondent pleads that the monthly salary for the Claimant was Kshs.320,000/= as at the time of termination. It then appears that the last gross salary of the Claimant is an issue for determination by this court as an auxiliary issue to the compensation payable.
42. The letter of appointment for the Claimant dated 17th September, 2013 confirms that the starting gross salary was Kshs.320,000/=. Logically, the said salary cannot have stagnated at that amount to remain the same as at the time of termination in May, 2021. There must have been some annual increment. In any event, the Respondent as the custodian of employment records availed the pay-slip for May, 2021, purportedly tabulating the terminal dues for the Claimant which indicates that the gross monthly salary for the Claimant was Kshs.365,016/= as at the time of termination.
43. In the circumstances, this court finds and holds that the gross monthly salary for the Claimant as at the time of termination was Kshs.365,016/=.
44. The chronology of events leading to termination of the Claimant is not in dispute as the evidence by both sides agree on the same as enumerated above.
45. 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.
46. 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).
47. 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.
48. 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 argued by and for the Claimant.



49. The reason for the termination of the Claimant is stated in the letter of termination to be sharing of confidential information with a customer through WhatsApp without following the due process and using unauthorized channels, exposing the bank to reputational risk in the event that the information shared landed in the wrong hands or unintended recipient, and failing to follow policies and procedures in handling disagreement/grievance where a customer felt aggrieved.
50. RW1 admitted and conceded that there is no rule, regulation, or policy that provides on the medium that should be used to contact or communicate with a customer by the employees. There is no bar to an employee contacting a client through WhatsApp, email, phone call, text messages etc. or at least no such barrier has been demonstrated or proved by the Respondent.
51. The customer that the Claimant is alleged to have sent out information to was disclosed during the disciplinary hearing as SS Dhillion Ltd (SSDTL). It is not disputed by either of the parties that this entity was a customer of the Respondent and held an account or accounts with it. It is also not disputed that the said customer applied for a facility of Kshs.25m but the same was downgraded to Kshs.10m by the Respondent but even then, the approval of the facility was subject to the customer supplying and availing some particulars and details that were required for the facility to be approved. The Claimant was the bank's linkman with the customer. It is in this scenario that the Claimant sent an email to the customer on 4th August, 2020 informing them of the details and particulars that were required for the facility to be processed and or approved. This email has been produced and relied upon by both parties as an exhibit.
52. The Claimant did not receive a response to the email above mentioned within what he considered to be reasonable time and so he called the customer to establish why there was delay from the customer in responding to the email. One of the directors of the customer informed him that she was not in a position to receive and read the email and as such she requested him to send the contents of the email via WhatsApp. It is the Claimant's case that he sent the said information as requested by the customer and he filed and availed the said message and the email in court as his evidence. He denies sending any other and or further information to the customer or indeed to any other person or entity.
53. This court has viewed the said message as contained in the email and the WhatsApp message and all that is contained in it is a request to the customer to avail and supply some specific information and details to enable the processing and or approval of the facility.
54. The Respondent alleges that the Claimant sent more information based on an extract from the CMS which contained comments from various bank officers and which information was confidential. The Respondent has not availed the alleged message(s) and the customer neither recorded a statement during the investigation nor was she called as a witness during the hearing of this cause in court. The customer did not testify in the disciplinary hearing as well.
55. Now, the Respondent has not shown any specific policy, rule, or regulation that bars communication between an employee of the bank and a customer either by phone, WhatsApp, email, or indeed in person over a particular subject matter. The Claimant simply informed the customer of the requirements by the bank that some particular details be supplied before the facility could be approved and or processed. What wrong or misconduct did the Claimant commit in that? What confidential information did the Claimant pass on to the customer that was not supposed to be known to the customer? Did the Respondent have any reason(s) for terminating the Claimant as envisaged in law, and more particularly Sections 43 and 45 of the Act?
56. Section 43(2) of the Act demands 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 Respondent



- alleges that the Claimant sent confidential information to the customer against the rules, policies, and regulations of the bank. The said information has not been availed, the concerned customer did not record a statement, and did not testify in the disciplinary hearing or in court. The customer was also not interviewed during the investigation and no statement has been availed from a director or official of the customer.
57. While the above test on reason(s) for termination is subjective, this court holds that the belief has to be honest, genuine, and reasonable. No rules, policies, or regulations have been specifically pointed out which would have barred the Claimant from communicating with the customer in the manner, mode, and style that he did. It was not upon the Claimant to prove his innocence during the disciplinary hearing. It was upon the Respondent to demonstrate that indeed it had an honest, genuine, and reasonable ground for terminating the Claimant. That burden did not shift even during the hearing in court.
 58. In absence of any evidence in regard to any confidential information sent to the customer and or evidence of clear violation of specific rules, policies, or regulations, this court holds that the Respondent had no honest, genuine, or reasonable ground(s) upon which to found the termination.
 59. The court has gone through the submissions made by Counsel for the Respondent on the foregoing issue but nothing has been submitted to convince this court that indeed the Respondent had any reason(s) to terminate the Claimant. The court has noted the sentiments of the learned judge in *Galgal Jarso Jillo v Agricultural Finance Corporation of Kenya* [2021] eKLR but even if this court adopted the most liberal interpretation of Section 43 of the Act this court still holds the view that there was neither honest, genuine, and or honest believe on the part of the Respondent that the Claimant had committed the misconduct alleged. The very fact that the said information was not availed to the Claimant and the court, the customer did not testify either during the disciplinary hearing or in court, and no rules, policies, or regulations have been demonstrated to have been abused dissuades this court from holding otherwise. All the other authorities cited on this point put emphasis on the same point, that the belief by the employer of existence of the alleged misconduct must be genuine and reasonable.
 60. The provisions of the bank code mentioned by counsel do not in any way fill-in the gaping holes left by the Respondent in establishing that the alleged information was confidential. How can a request to a customer to supply further details and particulars to enable facilitation or approval of a facility be confidential to the same customer? The communication to the customer was only done to the customer, as it was intended, and no one else. To what reputational risk did this expose the bank? None.
 61. It is the considered view of this court that the Claimant was denied substantive fairness for all the foregoing reasons and hence the Respondent had no lawful reason or justification in the termination.
 62. For all the foregoing reasons, the Claimant has proved and demonstrated that there was no reason for his termination and the Respondent has not justified the alleged reason for termination.
 63. 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 Respondent denied the Claimant procedural fairness as well.
 64. Rules of natural justice and common sense dictate that a person accused of any offence or misconduct shall not only be given adequate time to prepare for his defence but also informed with utmost and articulate details of the charges and the particulars thereof. Upon receipt of the show-cause letter on 12th April, 2021 the Claimant wrote back to the Respondent seeking and pleading for details of the charges specifically the identity of the customer concerned, evidence available against him, and the



- information as supplied by the alleged whistleblower. He followed up the email by way of a letter dated 29th April, 2021 reminding the Respondent that although the disciplinary hearing was set for 6th May, 2021 he had not been supplied with the particulars that he had desperately sought for.
65. Amazingly, the Claimant was not supplied with the requested details. In utter contempt, the Respondent did not even deem it fit to respond to the said request. In fact, the said customer was not disclosed until during the disciplinary hearing. On this ground alone, the procedure adopted by the Respondent was wrong, unfair, and unlawful.
 66. Article 47 of *the Constitution*, *Fair Administrative Action Act*, alongside the various provisions of the *Employment Act* that are cited in an earlier part of this judgment provide for fair administrative action. There should be no ambush and rules of natural justice must be adhered to in all administrative actions. Of course, disciplinary proceedings are an administrative action. No witnesses were called during the disciplinary hearing, there is no evidence that the Claimant was supplied with the details and particulars that he had sought, and there is no evidence that the Claimant was afforded an opportunity to question any of the witnesses who had allegedly provided the evidence that was relied upon.
 67. In refusing to supply the Claimant with the details and particulars that he sought, the Respondent denied the Claimant an opportunity to defend himself. In fact, the Claimant did not respond to the show-cause letter and the allegation to the contrary by the Respondent is not only cynical but also hypocritical.
 68. Even if the Respondent had a good reason for terminating the Claimant, which has been found not to be the case, the procedure adopted was hopelessly unfair and unlawful.
 69. The Claimant appealed against the termination on 19th May, 2021 and on 20th May, 2021 he received a letter confirming the termination. No evidence or explanation was offered as to when and or how the appeal was handled and by whom. It cannot be reasonable and or probable or even logical that while the entire disciplinary process, from suspension to termination, had lasted from March to May, the hearing, consideration, and determination of the appeal took just one day!
 70. It cannot be lawful that the Respondent considered the appeal so casually and routinely that the same was dismissed without any record of any deliberations on the same. This court takes the view that the Respondent had always had a predetermined and fixed mind at terminating the Claimant and since a letter of termination had already been issued, the Respondent did not deem it fit to consider the appeal with the due seriousness that it deserved.
 71. This court agrees with the submissions by Counsel for the Claimant on this aspect of procedural unfairness. Counsel has cited the holdings in *Jonathan Chepkwony v George Matokeo & Others* [2021] eKLR, *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, and *Oi Pajeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, among other decisions, and this court agrees with that submission.
 72. Contrary to the submission by counsel for the Respondent, the substance and procedure adopted by the Respondent leading and up to the termination was so grossly unfair that this court must intervene and declare the same unfair and unlawful for all the reasons stating in the foregoing paragraphs of this judgment.

VI. Reliefs

73. Having held that the Claimant was unfairly and unlawfully terminated, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.



74. Prayer (i) is for a declaration that the termination of the Claimant by the Respondent was unfair and unlawful. This court has found as such in the foregoing parts of this judgment and the court hereby makes the said declaration as prayed.
75. Prayer (ii) is for damages for unfair and unlawful dismissal calculated in the total of 12 months gross salary at Kshs. 4,398,192/=. This court has stated again and again that the only compensation that an employee who has been unlawfully terminated, unless otherwise pleaded and proved, is as provided for under Section 49 of the Act. The Claimant is seeking for the maximum compensation under Section 49(1)(c) of the Act.
76. As at the time of termination the Claimant had worked for the Respondent for about eight years. The parties have not expressed willingness to re-engage or re-instate the employer-employee relationship. It is common knowledge that the banking industry is a closely-knit family where once an employee is terminated by one bank it is difficult, if not impossible, for such an employee to land another job in the same industry. It is also a fact that banking is a highly confidential profession and once trust is lost or purportedly lost in an employee, it becomes hard for such an employee to get another vacancy in the same industry. As at the time of the hearing of this cause the Claimant had not landed another job.
77. This court has not detected any misconduct on the part of the Claimant that contributed to his termination. The same email, contents whereof were reproduced in the WhatsApp message, that the Claimant pleaded to have sent to the client is what was produced by the Respondent as its exhibits. Nothing was demonstrated to be confidential in the said content as it was intended for the consumption of the customer and the Claimant rightly sent and conveyed the same to the intended customer.
78. However, it is noted that in the pay-slip for May, 2021 the Respondent tabulated and paid to the Claimant what it considered to be due and payable to him in the sum of Kshs.354,072.40.
79. This court has considered the factors that should be taken into account when making an award of compensation under Section 49(1)(c) of the Act. This court takes the view that the Respondent ought to have been thorough, careful, and considerate in handling the disciplinary process against the Claimant. Having failed to supply the Claimant with the particulars and details that he so passionately pleaded for, and having failed to secure the allegedly confidential messages that were purportedly sent out by the Claimant to the customer, the Respondent ought to have reconsidered its position and refrained from proceeding with a fixed and predetermined mind to terminating the Claimant.
80. It is not every mistake or misconduct by an employee that must result in disciplinary action let alone a dismissal or termination. Employers, and more so the Respondent herein, ought to appreciate that employees are human beings and prone to error and as such, consider other alternative punishments such as denial of promotion, warning, admonishment, denial of performance allowance or bonus, and others. As noted above, the banking industry is based on trust and once an employee is dismissed or terminated it becomes very hard or impossible for such an employee to re-enter the closely-knit industry.
81. Counsel for the Claimant has supported this prayer and cited the attendant factors for consideration as the court has done here. Counsel for the Respondent maintained that the termination was fair and lawful and as such, no compensation is payable to the Claimant. Of course, this court has found and held to the contrary.
82. For all the foregoing reasons, this court takes the view and holds that this is an appropriate case for an award of the maximum compensation in 12 months gross monthly salary made up as follows – Kshs.365,016/= *12= Kshs.4,380,192/=. This award is subject to statutory deductions.



83. Prayer (iii) is for gratuity. This court has again and again stated that gratuity is not a right. The same may only be paid if agreed upon, as a term of the contract, and or at the discretion of the employer in appreciation of a job well done by the departing employee. I have looked at the contract of service and noted that there is no provision for payment of gratuity and the Respondent has not expressed willingness to pay the same. For this reason, this prayer is denied – See Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR, Bamburi Cement LTD v Farid Aboud Mohamed [2016] eKLR, and H. Young & Company EA Limited v Javan Were Mbago [2016] eKLR.
84. It is important to note that the dues that were processed and paid to the Claimant as per the pay-slip for May, 2021 settled the items mentioned therein and the Claimant has not included the said items in the prayers in this cause. However, the settlement in regard to the said items did not in any way bar the Claimant from filing this cause and pleading as he did.

VII. Costs

85. The Claimant has to a large 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 costs of the cause.

VIII. Disposal

86. In final disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the termination of Claimant by the Respondent was unfair and unlawful.
 - b) The Claimant is awarded a sum of Kshs.4,380,192/= being compensation for unfair and unlawful termination.
 - c) The Claimant is awarded costs of the cause.
 - d) All the other claims are denied.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 25TH DAY OF MAY 2023

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DAVID NDERITU

JUDGE

