



**Kaleli v Kingdom Bank (Cause 1621 of 2017)  
[2023] KEELRC 2588 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2588 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1621 OF 2017  
MA ONYANGO, J  
OCTOBER 5, 2023**

**BETWEEN**

**KEITH KALELI ..... CLAIMANT**

**AND**

**KINGDOM BANK ..... RESPONDENT**

**JUDGMENT**

1. Vide Memorandum of Claim dated 17<sup>th</sup> August 2017, as amended through the Amended Memorandum of Claim dated 8<sup>th</sup> October, 2021 the Claimant avers that he was employed by the Respondent, a Commercial Bank registered in Kenya under the *Companies Act* and regulated by the banking laws of Kenya, as a Branch Manager in the Respondent’s Machakos Branch on permanent and pensionable terms of service. That he worked in Machakos for a few weeks before he was transferred to Nairobi as Branch Manager in the Respondent’s Ngong Road Branch.
2. The Claimant states that his responsibilities as Branch Manager Ngong Road Branch were restricted to overseeing the branch’s operations and growth. That the effectiveness of his office was dependent on his relationship with the credit team and the central operations team which were responsible for approving loan facilities and doing background research for purposes of approving the opening of bank accounts.
3. The Claimant avers that on the 25<sup>th</sup> February 2017, he received a call from the Regional Manager, Mr. Nicholas Pimbi who informed him that he should expect a prospective client on the 27<sup>th</sup> February 2017.
4. On the 27<sup>th</sup> February 2017, the Claimant met the directors of Pole Star Co. Limited who were desirous of opening a bank account with the Merchandising Respondent. He directed the said prospective clients to the customer care for opening of the account.



5. The said Prospective Client then became the Respondent's client and operated one account until the month of May 2017 when the Claimant convinced the client to open two other accounts as it was trading in other businesses under different business names, Pole Star Mining Limited and Shreej Merchandising Company Limited.
6. The Claimant avers that he had been forbidden from honoring and or paying cheques before their maturity. However, the credit team on a number of occasions approved payment to this client against cheques before their maturity for which the Respondent charged a commission of 5%.
7. The said clients were also allowed to access unsecured overdrafts of huge amounts of monies in the name of different company and account names. This was done in total disregard of the Claimant's suggestion that the said facilities be secured. The Claimant however requested the clients to deposit logbooks to as security.
8. The Claimant avers that on or about 4<sup>th</sup> July 2017, the cheques that had been paid before maturity were dishonored or otherwise bounced as the collecting bank did not receive monies from the paying bank on behalf of the client.
9. It is the Claimants case that by letter dated 11<sup>th</sup> August 2017 he was summarily dismissed from employment on accusation that he had introduced the said clients who opened fraudulent accounts and that there was breach of credit policy. That under his supervision credit to the customers was irregularly approved as a consequence of which the bank was exposed to the tune of Ksh. 23,705,764/=.
10. It is the Claimant's case that approval of credit facilities was not within his responsibility or authority. It is further his case that his suggestions to have the facilities secured were ignored, neglected or disregarded by the respondent.
11. The Claimant further contended that the decision to summarily dismiss him was premature curious and suspect because the respondent continues to trade with the said clients, which clients have not disappeared from the jurisdiction of the Respondent and or failed to honor their financial obligations.
12. The Claimant avers that the Conduct and decision of the Respondent has occasioned him and his family untold psychological suffering, anguish and pain as he is now a subject of ridicule and shame as he has been portrayed as a thief and or a fraudster.
13. The Claimant's avers that the Respondent violated his Human Rights and Fundamental Freedoms as follows;
  - a. His right to fair administrative action under Article 47(1) and (2) of *the Constitution* of Kenya read together with section 4(1)(2)(3) and (4) of the Fair Administrative Action Act, 2015
  - b. His right to fair trial under Article 25 (c) of *the Constitution* of Kenya.
  - c. His right to the presumption of innocence, to be informed of the charges in sufficient detail and to have adequate time to prepare his defence under Article 50(2) of the Constitution of Kenya 2010.
  - d. Freedom from discrimination under Article 27 and Article 236(a)
  - e. His right to inherent dignity under Article 28 of *the Constitution* of Kenya 2010
  - f. His right to due process of the law under Article 236(b) of *the Constitution* of Kenya, 2010



- g. The right to his Social economic rights under Article 43(3) of the Constitution of Kenya 2010.
14. The Claimant prays for the following remedies:-
- a. A declaration Order that the Respondent violated the Claimant's rights as set out by law and that their conduct is illegal and unfair as it falls below the threshold set out under section 44 of the Employment Act 2007.
  - b. A declaration that the Claimant's summary dismissal from the employment was and continues to be illegal and unfair ab initio.

Description	Amount (Ksh)
Remunerative Allowances	
Basic Salary (170,000 by 132 months)	22,444,000.00
Monthly Allowance (15,000 by 132 months)	1,980,000.00
Jijenge na Marafiki Commission	30,000.00
1% of 3,000,000	50,000.00
1% of 5,000,000	400,000.00
1% of 40,000,000	
Grand Total	24,472,000.00

An Order compelling the Respondent to pay the Claimant special damages of Ksh. 24,900,000/= being remunerative and other remunerative allowances for the unexpired period of 11 years of the Claimant's term of service and arrears made up as follows and as more particularized as below;

- d. An award of general damages for breach and loss of legitimate expectations
  - e. Punitive damages for embarrassment cause, stress and psychological torture since experienced.
  - f. The costs of this suit with interest thereon from the date of the judgment.
  - g. Any other order and or relief this court may deem fit and just to make and or grant.
15. The Respondent filed a Response to Memorandum of Claim dated 21<sup>st</sup> November, 2017 and a Response to Amended Memorandum of Claim dated 21<sup>st</sup> April, 2022. The Respondent avers that the Claimant was engaged vide a contract dated 18<sup>th</sup> August 2016 and confirmed by letter dated 9<sup>th</sup> March 2017. That the contract of employment was effective from 1<sup>st</sup> September, 2016.
16. It is the Respondents averment that the Claimant's duties and responsibilities were to be undertaken in strict compliance with the Respondent's Customers Accounts Procedures Manual; Know Your Customer's Guidelines; Credit Procedures Manual and Fraud Detection and Prevention Policies & Procedures Manual.



17. The Respondent avers that the Claimant refused, failed and/or neglected to undertake its duties aforesaid and to comply with the Respondent's policy, control guidelines and or procedures thereby exposing the Bank to monumental losses and risks as follows;
18. It is further the Respondent's averment that on or about 23<sup>rd</sup> March, 2017, the Claimant sanctioned a transaction in which a customer withdrew money from its account before maturity of a cheque and allowed various transactions to a tune of Kshs. 16.6M on the same account without the necessary approvals; that further on or about 20<sup>th</sup> July, 2017 the Claimant sanctioned a fraudulent transaction in which a party not signatory to an account withdrew USD 100 and USD 891 from the Respondent's customer's account.
19. The Respondent further avers that on or about August, 2017, it came to the Respondent's attention that the Claimant introduced various Customers whose accounts were confirmed to be fraudulent and irregularly approved various facilities to the said customers thereby occasioning substantial exposure to the Respondent at Ksh.23,705,764/=
20. Consequently, the Respondent summoned the Claimant to show cause why disciplinary action should not be taken against him for his negligent actions and further undertook all the disciplinary procedures in accordance with the Respondent's disciplinary procedures and the *Employment Act, 2007*.
21. Subsequently, the Respondent found the Claimant liable for gross misconduct and summarily dismissed him vide its letter dated 11<sup>th</sup> August, 2017 in which the Respondent duly informed the Claimant the reasons for his dismissal and of his terminal benefits payable upon clearance with the Bank.
22. The Respondent avers that it is a banking institution and it required the Claimant to act with utmost honesty, diligence and integrity and further to take extreme caution in undertaking his duties.
23. The Respondent further avers that the employment relationship between the Claimant and the Respondent is based on trust and confidence and the Claimant's actions amounted to a fundamental breach of the contract between the parties.
24. The Respondent denies that the claimant is entitled to the prayers sought in the Memorandum of Claim and avers that the issues raised have no legal basis, that the suit in its entirety lacks merit, is vexatious and an abuse of the court process.
25. At the hearing of the Claim the Claimant testified on his behalf while the Respondent called John Wamwati, its Head of Human Resources who testified as RW1. The parties thereafter filed written submissions

#### **Claimant's case**

26. The Claimant testified that he was employed by the Respondent on 1<sup>st</sup> September, 2016 as Branch Manager and posted to Machakos. After one month he was posted to Nairobi and deployed as Branch Manager, Ngong Road Branch.
27. The Claimant testified that his role as Branch Managers was to grow both deposits and loans at the Branch.
28. He testified that in 2017 there were plans to close Ngong Road Branch and move it to the Respondent's new building in Hurlingham.



29. He testified that on 11<sup>th</sup> August 2017 he was called to the Head Office by the Respondent's Head of Business Mr. Warutere. When he reached the Head Office which was in the Respondent's new building at Hulingham Mr. Warutere asked him about the title deeds and log books for PoleStar Merchandising, the customer introduced by the Respondents Regional Manager Mr. Nicholas Pimbi.
30. The Claimant testified that upon informing Mr. Warutere where the documents were he was directed to arrange for the documents to be delivered to Head Office together with the customer's file. He was then asked to sit at the waiting room where he waited for about 20 minutes.
31. The Claimant testified that when he was called back he found the Mr. Warutere with the Head of Human Resources Ms. Wangari Gathu. He was shocked when he was handed a letter of dismissal dated the same date the 11<sup>th</sup> August, 2017.
32. The Claimant testified that he requested to be told the reason for dismissal as there had been no correspondence on any of the matters stated in the letter and had not been notified of any issue, but was referred to the last Paragraph of the letter which advised him of his right of appeal or that he could go to court and argue his case there.
33. The Claimant testified that the Head of Credit Team approved all services while the Operations Team ensured due diligence prior to opening any account.
34. He testified that around 25<sup>th</sup> February 2017, which was a Saturday he had received a call from his boss the Regional Manager who informed the Claimant that he was sending a potential client to the Claimant's branch. That on Monday two gentlemen Mr. Mohamed Adnan Tahir and Mr. Hareem D Mandavia visited his office on Ngong Road. He referred them to customer care desk where they were assisted to fill account opening forms. The forms were thereafter sent to the Claimant's office to confirm that all documents had been submitted.
35. The Claimant testified that it was the banks policy to carry out official search of documents and the client duly paid Ksh. 1500 for the search, which was done by Head Office where the documents were forwarded to by the branch for the due diligence and approval of account opening.
36. The Claimant testified that after they later got the approvals from Head Office they called the client to come and open the account.
37. The Claimant testified that the Bank had a reward programme an employee who introduced a new customer who deposits more than Ksh. 1 million was paid 1% of the deposit. That for this customer Mr. Nicholas Pimbi was paid the reward.
38. The Claimant testified that once the client had opened the account he inquired from the client about the nature of business the company was doing so that he could give the bank more business. He learned that the client was in scrap metal business and requested the client to open 2 more accounts for the other two sister companies which the client did.
39. That before the 2 new accounts were opened the documents were sent to head office for search and due diligence and approval was given to open the accounts.
40. The Claimant testified that the customer thereafter started requesting to be paid against uncleared cheques and approval was given by the bank's credit department who charged 5% commission. That the client also took overdraft facilities and at one time requested for an overdraft of Ksh. 2 million which was approved.



41. He testified that by that time the core business of the bank was trade. That the bank dealt with LPO funding and other short term businesses.
42. He testified that the figure kept growing. That at one time he recommended that the bank charges the log books deposited by the client to safeguard itself but the bank continued issuing unsecured facilities. That when he requested the client to bring security the client brought 10 title deeds worth Ksh. 130 million against a credit of Ksh. 60 million for an LPO financing.
43. The Claimant testified that there were also cheques which were encashed against uncleared proceeds which later bounced.
44. The Claimant testified that he talked to the client who started paying slowly and gave the bank post-dated cheques through the Regional Manager who also talked to the client. The Claimant testified that at the time of his dismissal the documents he recommended to be charged had not been charged.
45. On cross-examination the Claimant testified that he was not paid commission for opening the two new accounts for the customer because this was an existing customer opening accounts for sister companies. He stated that all transactions on the cheques which bounced were approved by Head Office. He stated that the Head Office did not at any time inform the branch that the accounts were fraudulent.

### **Respondent's case**

46. RW1 John Wamwati, the Respondents Head of Human Resource testified that he joined the bank in 2018. He testified that the role of a branch manager was business development by growing deposits and loans from existing and new clients. That the role of a branch manager in opening accounts was to do due diligence on getting the documents ready.
47. RW1 testified that the letter of dismissal states the Claimant was dismissed for opening fraudulent accounts. That the Claimant did not do due diligence to understand the customer.
48. He testified that the customer banked cheques and was paid cash which caused accumulation of debts of Ksh. 23 million.
49. He testified that the Claimant was cautioned on 23<sup>rd</sup> March, 2017 with reference to an account called Gilly Security Investigation Services Ltd. That the second caution relates to a fraudulent transaction where a Mr. Talisman made withdrawals yet he was not signatory of the account. He testified that the Claimant was rightfully terminated.
50. Under cross examination RW1 testified that he joined the Respondent on 1<sup>st</sup> May, 2018 and therefore did not personally know the Claimant. That he based his statement on records in the Claimant's file.
51. He testified that under the duties and responsibilities of the Claimant at paragraph 4 of his witness statement there is no role of approval of credit. That a branch manager grows business, manages customer relations, makes recommendations for loans and cheque accommodation for cheques from other banks, recommends for unsecured credits and overdrafts.
52. He testified that the debts that the Claimant was dismissed for arose from unsecured loans and cheque accommodation. He testified that the Respondent did not file audit reports or an investigation report. That at paragraph 9 of his statement he referred to an audit report which showed that the Claimant introduced a customer, which audit report had not been filed. That at paragraph 15 of his witness statement he referred to an investigation report which was not available in court.



53. He stated that he had testified that the Claimant's dismissal was fair. That there was communication to the Claimant but no hearing. That the dismissal was fair because the debt is still outstanding and the securities was discovered to be fake.

**Claimant's submissions.**

54. It is submitted for the Claimant that there are two primary aspects which one has to establish to determine if termination is fair or unfair. These are the procedure for termination and the reasons for termination. That these are reiterated in the case of *Walter Ogal Anuro v Teachers Service Commissions* [2013] eKLR.
55. It is further submitted that the burden of proof in employment cases is provided for in section 47 of the *Employment Act*.
56. It is submitted that in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers SACCO Limited* [2013] eKLR the court stated that whatever reasons cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process outlined in section 41 of the *Employment Act*. That the section is couched in mandatory terms.
57. It is submitted that the Claimant was not accorded a hearing. That this was confirmed by RW1.
58. On the reasons for termination the Claimant referred to section 43 and 45 of the Act and submitted that the reasons for termination were insufficient. He relied on the decision in *Dancan Mbathi Mulevi v Wanandege Cooperative Savings and Credit Society Limited* [2018] eKLR and *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR.
59. It is submitted that the Claimant was accused of introducing the new customers Pole Star Mining Limited, Pole Star Merchandising, and Shreeji Merchandising Company Limited yet according to the documents in the Claimant's list it is Nicholas Pimbi, the Respondents Regional Manager who introduced the client. That the Claimant was further accused of breaching the credit policy by approving loan facilities which was done by the credit team as the Claimants role was limited to giving recommendations. That all credit requests were forwarded to the credit team for approval.
60. It is further the submission of the Claimant that he could not have authorized the opening of fraudulent accounts as it was the role of the Central Operations Team which approved opening of accounts.
61. The Claimant submits that even after he was accused and dismissed for opening fraudulent accounts for the client, the Respondent still continues to trade with the client.
62. It is further the submission of the Claimant that his constitutional rights under Articles 25 and 47 to fair hearing and fair trial were violated by the Respondent. That the Respondent further violated his rights to freedom and equality under Article 27 and his right to dignity under Article 28 as the Respondent retained employees whose faults led to the Claimant's dismissal while refusing to grant the Claimant a fair hearing and an opportunity to defend himself was degrading and belittling to the Claimant.
63. It is submitted that the Claimant is entitle to the remedies sought as he has satisfactorily demonstrated and proved his case.



## Respondent's Submissions

64. The Respondent submitted that the procedure followed in terminating the claimant's employment contract was fair and lawful, that the Claimant was cautioned by letter dated 23<sup>rd</sup> March 2017 for sanctioning a withdrawal of money on account of a cheque before its maturity in one incident and was by letter dated 20<sup>th</sup> July, 2017 required to show cause for a fraudulent transaction which he sanctioned where a person who was not a signatory to an account was allowed to withdraw cash from a customer's account.
65. The Respondent submitted that in August 2017 it discovered that the Claimant authorized irregular and fraudulent transactions amounting to Kshs. 23,705,764 through withdrawals on uncleared cheques which were later not honoured.
66. It is the Respondent's submission that the Claimant contravened his employment contract, the Respondent's Customer Accounts Procedures Manual, Know your Customer Guidelines, Credit Procedure Manual, Fraud Detection and Prevention Policies & Procedures Manual and its Human Resource Policy Manual and by so doing exposed the Respondent to a loss of Ksh. 23,705,764.
67. It was submitted for the Respondent that the Claimant's contract was terminated to prevent further loss and exposure following his actions of introducing fraudulent accounts and irregularly approving payment of uncleared cheques to the said customers.
68. The Respondent relied on the decision in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2019] eKLR and *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR in which the courts discussed the standard of proof in employment matters under Section 43 of the *Employment Act* and held that an employer may terminate employment based on reasons that it genuinely believed to exist even if such facts were later found to be non-existent.
69. The Respondent further relied on the decision in *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR and *British Leyland UK Ltd v Swift* (1981) I.L.R. 91 where the court used the test of reasonableness in considering whether or not termination was unfair.
70. It was submitted that the Respondent lost faith in the Claimant on grounds of integrity. For emphasis the Respondent relied on the decision in *Evans Kamadi Misango v Barclays Bank of Kenya Ltd* (supra) and *Lawrence Onyango Oduori v Kenya Commercial Bank Limited* [2014].
71. The Respondent submitted that the termination of the Claimant's employment was fair, valid and in compliance with his employment contract and the Respondents credit and HR Policies.
72. The Respondent further submitted that it complied with section 41 of the Act in the termination of the Claimant's employment, having summoned the Claimant to show cause by letter dated 21<sup>st</sup> July 2017 when the Claimant failed to give a satisfactory explanation to the charges levelled against him.
73. It was further the Respondent's submission that it did not violate the Claimant's constitutional rights under Article 47(1) and (2), 25(c) 50(2) (a) and (c) and 43(3) of *the Constitution*. Reliance was placed on the decision in *Communication Commission of Kenya & 25 Others v Royal Media Services Limited & 5 others* [2014] eKLR where the court held that a person alleging infringement of his constitutional rights must comply with the principles set out in *Anarita Karimi Njeru v Republic* (1979) KLR 154 and *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others*.



## **Analysis and Determination**

74. Having carefully considered the pleadings, evidence adduced and submissions of the parties the issues arising for determination are whether there was valid reason for termination and whether the Respondent complied with fair procedure. The two issues will determine the third issue which is whether the Claimant is entitled to the remedies that he seeks.

## **Reasons for Termination**

75. Section 43 of the *Employment Act* provides that for termination to be fair the employer shall prove the reasons for termination. In the instant case, the reasons for termination are contained in the letter of dismissal which is reproduced below:

Private and confidential

Friday, 11 August, 2017

Our ref: WM/HR/252/2017

KEITH KALELI

NGONG ROAD

Dear Mr. Kaleli

RE: NOTICE OF SUMMARY DISMISSAL

Reference is made to various discussions on the violation of the credit policy.

It has been noted that you introduced some new customers: Pole Star Mining Limited, Pole Star Merchandising and Shreeji Merchandising company Limited. The accounts have now been confirmed to be fraudulent accounts and there was further breach of the credit policy where the Branch Manager under your supervision irregularly approved the facilities. The exposure for the bank now stands at 23,705,764 Kes. As per our Credit and HR policy; this constitutes gross misconduct.

Consequently, you are hereby dismissed from employment with Jamii Bora Bank effective immediately, August 11, 2017. Your final dues will be prepared in accordance with the terms of your employment contract to include salary for days worked, net of all statutory deductions and taxes.

Your final dues, which take into the account recovery of any money owed to the bank will be prepared and ready for collection after your clearance. All payments and final documentation will be subject to you returning any bank property that you may have in your possession and repayment of any monies owed to the bank. A separation checklist for clearance and an online exit interview are on company share-point to facilitate the clearance process.

Should you wish to appeal, you may write to the Chief Executive Officer within 10 days of receipt of this letter. We wish you well in your future endeavours.

Yours sincerely,

Signed

Wangari Muchoki- Gathu

Head of human resources

cc. Head of Business Development



76. From the letter, the Claimant is accused of introducing Pole Star Mining Limited, Pole Star Merchandising and Shreeji Merchandising Company Limited which accounts were found to be fraudulent. He is further accused of breach of credit policy where the Branch Manager under his supervision irregularly approved facilities which exposed the bank to (Ksh. 23,705,764/=.
77. At the hearing the Claimant testified that his roles as Branch Manager were to lead the branch, customer operations and ensuring that the branch grew deposits and loans.
78. The Claimant testified that in the case of Pole Star he worked with the Head of Credit Team for approval of services and the Operations Team to ensure due diligence which was done prior to operating any account.
79. He testified that Pole Star was introduced by his boss, the Regional Manager Mr. Nicholas Pimbi. That as per bank policy on new customers he sent the account opening documents to Head Office to carry out a search as part of due diligence and only allowed the client to operate the account after getting approval from Head Office.
80. He testified that the bank had a reward programme under which any staff who introduced a client who deposited more than Ksh. 1 (one) million was paid a commission of 1% of the deposit. That in the case of Pole Star the payment was made to Nicholas Pimbi the Regional Manager who introduced the client. He testified that the only role he played was to inquire from the client about his business and learned that the client had interests in mining, scrap metal and portland. That he persuaded the client to open accounts for 2 sister companies whose documents were sent to Head Office for due diligence and approval as per bank policy.
81. The Claimant testified that the client started requesting to be paid against uncleared cheques which as per bank policy a branch manager does not have authority to approve. That the Head Office approved the payments and charged a commission of 5%.
82. The Claimant testified that the Respondent's Head Office also approved unsecured overdrafts to the same client. That in a bid to safeguard the bank he asked for security from the client who deposited with the Respondent 10 title deeds worth Ksh. 130 million to secure a credit of Ksh. 60 million. The client also submitted log books. That the title deeds and log books were sent to head office for due diligence.
83. It was the Claimant's testimony that the head office approved credit facilities without charging the documents. That on 4<sup>th</sup> July, 2017 the cheques upon which credit had been given to the customer before maturity were dishonoured hence exposing the bank.
84. It was the Claimant's case that the Respondent was exposed due to the fault of the credit team, the operations team and the legal team and he was dismissed as a scape goat.
85. RW1 agreed that the Claimant's duties did not include approval of credit. He testified that the debt for which the Claimant was dismissed arose from unsecured credit and cheque accommodation meaning paying a client the value of a cheque before the cheque deposited in his account was cleared.
86. RW1 stated that the Respondent did not produce an audit or investigation report to demonstrate that the Claimant was responsible for the exposure of the bank as alleged in the Claimant's letter of dismissal.
87. From the foregoing it is my finding that the Respondent did not prove that the Claimant was responsible for the approving credit facilities to the client as alleged in the letter of dismissal. I thus find that it did not prove valid reasons for termination of the Claimant's employment.



## Fair Procedure

88. Section 41 of the [Employment Act](#) provides that an employee must be informed of the charges for which the employer intends to terminate his employment and given a chance to respond to and to defend himself against such charges.
89. The Claimant testified that on 11<sup>th</sup> August, 2017 he was called by the Respondent's Head of Business Mr. Warutere to go to Head Office which is located between Yaya Centre and Harlingham in Nairobi. That at that time there was a plan to close Ngong Road Branch where he was working and to transfer the branch to the Head Office which was in a new building. He therefore thought he was being called to discuss the movement of the branch.
90. He testified that upon arrival at the Head Office Mr. Warutere asked him the whereabouts of the title deeds and log books for Pole Star Merchandising. After informing Mr. Warutere where the documents were he was directed to arrange for them to be delivered to the head office together with the customers file. He was asked to sit in a waiting room where he sat for about 20 minutes.
91. The Claimant testified that when he was eventually called to go and see Mr. Warutere, the Claimant found him with Ms. Wangari Gathu, the Head of Human Resource. He was then handed the dismissal letter.
92. The Claimant testified that when he requested to be given the reasons for dismissal he was referred to the last paragraph in the letter which stated that he had the right to appeal.
93. RW1 although insisting that the dismissal was procedurally fair, admitted that there was no hearing before the Claimant was dismissed.
94. RW1 testified that he joined the Respondent on 1<sup>st</sup> May, 2018 after the Claimant left the employment of the Respondent and was therefore relying on the documents in the Respondent's records.
95. It is evident from the foregoing that the Claimant was never informed of the charges against him or given an opportunity to defend himself before he was dismissed.
96. Section 45 of the [Employment Act](#) provides that:
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.
97. Further, section 47(5) provides that:
  - (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.



98. In the case of Walter Ogal Aruro (supra) the court summarized the requirements for fair termination as follows:
- “... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
99. Having found that the Respondent did not prove the grounds for dismissal of the Claimant and did not subject him to the disciplinary process as provided in section 41,43, and 47 of the Employment Act, I hold and declare the dismissal of the Claimant unfair in terms of section 45(2) of the Act.
100. The Claimant pleaded and submitted that the Respondent violated his constitutional rights and freedoms under Article 47 which provides for fair administrative action, Article 25 which provides for the right to fair trial, Article 47 of the Constitution and section 5 of the Employment Act which provides for protection against discrimination and Article 28 of the Constitution which provides for respect and protection of a person’s inherent dignity.
101. The courts have time and again stated and it is worth repeating here, that the rights of individuals regulated by private law should not be elevated to the constitutional pedestal where statutory provisions provide sufficient remedy for such violations. See Patrick Mbau Karanja v Kenyatta University; Bernard Murage v Fine Serve Africa Ltd & Others; Godfrey Paul Okutoyi & Others v Habil Olaka & Another, Abraham Kaisha Kanziku v Government of Central Bank & Others – to mention but a few.
102. It is my view that the rights of the Claimant under his employment contract are sufficiently catered for under employment legislation and that this court need not resort to the constitution to grant him the remedies he is entitled to under the said contract of service.

### **Remedies**

103. Having found that the Claimant’s dismissal was unfair, I now consider whether he is entitled to the remedies that he seeks.
104. In the Amended Memorandum of Claim dated 8<sup>th</sup> October 2021 the Claimant seeks a declaration that the Respondent violated his rights under the law and that the conduct of the Respondent was illegal and unfair. I have already dealt with this remedy above.
105. The Claimant further prayed for a declaration that his summary dismissal was illegal and unfair ab initio. This prayer has also been dealt with.
106. The claimant prayed for basic salary of Ksh. 170,000 for 130 months being Ksh. 22,4440,660.00(sic), monthly allowance of Ksh. 15,000 for 132 months being Ksh. 1,980,000.00; Jijenge na Marafiki Commission of 1% of 3,000,000 at Ksh. 30,000, 1% of 5,000,000 at Ksh. 50,000 and 1% of 40,000,000 at Ksh. 400,000. None of these were proved by the Claimant. None of these prayers were mentioned by the Claimant in his testimony or in the submissions filed on his behalf. I accordingly dismiss the same for not having been proved and in place thereof award the Claimant only compensation as provided under section 49 of the Employment Act at the rate of 4 months gross salary, taking into account his length of service, the circumstances under which he was dismissed and all relevant factors under section 49(4) of the Act. I thus award him Ksh. 170,000 x 4 being Ksh. 680,000.



107. The prayers for general damages for breach and loss of legitimate expectation was never proved. Nor did the Claimant prove the prayer for punitive damages for embarrassment, stress and psychological torture.

108. The Respondent shall pay the Claimant's costs of this suit and interest shall accrue at court rates from date of Judgment.

**DATED, DELIVERED AND SIGNED AT ELDORET**

**THIS 5TH DAY OF OCTOBER, 2023.**

**M. ONYANGO**

**JUDGE**

