



**Gibendi v Bank of Africa Kenya Limited (Cause 273 of 2018)  
[2023] KEELRC 1210 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1210 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 273 OF 2018  
DN NDERITU, J  
MAY 18, 2023**

**BETWEEN**

**ROBERT MUSANGO GIBENDI ..... CLAIMANT**

**AND**

**BANK OF AFRICA KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a memorandum of claim dated October 26, 2018 and filed in court on December 5, 2018, through Wachira Wekhomba AIM & Associates, Advocates, the claimant prays for: -
  1. This honourable court do order the respondents to pay the claimant 1 months' salary *in lieu* of notice of Kshs 260,000.
  2. This honourable court do order the respondent to pay the claimant Kshs 86,667 for 10 days unpaid leave.
  3. This honourable court do order the respondent to pay the claimant unpaid salary for days worked till August 9, 2017 of Kshs 76,931.51.
  4. This honourable court do order the respondent to pay the claimant shuttle costs to and from Nakuru on August 9, 2017 of Kshs 1,500.
  5. This honourable court do order the respondent to pay the claimant the balance payable during the period of suspension of Kshs 130,000.
  6. This honourable court do order the respondent to pay the claimant mileage for transport to and from Nakuru on June 23, 2017 and July 14, 2017 of Kshs 48,000.



7. This honourable court do issue a declaration that the loan taken by the claimant is a staff loan within the meaning of clause 27.4 of the Human Resource Policy.
  8. This honourable court do order the respondent to implement the interest rate of 3 months treasury bills against the staff personal loan.
  9. This honourable court do compel the respondent to cause the claimant's name to be removed from the Credit Reference Bureau's list of defaulters.
  10. This honourable court do grant the claimant 12 months compensation for unfair termination Kshs 3,120,000.
  11. General damages for discrimination and unfair labour practices at the workplace.
  12. Costs and interest of this suit.
2. Together with the memorandum of claim, as expected, was filed a verifying affidavit by the claimant and also a witness statement and a list of documents dated October 26, 2018 and a bundle of the listed documents. The claimant filed a further witness statement on June 9, 2021.
  3. On May 16, 2019 the claimant changed his advocates from the above-named law firm to Wachira Wanjiru & Co, Advocates, and a notice of change of advocates was filed accordingly on May 17, 2019.
  4. On December 18, 2018 the respondent, through Hamilton Harrison & Mathews, Advocates, entered appearance and filed a response to the claim and a counter-claim on February 4, 2019 alongside a bundle of documents. Several witness statements were also filed but ultimately, only three witnesses testified for the respondent as analyzed in a latter part of this judgment.
  5. In its response to the claim the respondent prays that the claimant's cause be dismissed with costs for want of merits and that judgment be entered in its favour as prayed in the counter-claim in the following terms –
    - a. Kshs 1,264,960/- against the claimant in respect of the loans advanced to the claimant during the cause of her employment;
    - b. Interest on (a) above until payment in full;
    - c. Costs of the suit and the counterclaim;
    - d. In the event any judgment is entered for the claimant, the same be set off against the counterclaim;
    - e. Any other relief that this honourable court may deem fair and just to grant.
  6. The claimant filed defence to the counter-claim on March 28, 2019 putting the respondent to strict proof thereof.
  7. The respondent filed a supplementary bundle of documents on April 17, 2019 and a further list and bundle of documents on March 16, 2022.
  8. This cause came up for hearing in open court on February 10, 2022 when the claimant (CW1) testified and closed his case. However, the claimant was recalled for further evidence on March 17, 2022 after the respondent was allowed to file further list of documents to which the claimant needed to respond by way of oral testimony in court.



9. The defence was heard on March 17, 2022 when Moses Alango (RW1), Kennedy Kibibi Manyala (RW2), and Elizabeth Mumbi (RW3) testified for the respondent and the respondent's case was closed.
10. Counsel for both parties, by consent, addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Miss Wachira, filed her written submissions on June 14, 2022 while counsel for the respondent, Mr Owiti, filed on September 26, 2022.

## **II.The Claimant's Case**

11. 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.
12. In his memorandum of claim, the claimant pleaded that he was engaged by the respondent, a bank, as the Nakuru Branch manager, joining from Equatorial Commercial Bank. The respondent bought off a loan facility that the claimant had with his former employer and he started paying the same off his salary with the respondent. However, the claimant was terminated from his employment *vide* a letter dated August 9, 2017, with immediate effect, for alleged misconduct.
13. The chronology of the events leading to the termination of the claimant by the respondent is that on June 22, 2017 the claimant received an email from Nancy Gachui, the Head of Retail with the respondent, which email had been sent the previous day at 7:49pm. To the said email was attached a letter of suspension from duty.
14. The said letter of suspension stated as follows –

Wednesday, June 21, 2017

Mr. Robert Gibendi

C/o Bank of Africa Kenya Limited

Nakuru Branch

Nakuru

Dear Robert,

Re: Suspension from Duty

The above refers, following a client complaint resulting from the un-procedural debit of Kes.350,000.00 from their account for valuation fees.

For the Bank to investigate this matter further, you are hereby required to proceed on a 1 week suspension with effect from 22<sup>nd</sup> June, 2017. You shall however avail yourself for a disciplinary hearing on the 23<sup>rd</sup> of June, 2017 at BOA House at 2.00p.m. The notification for this hearing is herein attached.

You shall be advised when to report to work after the investigation is complete, on or by the 29<sup>th</sup> of June 2017.

Kindly sign a copy of this letter for your file, as an understanding and acknowledgement of the contents herein.

Yours sincerely,

for: Bank of Africa Kenya Limited

Signed,

Isabel Njooor Nancy Gichui



Acting Head of Human Resources Head of Retail

Encls.

Signed

15. It is clear and unambiguous from the above letter that the Claimant was suspended from duty to pave way for investigation of a complaint by a client arising from an alleged un-procedural debit of Kshs.350,000/= from the account of that client for valuation fees of a property ostensibly to be offered as a security for a loan facility. It is also clear that the Claimant was suspended for one week and was to be informed of the way forward on or by 29<sup>th</sup> June, 2017.
16. Alongside the letter of suspension, the Claimant was also served a notice of disciplinary hearing slated for 23<sup>rd</sup> June, 2017. The said notice of disciplinary hearing required the Claimant to show-cause why disciplinary action should not be taken against him and his response was supposed to be received by the Head of Human Resources of the Respondent before the date of the hearing, which in essence was the day that followed. The notice informed the Claimant of his right to come along with a witness or witnesses or a representative who could be a co-worker, and also his evidence. The Claimant was supposed to give the names of the representatives, witnesses, or interpreter by or before 4:00pm on 21<sup>st</sup> June, 2017, which date and time was long gone by the time the Claimant read the email on 22<sup>nd</sup> June, 2017. There is no mention in the notice that the Claimant had a right to bring a representative from his union, in case he was a member of such union.
17. In his short rejoinder to the letter of suspension and the notice of disciplinary hearing, which also doubled as the show-cause letter, the Claimant denied the allegation against him that he had facilitated the irregular and or un-procedural withdrawal and transfer of Kshs.350,000/= from the account of the complaining client and indicated that the said client had not been named or disclosed. This far, the said client had not been named by the Respondent in its correspondences above. The Claimant indicated that the client had transferred the alleged sum of money in settlement of valuation fees, which service had been rendered informally by one of the valuers in the panel of valuers enlisted by the bank, without involving the bank, and as such the Claimant had nothing to do with the matter.
18. In his testimony in court, the Claimant stated that he had to approach the Respondent in order to get the details of the client and that is how he learnt that it was an entity by the name Ponchoz Agencies Limited (Ponchoz) and that the valuer who had been paid was Dansal & Associates (Dansal).
19. Nonetheless, the Claimant attended the disciplinary hearing on 23<sup>rd</sup> June, 2017 as directed by the Respondent and the minutes of the said meeting were produced as an exhibit by the Respondent. From the minutes, which the Claimant and others present signed on diverse dates, it is indicated that the Claimant stated that he was ready to proceed with the hearing without any representatives.
20. During the disciplinary hearing, the Claimant stated that while he had indeed filled-in the form (G9) for the direct internal transfer of the sum of Kshs.350,000/= from the account of Ponchoz to that of Dansal, it is one of the directors of the client, Peter Kimani Kibathi, who executed the signature thereon and that since it was late in the evening, beyond working hours, the said form was postdated to the day that followed.
21. During the disciplinary hearing, the Claimant denied any wrong doing and the panel promised to get back to him as soon as a decision was made on his case.
22. After waiting for a while and receiving no response from the Respondent, the Claimant did approach the Respondent to be advised on the status of his suspension. Vide a letter dated 7<sup>th</sup> July, 2017



the suspension was extended to 21<sup>st</sup> July, 2017. For the entire period of suspension, and until the termination, the Claimant was paid his monthly salary as and when the same was due.

23. The Claimant testified that on 14<sup>th</sup> July, 2018 he was summoned by the Respondent and met a team mainly made of security officers of the Respondent. He was directed to write a further statement, in addition to the one he had already written earlier on when the investigation commenced. The directors of Ponchoz and Dansal were present but the Claimant had not been informed that this meeting was a continuation of the disciplinary hearing. He stated that he was not allowed to ask any questions to the said directors and as such, his case is that he was denied a fair hearing. The minutes of this meeting were not availed to court by either party.
24. In the letter of complaint dated 22<sup>nd</sup> June, 2017 (note that the Claimant was suspended on 21<sup>st</sup> June, 2017), which was produced by the Respondent as an exhibit, the client claimed not to have visited and or authorized the bank to transfer the sum of Kshs. 350,000/= from its account to that of Dansal. The directors of Ponchoz alleged in their statements to the security officers of the Respondent that they did not visit the Nakuru Branch of the Respondent on 7<sup>th</sup> April, 2017 when the alleged transaction took place. In an effort to exonerate himself from those serious allegations, the Claimant pleaded with the Respondent to supply him with the CCTV footage for the said date, at least for the period between 4pm and 6pm. He did his requests through several letters he produced as exhibits during the hearing. However, the said footage was not availed to the Claimant as the Respondent alleged that the said footage had been deleted permanently from the system.
25. As it turns out, the directors of Ponchoz and those of Dansal reconciled their accounts and Ponchoz was refunded a sum of Kshs.200,000/= for the overcharge on the valuation fees as the property which was to be offered as security for a loan facility was upon valuation found to be of far less value than what was declared by Ponchoz. According to the Claimant, the refund and re-negotiation of the valuation fees is by itself an admission on the part of the client that it had instructed on the valuation to be carried out only that the fees was overcharged culminating in the refund stated above.
26. According to the Claimant, there is no evidence that he signed the G9 form that enabled transfer of the Kshs.350,000/= from the account of Ponchoz to that of Dansal and that he committed no wrong or misconduct. He insists that the transfer of the said funds was procedural, regular, and normal.
27. Vide a letter dated 9<sup>th</sup> August, 2017 the Claimant was terminated with immediate effect. The said letter stated as follows –

09 August 2017

Mr. Robert Gibendi

Box 5-20100

Nakuru

Dear Robert,

RE: Termination Of Employment

We regret to note, with respect to the account of Ponchoz Agencies Limited, the following anomalies, all in contravention of the Bank's policies and procedures:-

1. You admit that you, on or about the 13<sup>th</sup> of March, 2017, released a proforma invoice issued by valuers known as Dansal and Associates, to a Mr. Raymond Chelula. We note that Mr. Chelula is not, and has never been an authorized



agent of Panchoz Agencies Limited and thus your release of the said pro forma invoice is a breach of the Bank's duty of confidentiality;

2. You admit to have filled a funds transfer form (G9) for the client, allegedly, on the client's instructions to enable the valuation of property by Dansal and Associates. You further advise that Mr. Peter Kibathi, one of the signatories to the account opened by the Client, thereafter signed the forms and you passed them on to the Customer Service Officer and the Customer Service Designate in the Nakuru Branch so that the same may be processed. Consequently, you exposed the Bank to both financial and reputational loss because the client's authorized signatories have advised, both through a written statement as well as verbally at the meeting held on 14<sup>th</sup> July, 2017 in your presence that they did not authorize the debit of funds from their account and the subsequent transfer of the same to Dansal and Associates;

During the disciplinary hearing held on the 23<sup>rd</sup> of June, 2017, you confirmed the following:-

- a. That the G9 instruction for payment of Dansal Valuers fees was filled and signed by the Client when they visited Nakuru branch on the 7<sup>th</sup> of April 2017. You further stated that you had stamped the date and time the forms were received.

We wish to advise that we have considered all the facts in this matter, and the representations that you have made, and following due consideration and deliberation, management has made a decision to terminate your services from the bank with immediate effect.

The reasons for terminating you from employment with us are that as a Branch Manager you had the overall responsibility of ensuring that all Bank procedures are properly adhered to. However, despite having full knowledge and understanding of what was required of you, you breached the outlined procedures and consequently have exposed the Bank to legal, financial and reputational risk.

Yours sincerely,

For Bank of Africa Kenya Limited

Signed Signed

Isabel Njoro Ronald Marambii

Acting Head of Human Resources Managing Director

Encls:

28. It is the Claimant's testimony that his termination was discriminatory as other officers who also participated in what he considers to have been regular and procedural transfer of the funds were not disciplined in any way or manner.
29. Further, the Claimant alleges that the banking industry is a tightly-knit family and his unfair and unlawful dismissal became known to prospective employers in the industry making it impossible for him to secure a job in the industry wherein he had served for long.
30. Moreover, the Claimant states that for lack of a job he was unable to service his personal loan facility with the Respondent and the latter caused him to be listed with the Credit Reference Bureau (CRB) causing his credit worthiness to diminish.



31. The Claimant stated that the interest on the balance of the loan should be paid at the staff rate as he was unfairly and unlawfully terminated and any changes on the interest rates amounted to unilateral variation of his terms and conditions of employment. He stated that as at the date of dismissal his loan balance was Kshs.1,366,232.29 and therefore if any of his terminal dues were applied to off-setting the loan the balance should be even lower.
32. The Claimant is categorical that he did not violate any rules, regulations, or policies of the Respondent and that he was very professional at all the time when he served the Respondent. In particular he states that the transaction concerned was overboard and that he did nothing wrong.
33. It is on the basis of the foregoing that the Claimant prays as per the Memorandum of claim.
34. The submissions by the Claimant's Counsel shall be considered in the succeeding parts of this judgment.

### **III. The Respondent's Case**

35. The Respondent's case is contained in the response to the claim, the counter-claim, and the oral and documentary evidence adduced through RW1, RW2, and RW3, and the same is summarized hereunder.
36. 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 engaging in un-procedural transfer of funds from the account of Ponchoz to that of Dansal by filling form G9 and forging the signature of the director of the said transferor.
37. RW1, the manager security and investigations of the Respondent, stated that he joined the Respondent in December, 2018 and as such, he was not part of the team that investigated the subject matter concerning the Claimant. He stated that the issue for investigation concerned an allegation by Ponchoz that a sum of Kshs.350,000/= had been transferred from their account fraudulently through forgery of the signature of one of the directors.
38. He admitted that while the Claimant filled-in the G9 form for the transfer of the said funds the investigations revealed that he did not sign the said form as per the report of the document examiner, one Catherine Kefa. He stated that based on the foregoing findings, the Respondent recommended that the matter be investigated further by the Directorate of Criminal Investigations (DCI) and that the said investigations had not been concluded as at the time of his testimony in court.
39. Further, he stated that the CCTV footage requested for by the Claimant could not be availed to him as the same had been permanently deleted from the record upon expiry of 14 days from the date of recording or at most 30 days.
40. He admitted that the complaint by Ponchoz was made on 22<sup>nd</sup> June, 2017 and that the said company was not eligible for any loan facility as it had been listed with CRB.
41. In cross-examination, he admitted that Catherine Kefa did not supply any evidence to prove that she was a qualified document examiner and further, that there is no evidence that the matter was actually escalated to DCI for further investigations. He also admitted that investigation in the matter had not been concluded and that the disciplinary hearing of 23<sup>rd</sup> June, 2017 was conducted without the benefit of conclusive evidence on the issues. He admitted that no criminal charges were preferred against the Claimant in respect of this matter.



42. RW2, was the Head of Operations of the Respondent at the material time and the Regional Head, Coast, as at the time of his testimony. He testified that he sat in the disciplinary hearing panel on 23<sup>rd</sup> June, 2017. He stated that the Claimant attended the hearing and thereafter signed the minutes of the meeting on 28<sup>th</sup> June, 2017. He stated that the Claimant indicated that he did not have a representative and that the Claimant did not complain of not having been given adequate time to prepare for the hearing.
43. He alleged that it was wrong for the Claimant to have filled-in the form for the internal transfer of the funds from Ponchoz to Dansal. He stated that no loan application had been submitted by Ponchoz as none was found in the system.
44. In cross-examination, he admitted that the Claimant, as the branch manager, had no access rights to transfer funds and as such the transfer of the Kshs.350,000/= must have been effected by someone else, other than the Claimant. He admitted that the issues of valuation fees were subsequently agreed on and settled as between Ponchoz and Dansal, and that part of the transferred money was refunded to the former.
45. He admitted that although a client should fill-in the form for transfer of funds, there is no law or policy that prohibited the Claimant from filling-in the same for the client but the practice is that a bank employee should not do so unless under special circumstances such as in a case of a disabled, impaired, or illiterate client.
46. RW3 is the Human resource manager of the Respondent. She did not take part in the disciplinary hearing of 23<sup>rd</sup> June, 2017. Basing her testimony on the minutes of the disciplinary hearing, she stated that the Claimant waived his right to have a representative, a witness, or a union member during the hearing and that he did not ask for more time to prepare for the hearing. She stated that by the Claimant signing the minutes he endorsed the same as a true reflection of what happened during the hearing.
47. In regard to the counter-claim by the Respondent, she testified that the Claimant was to enjoy preferential staff terms, especially on low interest rate, as long as he was an employee of the Respondent. Once the Claimant was terminated, she went on, the Claimant lost that privilege. She stated that after termination the Claimant did not service the loan facility and the same stands unpaid to this day.
48. She stated that upon termination the dues payable to the Claimant were applied to the loan as a partial set-off. And, since the Claimant had failed and or refused to service the loan, the Claimant was listed with CRB, of course, upon a report from the Respondent.
49. In cross-examination, she admitted that the Claimant was suspended for a longer period than what is provided for in the human resource manual of the Respondent, but she argued that the situation was remedied by the Respondent paying to the Claimant full salary for all the period that he was on suspension.
50. She admitted that the Claimant was suspended before a complaint was received from the Client, Ponchoz.
51. She stated that there are no minutes for the further disciplinary meeting that allegedly took place on 14<sup>th</sup> July, 2017.
52. She admitted that no warnings were issued to the Claimant before action was taken as provided for in the human resources manual of the Respondent. She also admitted that no action was taken against any other employee at Nakuru Branch of the Respondent over the subject matter.



53. She stated that the salary and benefits payable to the employee were the security for the personal loan advanced to him and that once he was no longer an employee the security was gone and with it the preferential terms that the Claimant enjoyed as an employee.
54. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs and that judgment be entered for the Respondent as prayed in the counter-claim. The submissions by Counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimant.

#### **IV. Issues For Determination**

55. 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. Is the counter-claim by the Respondent merited?
  - d. Who meets the costs in this cause and in the counter-claim?

#### **V. The Termination**

56. 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 branch manager at Nakuru at a monthly gross salary of Kshs.260,000/=.
57. The chronology of events leading to termination of the Claimant is not in dispute either as the evidence by both sides agree on the same as analyzed above.
58. 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.
59. 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).
60. 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.
61. It is on the basis of the foregoing provisions of the law that the termination of the Claimant by the Respondent has to be weighed and scaled in determining whether the same was substantively and procedurally unfair and unlawful as argued by and for the Claimant.
62. The reason for the termination of the Claimant is stated in the letter of termination as failure by the Claimant to follow the banking procedures in effecting transfer of Kshs.350,000/= from the account of Ponchoz, a client, to that of Dansal, a client and a listed valuer with the Respondent. What is not in dispute is that the Claimant filled-in the G9 form. While the directors of the client allegedly denied



signing the said form (the said directors were not called as witnesses in this cause) the evidence on record is that the Claimant did not sign or forge the signature thereon.

63. RW1, RW2, and RW3 admitted and conceded that there is no rule, regulation, or policy that provides that the Claimant or indeed any employee of the Respondent should not fill-in the said form for a customer. In fact, the evidence on record is that in cases of illiteracy or impairment an employee should indeed help a customer in filling-in the form or offer any other such help needed by the client. While there is no evidence on record that the directors of Ponchoz were illiterate or physically impaired, there is no evidence that the Claimant abused any procedural rule, regulation, or guideline in filling-in the form for the said client.
64. The evidence on record is that indeed the said client instructed Dansal to carry out a valuation of the property that was ostensibly to be offered as a security for a loan facility that was to be applied for based on an estimated value of the property by the client in excess of Kshs.105 million. It turned out that the value given by the client was exaggerated and the fees of Kshs.350,000/= was hence excessive. Ponchoz and Dansal subsequently settled the matter and a refund of about Kshs.200,000/= was made by Dansal to Ponchoz.
65. Surely, if Ponchoz had not instructed Dansal and even made the said payment, how did the two then settle the matter and even negotiate the fees downwards? As it turns out as per the evidence of RW2, Ponchoz did not qualify for any loan as it was listed with CRB. And this explains why no loan application was ever received or made by the said client.
66. The question then becomes – What wrong did the Claimant commit in all this? This court is of the considered view that no misconduct was committed by the Claimant in the foregoing circumstances. In any event, if the Respondent was not happy with the Claimant filling-in form G9 for the client, it is the considered view of this court that the situation would have been addressed by way of a verbal or written warning and the matter did not deserve a disciplinary hearing that culminated in termination.
67. Employees, including the Claimant, are humans and are prone to error. If employers were to result to disciplinary actions for each and every perceived or even misconceived error or infraction by an employee, then all employees would fall short of glory and the employer would have to terminate employees every now and then. That would result in very high employee turnover, low morale and productivity, and disruptions. That does not paint a picture of the setting of a healthy workplace.
68. 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, that the Claimant acted un-procedurally or unprofessionally in dealing with and handling the client, Ponchoz.
69. 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.
70. The client, Ponchoz, complained to the Respondent vide a letter dated 22<sup>nd</sup> June, 2017. Bizarrely, and no explanation has been offered by the Respondent, the Claimant had been suspended on 21<sup>st</sup> June, 2017 as per the letter of suspension of even date. There is no evidence that the Respondent had any knowledge of the alleged misconduct prior to the letter of complaint from the said client. On what basis or complaint then did the Respondent suspend the Claimant from duty? The suspension was hence based on a non-existent complaint or a complaint whose source the Respondent has refused to avail to and or inform the court.



71. Rules of natural justice and common sense dictate that a person accused of any offence or misconduct shall be given adequate time to prepare for his defence. Such an accused person need not complain that he has not been given adequate time before or during the hearing. It is incumbent upon an employer to ensure that an employee is given adequate time to prepare for the hearing. In this case the Claimant was emailed at 7:49pm on 21<sup>st</sup> June, 2017 to appear for a hearing on 23<sup>rd</sup> June, 2017. The Claimant testified that he received the email on 22<sup>nd</sup> June, 2017. There is no way that such a short notice can be deemed to have been adequate. It does not matter that the Claimant did not complain about the shortness of the notice during the disciplinary hearing. It is amazing that RW3, a human resources practitioner, thinks that such a procedure was okay.
72. It is the opinion of this court that unless for a good reason, which should be indicated in the show-cause letter or the notice of disciplinary hearing, an employee should be granted at least seven clear days to prepare for his defence before appearing for the disciplinary hearing. The Claimant was on suspension already as at the time of the disciplinary hearing. What was the emergency or hurry in having an urgent disciplinary hearing? None.
73. In his response to the show-cause letter the Claimant requested that he be supplied with the CCTV footage to demonstrate that the directors of Ponchoz were indeed at the bank at the material time of signing the G9 form. The said CCTV footage was not supplied and no explanation was offered to the Claimant then. It is during the hearing in court that the Respondent indicated that the material CCTV footage was not available.
74. While the Respondent availed the minutes of the disciplinary hearing of 23<sup>rd</sup> June, 2017, it has been confirmed that another hearing was conducted on 14<sup>th</sup> July, 2017. There is no notice availed inviting the Claimant to that hearing and no minutes have been availed for that hearing.
75. The specific allegations against the Claimant were not stated in the show-cause letter of 21<sup>st</sup> June, 2017 and the concerned client who was complaining was not named. It is in the letter of termination that the allegations against the Claimant are detailed and the reasons for termination stated as – “The reasons for terminating you from employment with us are that as a Branch Manager you had the overall responsibility of ensuring that all bank procedures are properly adhered to. However, despite having full knowledge and understanding of what was required of you, you breached the outlined procedures and consequently have exposed the Bank to legal, financial and reputational risk.”
76. Other than that, the Claimant filled-in form G9 for the transfer of the funds, which conduct this court has found to have no prohibition in the rules and procedures of the Respondent, nothing else is stated on how the Claimant failed to follow the guidelines or procedures of the Respondent.
77. RW1 and RW2 admitted that there is no evidence that the Claimant committed fraud or forgery and that the matter is still under investigation. On what basis then did the Respondent take the drastic action of terminating the Claimant?
78. For all the foregoing reasons, this court comes to the obvious and inevitable conclusion that the termination of the Claimant by the Respondent was unfair and unlawful, both in substance and procedure, and it is so declared.
79. This court agrees with the submissions by Counsel for the Claimant on the foregoing issues for the specific reasons stated above. Counsel for the Respondent has not alluded to any factual or legal reasons that should persuade this court to depart from the foregoing reasoning on the issue of unfairness and unlawfulness of the termination.



## **VI. The Counter-claim\*\*** \_\_\_

80. There is no dispute that as at the time of termination the Claimant had a personal loan with the Respondent, advanced on preferential staff terms and which the Claimant did not service after the termination. The Claimant testified that as at the time of termination the balance of the loan stood at Kshs.1,366,232.29 and this is admitted and conceded by the Respondent in the letter of termination. However, the Respondent puts the balance as at the time of termination at Kshs.1,264,960/=.
81. There is no doubt that the Claimant owed to the Respondent some money in balance of the personal loan. The court has found that the termination of the Claimant was unfair and unlawful and as such, the Claimant should have continued in employment servicing the loan from his monthly salary till payment in full. There must have been an agreed payment schedule clearly indicating when the final payment and settlement would be made.
82. In all fairness and for justice to prevail, this court declares that the Claimant owes the Respondent the balance in the loan based on the agreed schedule of payments at the agreed staff preferential rate and no more. The said balance should not earn any further interest beyond what was due and payable as at the time of the unfair and unlawful termination. This court can only go by what the Respondent has stated in its pleadings in the counter-claim.
83. For the foregoing reasons, the counter-claim is allowed and judgment entered in favour of the Respondent at Kshs.1,264,960/=.

## **VII. Reliefs**

84. 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.
85. Prayer (1) is for one month's salary in lieu of notice in the sum of Kshs.260,000/=. This court has no difficulties at all in granting this prayer for the reasons stated elsewhere in this judgment that the termination was unlawful and unfair.
86. Prayer (2) is for Kshs.86,667/= for 10 days of unpaid leave. This amount is conceded by the Respondent in the letter of termination as due and payable to the Claimant and the same is accordingly awarded.
87. Prayer (3) is for a sum of Kshs.76,931.51/= being salary for days worked in August, 2017. This amount is admitted and conceded by the Respondent in the letter of termination and the same is awarded accordingly.
88. Prayer (4) for shuttle costs in the sum of Kshs.1,500/= is admitted by the Respondent and the same is awarded accordingly.
89. Prayer (5) is for balance payable during suspension in the sum of Kshs.130,000/=. There is no evidence or any explanation in the written submissions as to what this amount is about. The court cannot in the circumstances discern what this claim is all about and the same is denied and dismissed.
90. Prayer (6) is for Kshs.48,000/= for mileage and the same is admitted by the Respondent in the letter of termination. The same is accordingly awarded.
91. Prayer (7) is for various aspects of the loan facility advanced to the Claimant by the Respondent. The court has made substantive findings on the same above and there is no need for repeating the same here. However, this court orders that upon delivery of this judgment the Respondent shall forthwith,



- and in any event within seven (7) days thereof notify the CRB of the settlement so that the name of the Claimant is delisted with CRB.
92. Prayer (8) is for compensation for unfair and unlawful termination. The Claimant is seeking a maximum of 12 months gross salary totaling to Kshs.3,120,000/=. This court has considered the entire circumstances of this cause and more so the finding that the Claimant was denied both substantive and procedural fairness.
  93. The court takes judicial notice of the fact that the banking industry is a closely-knit family where information flows freely and quickly from one bank to the other and as such once an employee is dismissed or terminated from one bank it becomes difficult to find employment in another bank. The Claimant testified that for the foregoing reason, he has not been able to secure another job in the industry since the termination.
  94. The court has not found fault on the part of the Claimant that may have contributed to the termination. The Respondent rushed to carry out hasty disciplinary hearing and termination without conclusive evidence and without allowing the investigations to be completed. That is not the way to deal with disciplinary matters as it resulted in great prejudice to the Claimant.
  95. All that the Claimant wishes to happen, as far as this court can discern, is to have this matter determined so he can move on with his life. He has not expressed any wishes to be re-engaged by the Respondent and the latter has expressed no such intentions.
  96. In the circumstances, and considering all the factors and parameters provided for under Section 49(4) of the Act this court considers this cause to be an appropriate one for award of the maximum compensation of 12 months gross monthly salary totaling Kshs.3,120,000/=. This amount is awarded subject to statutory deductions.
  97. Prayer (9) is for compensation for discrimination and unfair labour practices at the workplace. The Claimant argues that since the transfer of the funds was done by other officers in the bank, mutandis mutatis, they ought to have been disciplined as well. The Claimant was the branch manager and the transaction for transfer of the funds originated from him. The other two employees who acted on the transaction, Grace Mbau, the customer service manager, and Daniel Oeta, another customer manager, acted on the instructions from the Claimant who was their boss. It is in the opinion of this court that the two named employees, though not called as witnesses in this cause, acted in honest belief that the Claimant, as the manager, had authenticated and verified all the details before instructing them to act on the same. From the evidence and submissions by Counsel, the Respondent took disciplinary action against the Claimant, albeit unfairly and unlawfully, as the buck stopped with him as the branch manager.
  98. Applying the principles in Anarita Karimi and Mumo Matemu decisions, this court holds that the Claimant has not proved discrimination against him considering the entire circumstances of this cause.
  99. Further, in regard to unfair labour practices against the Claimant this court has already concluded and held that the termination was unfair and unlawful and awarded compensation therefor above. The court, considering all aspects of this cause, sees no reason for awarding any special or additional compensation besides what is granted above. Prayer 9 is therefore denied.
  100. The amounts awarded in prayers (1) to (6), exempting prayer (5) for the amount of Kshs.130,000/= which has been denied by court, all amounting to Kshs.473,098.18 was admitted by the Respondent and acknowledged in the letter of termination. The Respondent alleges that this amount was paid to the Claimant and applied as a partial set-off of the loan. The Claimant denied that the said amount was either paid to him or applied as a partial set-off to the loan.



101. The Respondent did not avail a loan account statement of the Claimant to confirm that indeed the said sum of money was applied as alleged. However, a salary account statement for the Claimant was availed in court by the Respondent indicating that a sum of Kshs.341,154.36 was paid into the account operated by the Claimant with the Respondent on 21<sup>st</sup> September, 2017, being salary for August, 2017 and settlement of terminal dues payable to the Claimant. Although the Claimant denied receiving this money and or the same being applied in partial set-off of the loan, this court takes the view that this amount was actually paid to the Claimant as per the bank statement. The Claimant did not in any way dispute or disprove the contents of the said bank statement which was admitted and accepted as evidence by the court.
102. However, the Respondent did not offer any explanation as to what happened to the sum of Kshs.132,943.82 being the difference between the amount of Kshs.473,098.18 that is admitted as payable to the Claimant in the letter of termination, and the sum of Kshs.341,154.36 that was actually deposited into the salary account of the Claimant as explained above.
103. It would appear to this court, and logically so, that this amount of Kshs.132,943.82 is the same amount that the Claimant is praying for in prayer (5) of the Memorandum of claim, although claimed as Kshs.130,000/=. For the foregoing reasons, the Claimant is awarded the sum of Kshs.132,943.82 which was deducted from the final dues paid with the salary for August, 2017 without any reason or explanation being offered. The Respondent did not avail the Claimant's pay-slip for August, 2017 to establish any basis for the deductions or offer an explanation on how this amount was expended.
104. The statement of the loan account availed in court by the Respondent does not show any credit or payment of the dues into that account as a partial set-off to the loan balance and the allegation by the Respondent about such payment being made is not proved.

#### **VIII. Costs**

105. The Claimant has to a large extent succeeded in his cause and hence the court has made the awards in the foregoing part of this judgment. For this reason, the Claimant is awarded costs of the cause.
106. On costs for the counter-claim, the Claimant admitted owing a sum of Kshs.1,366,232.29 as at the time of his termination. The Respondent states in the counter-claim that the balance due as at 22<sup>nd</sup> January, 2019 was Kshs.1,264,960/=. The Claimant argues that he had no means of repaying or servicing the loan after the unfair and unlawful termination. However, there is no dispute that the Claimant was aware of existence of unpaid balance on the loan and the only issue was on the amount due and payable. Had the Respondent not terminated the Claimant unfairly and unlawfully, *ceteris paribus*, the loan should have been recovered in full. The Respondent is hence to blame for the non-payment of the loan balance in full and for that reason each party shall meet own costs in regard to the counter-claim.

#### **IX. Disposal**

107. 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.3,286,380.82 made up as hereunder –
    - i. One month's salary in lieu of notice ...Kshs.33,437.00
    - ii. Balance not paid in regard to prayers



1. to (6), excluding prayer (5), in the memorandum of claim.....Kshs.132,943.82
  - iii. Compensation for unfair and unlawful termination.....Kshs.3,120,000.00
  - iv. Total.....Kshs.3,286,380.82
  - d. The Claimant is awarded costs of the cause.
  - d) All the other claims are denied.

106. In regard to the counter-claim the following orders are issued –

- a. Judgment be and is hereby entered in favour of the Respondent in the sum of Kshs.1,264,960/=.
- b. The amount above shall be deducted from the amount that is awarded to the Claimant above as a set-off and the Respondent shall be liable to pay to the Claimant the difference.
- c. Each party shall meet own costs for the counter-claim.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU**

**THIS 18TH DAY OF MAY 2023.**

.....

**DAVID NDERITU**

**JUDGE**

