



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njuguna v Co-operative Bank of Kenya (Cause 8 of 2019)
[2023] KEELRC 3095 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3095 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 8 OF 2019
JK GAKERI, J
NOVEMBER 30, 2023**

BETWEEN

ZIPPORAH WACHUKA NJUGUNA CLAIMANT

AND

CO-OPERATIVE BANK OF KENYA RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a Memorandum of Claim filed on January 10, 2019 alleging unlawful and wrongful termination, violation of rights and unfair labour practices.
2. The claimant avers that she was employed by the respondent on February 16, 2006 as a Graduate Clerk at Kshs 34,619.00 per month and served at various branches including Murang'a, Buruburu, Wakulima, Nacico Plaza, Co-operative Foundation (Secretary's office) and later appointed as an Unsecured Remedial Officer in the Remedial Department on February 5, 2015 and later in Secured Remedial Department in October 2015 and served diligently and outstandingly.
3. It is the claimant's case that the remedial department was understaffed and although the Head-Remedial was to liaise with the Human Resource Department for more human capital, the status quo remained.
4. The claimant avers that she was the highest paid collector by September 2017 at Kshs 207,255/= per month.
5. It is the claimant's case that the respondent was keen on terminating her employment on account of irregular auctions.
6. The claimant admits that there were errors in the Board of Management (BOM) paper and explains the circumstances in which the errors arose. That the then Manager Secured Remedial Unit, Mr Andrew



- Kagiri, the claimant's boss offered to prepare the BOM paper which the claimant went through and agreed with but noticed the errors after the paper had been approved by the Board of Management.
7. According to the claimant, the offer by Dalali Auctioneers fell through on account of failure of the auction and the BOM paper recommended disposal of the motor vehicles at Kshs 1,500,000/= each as per the offer on the table.
 8. Finally, the claimant avers that she responded to the Notice To Show Cause exhaustively, co-operated with the investigator, was invited and attended a disciplinary hearing, declined to sign the minutes owing to errors and wrote an addendum dated September 17, 2018 and employment was terminated by letter dated September 17, 2017.
 9. The Claimant prays for;
 1. A declaration that the respondent's action of terminating the claimant's employment on or about September 17, 2018 was null and void.
 2. An order lifting the termination of the claimant and mandatory injunction directed to the respondent to reinstate the claimant to employment.
 3. A permanent injunction to restrain the respondent, its agents and/or servants from prematurely terminating the services of the claimant.
 4. An order restraining the respondent whether by itself, its agents and/or servants from replacing the claimant with any other such person recruited.
 5. In the alternative and without prejudice to the foregoing, an order that the respondent compensates the claimant for wrongful/unlawful/unfair termination as hereunder:-
 - i. Leave days earned not taken 24 days Kshs 207,255.00.
 - ii. Gratuity for 12 years Kshs 1,243,530.00.
 - iii. Damages for unlawful termination (5 years) Kshs 12,435,300.00.
Total Kshs 13,886,300.00
 - iv. Any further and/or other relief that this honourable Court may deem fit and just to grant.
 - v. Costs of this suit.
 - vi. Interest on all monetary awards at court rates from the date of filing this suit until payment in full.

Respondent's case

10. In its response filed on April 2, 2019, the respondent admits that the claimant was indeed its former employee effective February 16, 2006 and her terms of engagement were subject to the CBA, Bank Staff Manual and administrative circulars issued from time to time.
11. That the claimant was issued with a verbal warning letter on August 18, 2009 for a fraudulent cash withdrawal of Kshs 14,000/= and another warning on March 6, 2012 for non-compliance with procedures.



12. That the claimant was promoted as follows; Unsecured Remedial Management Officer February 5, 2015, Section Head Grade, November 11, 2015, Secured Remedial Collector December 29, 2015 and Supervisory Grade 2, March 30, 2017 and was part of a team of 11 employees.
13. It is the respondent's case that it issued the claimant with a role profile for the position and the claimant duly executed the same and was trained and inducted as a Collector.
14. That the claimant was provided with the Operating Manuals, Policies and Business Code of Conduct.
15. The respondent avers that it investigated allegations of corruption at its Remedial Department on or about June 27, 2018 and the investigation revealed that the claimant had negligently and/or carelessly provided misleading information regarding the auction of some trucks disposed of at a relatively low price compared to their forced sale value exposing the respondent to loss.
16. That the claimant was interviewed and recorded a statement admitting that she had been negligent and a show cause letter dated July 2, 2018 was issued and the claimant responded confirming that she misled the Board of Management (BOM).
17. The respondent further avers that the claimant was invited for a hearing on August 13, 2018, attended with a representative, one Alex Nguli and contested the contents of the minutes and did not avail the same to the representative for review.
18. That after termination of employment, the respondent computed and paid for 17.06 leave days and any outstanding salary to the claimant.
19. That her pension benefit amounting to Kshs 1,892,684.08 was also paid.
20. It is the respondent's case that termination of the claimant's employment was lawful and justifiable as it had a reason and employed a fair procedure.
21. The respondent prays for dismissal of the suit with costs.
22. In her response to the respondent's Memorandum of Reply, the claimant provided more details on the activities that led to the warning letters in 2009 and 2012.
23. According to the claimant, she joined a team of 5 employees at the Secured Remedial Department and 2, one Sarah Adhiambo and Alex Musila Nguli joined in 2017.
24. It is the claimant's case that her role as a collector ended after seeking approval from the Bank's Credit Board of Management for a sale below the forced sale value as the file proceeded to an administrator.
25. That her decision to seek the BOM approval was arrived at after a department meeting held in July 2017.

Claimant's evidence

26. On cross-examination, the claimant testified that her role was to work with the customer in default and auctions were handled by Administrators as she was a collector.
27. It was her testimony that the BOM Report was prepared by the Relationship Manager and confirmed by the Head of Department and was signed by four persons and she had signed the one dated August 10, 2017 and provided no evidence to show that other signatories contributed in its preparation.
28. The witness confirmed that bank salaries were paid on the 25th day of the month.



29. The claimant testified that payment of her dues appeared to suggest that a decision had already been made to terminate her employment.
30. According to the witness, the BOM paper had only one clerical error.
31. That she responded to the notice to show cause and highlighted the parts of the minutes she contested and attached an addendum.
32. On re-examination, the claimant maintained that she was a Collector and was not involved in auctions and understood the Remedial Procedure Manual and typed the BOM paper on behalf of the department and other persons signed the document she had prepared.
33. That she only received the outcome of the appeal after making an inquiry.
34. According to the witness, the main error in the minutes of the disciplinary hearing was the reason given for the failure of previous auctions i.e low bids or no bids at all.
35. That the error in the BOM did not occasion any loss to the bank.

Respondent's evidence

36. RWI, Mr Samuel Magati Osero testified that it was the Remedial department that prepared the BOM report for approval to sell the security at a lower price.
37. That his investigation was actuated by a complaint of alleged collusion between staff and auctioneers and the particular trucks in question were disposed of after the Claimant prepared a BOM paper and there was no evidence of a previous failed auction.
38. The witness testified that the claimant prepared the BOM on August 10, 2017 yet the offer was received on August 17, 2017 and the trucks were bought by one person at Kshs 1,500,000/= each.
39. The witness testified that as the Relationship Officer, the claimant had all the facts necessary for the preparation of the BOM and was responsible for the erroneous information.
40. On cross-examination, the witness confirmed that he was the Security Manager of the Respondent from September 10, 2007 and had access to all documents in the bank.
41. The witness confirmed that the Collector collected debts and Administrators acted.
42. The witness explained the investigation matrix as receipt of the complaint, interviewing of the complainant, gathering of relevant documents and interviewing of persons and recording of statements, gather relevant documents, analysing the documents and preparing a report.
43. According to the witness, the sale of 5 trucks at Kshs 1,500,000/= each was a well orchestrated scheme to siphon funds from the bank.
44. The witness confirmed that he found no evidence that auctions took place in May and June for any of the 5 trucks.
45. That he attended the disciplinary hearing and there was no representation from the Remedial Department.
46. That when interviewed, the claimant could not explain when the auctions took place and the file had no evidence of the auctions alleged in the BOM paper.



47. The witness confirmed that the responsibility of the correctness of the BOM report fell on the author, the claimant as none of her colleagues attended the auction.
48. RWII, Leah Kerich, the head of Employees Relations testified that she was the custodian of all documents on employment matters.
49. The witness confirmed that a warning letter was valid for 12 months after which it had no effect on salary increment and promotion.
50. That records showed that the claimant joined a team of 10 employees in the department.
51. The witness confirmed that the claimant was a collector and administrators dealt with auctioneers.
52. According to the witness, the fact that there was no representation from the Remedial department in the disciplinary hearing did not affect it as the panel had the investigation report to rely on.
53. The witness confirmed that one Andrew Kagiri was part of the remedial team and had been implicated in the irregular sale of motor vehicles and was suspended.
54. The witness further confirmed that although the manual provided for the inclusion of a technical person, it was discretionary.
55. That the termination letter was dated September 17, 2018, the day the respondent received the claimant's addendum.
56. The witness confirmed that the right of appeal did not prevent the Respondent from progressing the matter further including computation of terminal dues as the claimant had ceased to be the respondent's employee.
57. RWII confirmed that the benefits were paid on October 5, 2018.
58. The witness further confirmed that the claimant was accorded an opportunity to defend herself and the hearing was fair.

Claimant's submissions

59. The claimant's counsel isolated three issues for determination, namely;
 - (i) Whether there were justifiable reasons and or grounds to lawfully terminate the claimant's employment.
 - (ii) Whether the respondent procedurally terminated the Claimant's employment.
 - (iii) Whether the claimant is entitled to the remedies sought.
60. On the 1st issue, counsel cited the provisions of section 43 and 45 of the *Employment Act, 2007* on the burden of proof borne by the employer and cited the decisions in *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR and *John Jaoko Othino v Intrahealth International* to urge that the employer is required to prove actual misconduct by the claimant.
61. According to counsel, the respondent failed to demonstrate a justification for termination of the claimant's employment as the letter of termination purports to do so on account of irregular auction process.
62. That in any event, the claimant was employed as a collector.
63. As regards the BOM Paper, counsel refers the court to the claimant's witness statement.



64. That the respondent did not establish the loss suffered.
65. As to whether the termination was procedural, counsel urged that the presence of the investigator made the disciplinary panel biased and had no representation from the claimant's department.
66. According to counsel, the disciplinary process was flawed.
67. On remedies, counsel urged that the claimant was entitled to all the reliefs sought.

Respondent's submissions

68. As to whether termination of the claimant's employment was unfair, counsel submitted that since the claimant was interviewed and a statement taken, was issued with a Notice To Show Cause setting out the charges, was invited for a hearing, accorded all the rights and attended the hearing, and tendered no evidence of the inaccuracies or deficiencies in the minutes, and the termination letter outlined the justification for the termination, the same was fair and lawful.
69. As regards the absence of technical support of the disciplinary committee, counsel urged that clause 28.16.1 of the respondent's Human Resource Manual gave the Director-Human Resource Division discretion to seek technical support from other departments dependent on the nature of the case as need arises and the claimant had not shown how technical support was required during the hearing, if at all.
70. Counsel submitted that the claimant adduced no evidence to show that she was not given an opportunity to defend herself. That if that was the case, the claimant ought to have called one Alex Nguli, the representative to confirm the position.
71. The decision in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR was relied upon to buttress the Submission that the termination of employment was procedurally fair.
72. As regards validity and fairness of the reason for dismissal, reliance was made on the provisions of section 43 and 45(2) of the *Employment Act, 2007*, the Court of Appeal decision in *Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 others* (2019) eKLR and an extract from the *Halsbury's Law of England* on the reasonableness responses test and others to urge that the respondent had a valid and fair reason to terminate the claimant's employment as confirmed by the investigation report.
73. On the reliefs claimed, counsel submitted that the Claimant adduced no evidence of entitlement to 32 leave days and had been paid for the 17.06 days accrued leave days and provided no evidence of entitlement to gratuity as no copy of the Collective Bargaining Agreement (CBA) was provided.
74. The decision in *Bamburi Cement Ltd v Farid Aboud Mohamed* (2016) eKLR was relied upon to reinforce the submission.
75. Counsel urged that the claim for gratuity was unproven.
76. Counsel submitted that the claimant's duty was one of confidentiality, honest and reasonable care and having failed to maintain the standards, termination was justified.
77. As regards damages for unlawful termination, counsel submitted that the Claimant did not qualify for any of the reliefs under section 49 of the *Employment Act, 2007*.

Determination

78. From the pleadings, evidence on record and submissions by counsel, the issues for determination are:-



- i. Whether termination of the claimant's employment by the respondent was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.
79. Before delving into the foregoing issues, it is essential to dispose of the preliminary issue of the position and duties of the claimant.
 80. According to the claimant, her designation was that of a Collector and had no role in auction sales which was the domain of Administrators.
 81. It is common ground that the claimant was Collector in the Secured Remedial department of the respondent and worked with other colleagues including Andrew Kagiri and Jacquelyn Khandambi among others.
 82. Documentary evidence on record shows that the claimant joined the Secured Remedial department on October 19, 2015 and was reporting to Jacquelyn Khadambi (direct) and Joseph Irungu, acting Head Remedial Management.
 83. According to the claimant's counsel, the notice to show cause dated July 2, 2015 and the termination of employment letter dated September 17, 2018 under the Reference "Termination of Employment – Irregular Auction of repossessed vehicles at Remedial Management Department" signified that the Claimant was being accused of having conducted the irregular auction sale yet she was a Collector and Administrators dealt with auctioneers and auction sales.
 84. No doubt the claimant understood her role in the department and prided herself as the highest paid Collector and was aware of the processes that culminated in an auction sale as she dealt with matters before the respective files were handed over to the Administrators to facilitate the auction sales.
 85. The fact that the same file left the collector and was handed over to the Administrator would appear to suggest that the processes were interrelated and intertwined but employees performed different roles.
 86. Instructively, both the claimant and RWI confirmed that the Remedial Management manual permitted the sale of items below the reserve price, provided authority was sought and given and the authority would be sought not by the Administrator, but by the Collector for the Administrator to proceed with the next process.
 87. It is common ground that the bank would be represented at the auction.
 88. It is unclear to the court as to whether the representative would be a collector or an administrator.
 89. Although the reference of the two letters refers to irregular auction sales, the body of the letter sets out the allegations made against the Claimant coupled with essential details.
 90. The gravamen of the allegation is that the claimant misrepresented facts to the BOM when seeking approval for the sale of 5 trucks repossessed from Hardware and Steel Centre Ltd at prices of Kshs 1,500,000/=.
 91. Needless to emphasize, none of the letters accuse the claimant for having participated in the irregular auction sale and the claimant cannot concomitantly deny that her actions culminated in the alleged irregular auction sales.
 92. As will become clearer later in this judgement, the BOM paper prepared by the claimant placed her at the centre stage of the alleged auction sale.
 93. It is unclear why the claimant prepared the BOM paper if it was not part of her remit.



94. In sum, although the reference of a letter is essential as it identifies the context of the letter, the body of the letter provides the specifics and the reference, in court's view, cannot be construed as the message a letter is intended to convey. The message of a letter is decipherable or discernible from its body.
95. Both the notice to show cause and the termination letter are specific on the role the claimant played in the process and did not have to be the person who instructed the auctioneer or represented the bank at the auction. The BOM paper she prepared contained her statements. It was her draft which was approved without any amendment and was thus her document.
96. The information therein is not attributable to any other person. All the other persons merely "supported" her proposal as evidenced by their comment on the paper.
97. It was her ideas and facts that were actualized by the Administrators and cannot disown the baby after it is born. She was one of the principal actors whose actions culminated in the auction sale.
98. Put differently, but for the BOM paper the claimant prepared, the 5 trucks would not have been sold to one bidder.
99. As to whether termination of the claimant's employment was unfair, the guiding legal framework are the provisions of the *Employment Act, 2007* on the termination of employment such as section 45(2) which requires the employer to demonstrate that it had a valid and fair reason to terminate the employment and conducted it in accordance with a fair procedure. The reason must relate to the capacity, conduct or compatibility of the employee or operational requirements of the employer and the termination must be justifiable.
100. Put in the alternative, the employer must prove that it had a substantive justification for the termination and employed a fair procedure in effecting termination. (See *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR, *CMC Aviation Ltd v Mohammed Noor* (2015) eKLR.)

Reason for termination

101. While the claimant's counsel submitted that the respondent had no valid and fair reason to terminate the Claimant's employment, the respondent's counsel maintained that it had, that the claimant misrepresented facts in the BOM report which triggered the auction sale.
102. The Notice To Show Cause dated July 2, 2018 alleges that on August 16, 2017, the Claimant gave misleading information in the BOM Paper she prepared requesting approval for the sale of 5 trucks at a minimum price of Kshs 1,500,000/=. The information related to a previous offer by an auctioneer which the Claimant indicated as below the forced sale value of the trucks, that an auction scheduled for 21st May, 2017 for motor vehicle KCB xxxP failed on account of low bids and the auction slated for June 30, 2017 failed on the same ground, but provided no evidence of the failed auction sales or the fact that they took place at all.
103. The other form of misrepresentation related to the receipt of offer from Leakeys Auctioneers allegedly in July 2017 while evidence on record showed that it was received on 17th August, 2017.
104. Puzzlingly, in her Supplementary Statement dated May 21, 2019, the claimant states that the BOM paper was prepared by Mr Andrew Kagiri, having offered to do so as they were working as a team. That the claimant perused the paper and was agreeable but does not indicate that she signed the paper and only noticed the errors after the paper had been approved and the errors did not occasion any loss to the bank.



105. In the earlier statement dated January 9, 2019, the Claimant did not explain who prepared the BOM paper but stated that the errors were clerical.
106. The testimony that the BOM paper was prepared by Mr Andrew Kagiri puts the Claimant's credibility into question as she signed the BOM Paper as the author not on behalf of Mr Andrew Kagiri.
107. More significantly, she did not deny the contents of the investigation report dated June 27, 2018 which state that "she asserted that she prepared the BOM paper after several discussions with Andrew Kagiri" (page 60).
108. Equally, her statement dated June 21, 2018 at 16.30 hours, which she did not contest state that they (the team) agreed that she prepares a BOM Paper.
109. Finally, Mr Andrew Kagiri's statement dated June 22, 2018 at 11.50 am, which she did not contest state that the Claimant prepared a case paper to the BOM Credit Management requesting approval to sell the trucks at a minimum price of Kshs 1,500,000/=.
110. It is unclear to the court why the Claimant contradicted written statements yet she appended her signature on the document and did not explain why the author, assuming was Mr. Kagiri did not sign the document in any capacity or recommend it.
111. In the face of the foregoing overwhelming evidence, the court is satisfied that the claimant prepared the BOM paper but unconvincingly endeavoured to distance herself from its contents.
112. The termination letter dated September 17, 2018 generally rehashes the contents of the notice to show cause on misrepresentation of facts in the BOM paper in relation to the 5 trucks repossessed by the respondent and the offer from Leakeys Auctioneers. In sum the two documents are in sync.
113. It is common ground that the respondent had repossessed 5 trucks from Hardware & Steel Centre Ltd for a non-performing loan by the company and as at October 2016, the outstanding balance was Kshs 27,074,152.58 by which time the trucks had been repossessed.
114. It is evident that attempts by the borrower to secure release of the trucks in late 2016 failed.
115. There is no evidence on record to show that the trucks were advertised for sale in 2016 or that any offers were made.
116. The offer from Dalali Auctioneers is dated March 21, 2017 but appear to have been received by the Respondent bank earlier.
117. Notably, all the offers were above the forced sale value.
118. Strangely, the respondent instructed the Auctioneer to sell one truck by letter dated May 26, 2017 and the other three by letter dated June 14, 2017.
119. For unexplained reasons, the offer by Dalali Auctioneers was divided into two.
120. But more intriguing, there is no evidence that the alleged auction sales materialized.
121. The reasons given are that no one turned up on June 21, 2017 and there were no bids on June 30, 2017 respectively. These explanations by the claimant lack cogency as they were not supported by any verifiable evidence. Moreover, the investigator testified that he found no evidence of an auction sale having taken place. It was his testimony that there was no record on the file.



122. In her statement to the investigator, the claimant stated that the information that no one turned up and there were no bids on the two dates was by the auctioneer, but fails to disclose how the information was communicated or reached her since she is the one who reported it in writing in the BOM paper.
123. As the author of the document, it was incumbent upon the claimant to ascertain the veracity of the information she was reporting and ought to have had supporting documents to safeguard her credibility.
124. To the extent that the claimant reported that the auction slated for June 21, 2017 for the sale of KCB 270 P failed due to low bids without any supportive evidence of that fact, and there was none in the file, as confirmed by the investigator and the letter allegedly relied upon by the claimant stated that there were no bids, she misrepresented that fact.
125. Similarly, the statement by the claimant that they had received offers for 4 trucks for Dalali Auctioneers but three were below forced sale value was cited by the Respondent.
126. The offer prices were as follows;

		<u>Offer Value</u>	<u>Forced sale</u>
1.	KCB xxxF	3,000,000	2,700,000
2.	KCS xxxW	2,000,000	1,900,000
3.	KCB xxxP	2,800,000	2,380,000
4.	KCB xxxQ	3,000,000	2,700,000
5.	KCG xxxS	36,000,000	

127. Evidently, the offer prices were above the forced sale value contrary to the claimant's statement in the BOM.
128. Relatedly, the statement that Dalali Auctioneers made offer for 4 trucks was also a misrepresentation as the offer dated March 21, 2017 related to the five trucks.
129. As regards the last offer, the claimant stated that they had "received offers of Kshs 1.5 million for the trucks from Muga and Leakey Auctioneers."
130. This is the offer that led to the preparation of the BOM paper.
131. For unexplained reasons, the claimant did not adduce evidence as to when the respondent received the offer from Leakey Auctioneer's and Muga.
132. The claimant's written statement makes no reference as to when the offers were received.
133. In the statement to the investigator, the claimant stated that the offer was received in July but could not recall the date.
134. Although the claimant stated that the offer was received a few weeks before August 17, 2017 via email to Andrew Kagiri and one John Chege, a copy of the alleged email was not provided begging the question whether it in fact existed.



135. The date of receipt of the offer is critical bearing in mind that the BOM paper is dated August 10, 2017 yet the offer from Leakey’s Auctioneers on record is dated August 16, 2017 and was received on August 17, 2017.
136. Strangely, details of the offer from Muga were not disclosed, nor its fate.
137. Equally, the BOM stated that the offer of Kshs 1,500,000/= related to four trucks only, the offer identifies six motor vehicles.
138. The claimant’s statement about the 4 trucks was indeed a misrepresentation of the reality.
139. In totality, the BOM paper prepared by the Claimant on matters other than her ordinary duties as a Collector contained several material misrepresentations of fact which were within the Claimant’s knowledge and appear to have been intentional perhaps to camouflage an undisclosed motive.
140. For the foregoing reasons, the court is satisfied and finds that the Claimant misrepresented certain material facts in the BOM, realized the “errors” but did nothing about them.
141. According to the Respondent, the misrepresentation was a contravention of the Bank Operating Manual, Staff Manual, occasioned loss to the bank due to the relatively low prices at which the trucks were sold compared to their forced sale value and amounted to gross misconduct.
142. Section 43(2) of the [Employment Act, 2007](#) provides that;

“The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
143. Judicial authority is clear that as long as the employer had a reasonable ground for the belief, the termination is deemed justifiable.
144. In [Kenya Revenue Authority v Reuwel Waithaka Gitabi & 2 others](#) (*supra*), cited by the respondent, the Court of Appeal acknowledged that the test is subjective to some extent.
145. The court expressed itself as follows;

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist” causing it to terminate the employee’s services. That is a partly subjective test.”
146. The foregoing is also consistent with the band of reasonableness test enunciated by Lord Denning in *British Leyland UK v Swift* (1981) IRLR 91.
147. The test is essentially whether termination of employment was one of the options available to a reasonable employer in the circumstances.
148. For the above-stated reasons, it is the finding of the court that the respondent had a valid and fair reason to terminate the claimant’s employment. In other words, it had a substantive justification for the termination.

Procedure

149. The claimant’s counsel faulted the procedure employed by the Respondent on the ground that the claimant was not accorded a fair hearing as envisioned by section 41(2) of the [Employment Act, 2007](#)



- in that Mr. Osero, the Investigator attended the hearing and he had ‘declared war’ on the Claimant and the panel had no person from the remedial department to assist members understand the different roles of staff in the department.
150. According to the claimant’s counsel, the Respondent did not consider the claimant’s addendum.
 151. It requires no emphasis that section 41 of the *Employment Act*, 2007 is couched in mandatory terms as held in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*.
 152. The gravamen of the Claimant’s case is that she was not accorded a fair hearing.
 153. Evidence on record reveals that after one Mr Charles Mbugua complained about possible irregularities at the Respondent’s Remedial Department, the Respondent’s Security Department conducted an investigation and made several findings.
 154. Although most of the alleged corrupt practices implicated Mr Andrew Kagiri, the then Head of Remedial Department, the Claimant was implicated in that she prepared and signed the BOM paper which led to the sale of the 5 repossessed trucks.
 155. The investigator recommended disciplinary action against the Claimant for giving misleading information while preparing the BOM paper on August 16, 2017 requesting for approval for the sale of the five trucks.
 156. First, the claimant was issued with a notice to show cause dated July 2, 2018 detailing the allegations against him.
 157. Second, the claimant responded by letter dated July 6, 2018.
 158. The claimant admitted that she gave incorrect information about the offer by Dalali Auctioneer’s as well as the amounts quoted being below the forced sale value.
 159. The claimant also admitted that she was the author of the BOM paper.
 160. In sum, the claimant responded to the notice to show cause substantively.
 161. By letter dated August 7, 2018 received by the claimant on August 9, 2018, the respondent invited the claimant for a Staff Disciplinary hearing scheduled for August 13, 2018.
 162. Third, the letter was explicit the claimant would be allowed to tender documentary evidence in support of her case, was entitled to have another employee present and the charges were those enumerated in the notice to show cause.
 163. Fourth, the disciplinary hearing took place on August 13, 2018 under a 4 person panel with Mr Simon Maina as the Chairperson.
 164. The claimant was accompanied by Mr. Alex Ngui, a colleague in her department and the charges were read out to her.
 165. The claimant did not deny having given misleading information.
 166. Strangely, asked about her statement in the BOM paper on why the auctions failed due to low bids while the auctioneer stated that there were no bidders, the Claimant’s retort was that she did not attend auctions but had attended one and could not confirm whether the auctions took place or not as she had indicated in the BOM paper.
 167. A panoramic view of the minutes the claimant declined to sign reveal that she participated in the hearing, responded to questions and asked questions.



168. The minutes were forwarded to the claimant *vide* email dated September 12, 2018 which was explicit that she was free to highlight any omissions or include an addendum and the Claimant opted for an addendum which would suggest that the minutes had no omissions.
169. Intriguingly, in her addendum, the claimant introduced new evidence that Mr Andrew Kagiri prepared the BOM paper and she signed it without reading, having admitted during the hearing that she printed the paper on August 10, 2017 but did not present it for approval. If the foregoing addition was the reason why the claimant declined to sign the minutes on September 12, 2018, then it was disingenuous on her part.
170. The addendum was received on September 17, 2018 and the claimant's employment was terminated on the same day.
171. Sustaining the argument that the respondent did not consider the addendum, in the court's view would be overstretching imagination as the claimant was raising an issue on a question she had responded to and admitted in writing.
172. Having admitted that she prepared the BOM paper, she could not turn round and argue that it was prepared by another person, yet it was the sole foundation of the notice to show cause and the disciplinary hearing.
173. Although counsel contended that the inclusion of the investigator rendered the committee improperly constituted, no evidence was adduced to show that the respondent's Manual excluded an investigator on account of having conducted the investigation Relatedly, the claimant tendered no evidence to show that Mr Samuel Osero was biased against her and finally, the claimant did not object to his participation or presence, a fact the minutes would have captured.
174. Similarly, the fact that the Remedial department had no representation in the disciplinary panel did not, in the court's view, vitiate its proceedings, as it was not a requirement of the respondent's Human Resource Manual that the department be represented. More importantly, the discretion to enlist a technical person was vested in the Director Human Resource and only if it was deemed necessary.
175. Finally, the issues before the disciplinary panel were of a non-technical nature and implicated the claimant's honesty as an employee as opposed to her role in the department which was her major defense.
176. Juxtaposed against the provisions of section 41 of the *Employment Act, 2007*, the court is satisfied and finds that the Respondent accorded the Claimant an opportunity to defend herself and a fair hearing as by law required.
177. Having found that the Respondent had a substantive justification to terminate the Claimant's employment on September 17, 2018, and having further found that it conducted the termination in accordance with a fair procedure, it is clear to the court that the Claimant's case is unsustainable.
178. The foregoing notwithstanding, it behooves the court to examine the reliefs sought by the claimant and proceeds as follows;

(a) Declaration and injunctions

179. Having found as above, the declaration and orders of injunction sought are unavailable at this stage and are declined.



(b) Leave days earned but not taken (24 days)

180. In her written statement dated January 9, 2019, the claimant reproduces the ‘Reasons Wherefore’ as is in the Memorandum of Claim and mentions the 24 leave days without providing any evidence as to when the days accrued and had not been paid for by the respondent.

181. More significantly, the claimant was paid for the 17.06 accrued leave days as evidenced by the Respondent’s computation of Terminal Benefits Sheet on record which was not contested.

The prayer for payment for 24 leave days is declined.

(c) Gratuity for 12 years

182. Gratuity is an amount paid by the employer to the employee gratuitously in appreciation for the services rendered by the employee and must have a basis, if it is to be enforced by the court.

183. The Claimant adduced no evidence of entitlement to gratuity.

184. It is trite that gratuity unlike service pay under section 35(5) of the [Employment Act, 2007](#) is a contractual entitlement either provided for in the employment contract or in a Collective Bargaining Agreement (CBA) in the case of unionisable employees.

185. The claimant neither adduced evidence of membership of a trade union nor avail a copy of the Collective Bargaining Agreement to justify the claim.

186. It is also noteworthy that the claimant was a member of the respondent’s Pension Fund administered by Zamara which she joined on February 21, 2006.

The prayer for gratuity is declined.

(d) Damages for unlawful termination (5 years)

187. Having found that termination of the claimant’s employment was not unfair within the meaning of section 45 of the [Employment Act, 2007](#), the claim for compensation for unlawful termination is unsustainable and is declined.

188. In the end, the claimant’s case against the Respondent is for dismissal and it is accordingly dismissed.

189. In the circumstances of this case, the court is persuaded that it is only fair that parties bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

