



**Munyori v Bank of Africa Limited (Cause 1447 of 2018)
[2023] KEELRC 2889 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2889 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1447 OF 2018
JK GAKERI, J
NOVEMBER 14, 2023**

BETWEEN

FAITH WAIRIMU MUNYORI CLAIMANT

AND

BANK OF AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging unfair and unlawful termination of employment and non-payment of terminal benefits and accrued dues.
2. The Claimant was employed by the Respondent on 14th July, 2005 as a clerk at a consolidated salary of Kshs.33,066/= per month and rose up the ranks over the years to the position of Operations Assistant earning a salary of Kshs.156,000/= at the time she was terminated.
3. The Claimant avers that on or around 22nd October 2015 she was unlawfully and or unfairly subjected to unjust and unfair disciplinary process contrary to *the constitution* of Kenya and the labour laws.
4. The Claimant states that the Respondent subjected her to an unjustified disciplinary process and later preferred criminal charges against her on a commercial transaction being Nairobi Criminal case No. 1078 of 2016 R vs Adul Hafeth Zubedi & 7others but was later acquitted on 12th July, 2018 under section 210 of the Criminal Procedure Code for lack of sufficient evidence.
5. It is the Claimant's case that she suffered mental anguish, emotional distress, psychological suffering, loss of amenities and a damaged career in banking. That despite her qualifications and wealth of experience in Banking she missed employment opportunities resulting from the negative publicity arising from the criminal case.
6. The Claimant avers that on the 2nd July 2015 in the ordinary course of business she sighted a sum of six million South African Rand from Dubai Bank and advised the treasury front office to confirm the



same and the officer confirmed with Dubai Bank that they had placed the 6 Million ZAR for sale and the officer went ahead and negotiated the exchange rate. She stated that the sale was confirmed through the usual banking procedure and the Respondent wrote to Central Bank of Kenya confirming the sale transaction.

7. The Claimant further states that Dubai Bank was supposed to pay the funds by close of business on 2nd July 2015 but failed to do so and on the 16th July 2015 after deliberations between the Respondent and Dubai bank the funds were converted into a commercial loan payable by 27th July 2015 at an interest rate of 12% which Dubai Bank failed to honour.
8. The Claimant states that she was suspended from duty on 20th August 2015 to pave way for investigations and on the 18th September 2015 she was served with a disciplinary hearing notice to show cause on the transaction.
9. The Claimant avers that the notice and the entire disciplinary hearing was malicious, unfair, un-procedural, unreasonable and in breach of the rules of natural justice as the same was too short, she was not accorded enough time to prepare for her defence, notice to show cause was issued while a hearing date had already been fixed, subjecting the Claimant to two stages of disciplinary process at the same time occasioning miscarriage of justice.
10. The Claimant avers that she was subjected to a sham disciplinary process whose basis was external factors such as Dubai Bank failure to honour the loan agreement.
11. The Claimant further states that on 22nd October 2015 she was unfairly and unlawfully terminated on allegation that the respondent had lost Kshs.48,180,000/= which the claimant states had not been lost as it was converted into a loan payable at an interest by Dubai Bank.
12. The Claimant further states that the decision by the Respondent to subject the claimant to a disciplinary process over a commercial contract was unlawful, unfair, unjust and inequitable
13. The Claimant prays for;
 - a. The sum of Kshs.1,872,000 being 12 months salary compensation for unlawful and /or unfair and/or wrongful termination of employment
 - b. The sum of Kshs.1,560,000/= being service pay for 10 years worked.
 - c. The sum of Kshs.156,000/= being one-month salary in lieu of notice.
 - d. A widely publicized apology for damaged career in banking.
 - e. General damages for breach of employment contract.
 - f. Punitive and/or exemplary damages for malicious and unfair and or wrongful termination of employment.
 - g. General damages for employment related defamation.
 - h. Costs of the suit.
 - i. Interested on a)- h) above
 - j. Any other relief that the court may deem just and expedient to grant in the circumstances of this case.



Respondent's case

14. The Respondent denies that the claimant was subjected to unwarranted, unjust or unfair disciplinary process and further states that the claimant's termination was lawful fair and based on valid grounds.
15. The Respondent denies that it preferred criminal charges against the claimant and states that the claimant was dismissed on account of reckless discharge of duty which the claimant was responsible as there was no sum of Six Million Rands received from Dubai Bank and what was actually received was Six Million United States Dollars and according to the respondent, a person with the claimant's experience ought to know the differences in currencies.
16. The Respondent states that the claimant failed to verify the transaction causing the respondent to transfer Kshs.48,180,000/= to Dubai bank without receiving corresponding foreign currency from the Bank.
17. That as a result of the claimant's negligence the Respondent has been unable to recover the amount from Dubai Bank which was shortly thereafter put under receivership.
18. The Respondent denies having defamed the claimant in any way.
19. The Respondent admitted having suspended that Claimant to pave way for investigations and the suspension was lawful and in accordance with the disciplinary procedures.
20. The Respondent states that during the hearing the Claimant was granted a right to present her defence and her representative was also allowed to make a representation at the hearing.
21. The Respondent further states that the Claimant was paid all her terminal dues on the 22nd October 2015 and was thus not entitled to the reliefs sought.
22. In its counter claim, the Respondent states that the Claimant's indebtedness to the respondent as at 22nd October 2015 stood at Kshs.6,022,898.73
23. The Respondent avers that despite demand for full payment of the debt, the claimant is yet to settle and as at 19th December 2018, the claimant's debt stood at Kshs.664,079.21
24. The Respondent urges the court to dismiss the claim with costs and enter judgment against the claimant as follows;
 - a. Kshs.664,079.21 in respect of the loans advanced to the claimant during the course of her employment.
 - b. Interest on (a) above at prevailing bank lending rates from 22nd October 2015 until payment in full.
 - c. In the event any judgment is entered for the claimant the same be set off against the counterclaim.
 - d. Costs of the suit.
 - e. Any other relief this Honourable court may deem fair and just to grant.

Claimant's evidence

25. The Claimant testified as CW1 and adopted her written statement dated 18th October, 2018 that rehashes the contents of the Memorandum of Claim as her evidence in chief.



26. On cross-examination the claimant testified that on the 2nd of July 2015 there was a transaction between the respondent and Dubai Bank which transaction was effected by a dealer, one Robert. That Dubai bank was paid 6 Million USD which was an error on currency as it ought to have been on South African Rands which monies the bank had committed to pay but did not and subsequently went into receivership.
27. The Claimant testified that during the course of her employment, she had taken an unsecured personal loan as well a mortgage secured by property No.18 block 16 erected on L.R No. 12715/288 Mololongo with the respondent.
28. It was the Claimant's testimony that upon termination of employment, she sold the property for a sum of Kshs.6,000,000/= and the proceeds were paid to the Respondent and a further deposit of Kshs.100,000/= which amount cleared the total debt claimed in the counterclaim and did not owe the respondent any money.
29. CW2 Mr. Adera Balongo adopted her witness statement dated 5th September 2022 as evidence in chief.
30. The witness stated that at the time of the incident, she was not at the Bank but was informed on the 15th July 2015 when he resumed work.
31. It was his testimony that he was made aware of the agreement between Dubai Bank and Bank of Africa Senior leadership and the resolution that the sum of Kshs.48,180,000/= was converted into a commercial loan which Dubai Bank committed to pay.
32. The witness stated that he was the head of Treasury at the time of the incident and was properly briefed and stated that these are errors that happen all the time.

Respondent's evidence

33. RWI, M/S EVA KIPESHA the Senior Human Resource Officer of the respondent adopted the witness statement dated 16th January 2023 as evidence in chief and was cross-examined.
34. In her evidence, the witness stated that the claimant was expected to perform her duties diligently and exhibit keen attention to detail. That after the 2nd July 2015 incident, the Respondent conducted investigations and found that the claimant had negligently handled the transaction leading to her suspension to pave way for investigations.
35. It was her testimony that the investigation revealed the gross and costly negligence by the Claimant on the 18th September 2015 and she was issued with a notification for disciplinary hearing and a notice to show cause why disciplinary action should not be taken against her.
36. The witness testified that the disciplinary hearing notification was issued in full compliance of the respondent's manual and the law.
37. The witness testified that the Claimant did not request for more time or any resources in order to respond to the notice to show cause and the fact that the Respondent may have settled the commercial dealings with Dubai Bank did not absolve the claimant from being held to account for the reckless performance of her duties.
38. The witness further stated that the disciplinary hearing was not based on a charge of fraud.



Claimant's submissions

39. The Claimant's counsel identified the following issues for determination;
- i. Whether the suspension from duty on 20th August, 2015 was lawful.
 - ii. Whether the Claimant's termination was unfair.
 - iii. Whether the prayers in the claim should be granted
 - iv. Whether party should bear the costs of these proceedings.
40. As regards the 1st issue, counsel relied on the sentiments of the court in Donald C Avude V Kenya Forest Service (2015) where the court had the following to say on administrative suspension;
- “In the Cabiakam case the court set out the criteria for administrative suspension as follows; sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or to his reputation; the existence of immediate, important inconveniences that cannot be practically countered by alternance measures (for example: assigning the employee to another post) and the necessity of protecting the public”
41. Counsel submitted that the Respondent did not serve the Claimant with a notice to show cause why she should not be suspended from duty thereby condemning her unheard. Further counsel urged that the Respondent did not produce the Human Resource Manual to justify the action of suspending the claimant without notice.
42. Counsel argued that at the point of suspension on the 20th August, 2015, there was no report implicating the Claimant with any wrongdoing.
43. On the 2nd issue, counsel submitted that Section 45(1) of the *Employment Act* provides that no employer shall terminate the employment of an employee unfairly. Under section 45(2) of the *Employment Act*, the termination of employment is unfair if the employer fails to prove that the reasons for the termination was valid and fair.
44. Counsel submitted that the termination of the Claimant's employment was in breach of the principle of procedural fairness as the claimant was not given an opportunity to be heard before suspension.
45. It was submitted that the termination letter dated 22nd October 2018 stated that the claimant was guilty of gross negligence, carelessness, improper performance of work and failure to follow due process which reasons were never set out in the invitation for the disciplinary hearing.
46. Counsel further submitted that the disciplinary hearing was conducted before the conclusion of the investigation mentioned in the suspension letter.
47. Counsel submitted that the investigation officer who testified in the criminal case against the claimant stated that funds were transferred to the account of Dubai Bank held at Central Bank by mistake and when it was detected, the Dubai Bank agreed to reimburse the funds but it was unable to pay owing to liquidity problems.
48. Counsel submitted that the Claimant was not negligent but a genuine mistake happened and failure by Dubai Bank to reimburse the funds as agreed was beyond the claimant's control therefore could not be blamed for the same.



49. It was submitted that the audit report identified several operational weaknesses in the respondent that included lack of clarity in the forex payment systems, overloading the treasury back office with other bank transactions, which showed that a combination of factors led to the human error and it was unfair for the respondent to terminate the claimant's employment for an error emanating from the respondent's operational weaknesses.
50. Counsel relied on the holding in Kenya Petroleum oil Workers union vs Kenya Shell Limited (2014) eKLR, where the court held that there was unfair termination where the employee was accused of a loss traceable to operational weaknesses in the employer's place of work.
51. On the 3rd issue, Counsel submitted that the Claimant had demonstrated that her dismissal was unfair as the respondent corrected the erroneous payment of funds.
52. It was submitted that the claimant having discharged her burden of proof that the termination was unfair and the respondent having failed to justify the reasons for termination she is entitled to the prayers sought.
53. The Claimant relied in the holding in JMD vs Nacico Society Limited (2016) eKLR where the court held that the onus of proving the reasons for dismissal rests with the employer while the burden of showing the dismissal was unfair borne by the employee.
54. On the counter claim of a sum of Kshs.664,079/= together with interest which was allegedly an outstanding debt, Counsel submitted that the respondent had not strictly proven the outstanding balance through production of Bank statements.
55. Counsel submitted that the claimants total debt as at 22nd October 2015 was Kshs.6,022,898/= and she liquidated the security for the mortgage for Kshs.6 million with the consent of the respondent and deposited a further Kshs.100,000/= into her savings account which funds were sufficient to clear her outstanding debt.
56. Counsel submitted that the respondent did not prove how the interest rate changed from 4% to 14% as the Claimant did not consent to such a change, she further submitted that the Respondent cannot unilaterally load unexplained Kshs.196,729/= into a savings account and characterize it as a loan.
57. Counsel submitted that the Respondent has failed to prove that the claimant owed it the sum of Kshs.664,079/= as pleaded in the counterclaim.

Respondent's submissions

58. By the time the court was retiring to write this judgment, the Respondent had not filed submissions.
59. The copy availed to the court on 31st October, 2023 show that the submissions were filed electronically on 25th October, 2023 at 14.47 hours, long after the judgement was prepared.
60. Both parties were accorded 21 days on 20th March, 2023 but none had filed by 10th May, 2023 and were accorded another 7 days on 13th July, 2023 when the judgement date was fixed.

Findings and determination

61. The issues for determination are;
 - i. Whether termination of the Claimant's Employment was fair.
 - ii. Whether the claimant is entitled to the remedies sought?



iii. Whether the respondent is entitled to the remedies sought in the counter claim?

62. On the first issue, the court is invited to interrogate the fairness of the Claimant's termination from employment. In determining this, the court has to consider whether the respondent had a substantive justification to terminate the claimant's employment and conducted it in accordance with a fair procedure. The absence of both or one of these elements renders the termination of employment unfair within the meaning of Section 45 of the *Employment Act*, 2007.
63. The elements of a fair termination of employment were aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as substantive justification and procedural fairness. (See also *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR).
64. Section 41 and 45(2) of the *Employment Act*, 2007 address procedural fairness, while Sections 43, 45(2), 45(5) and 47(5) deal with substantive justification.

Reason for termination

65. It is common ground that the Claimant was an employee of the Respondent from 18th July, 2005 to 22nd October, 2015, about 10 years and received several salary reviews until January 2008 when her terms of service changed to Administration Assistant at a consolidated salary of Kshs.71,000/= per month and about one year later was upgraded to Banking Officer and by July 2009, the Claimant's salary had risen to Kshs.102,917.00.
66. In December 2009, the Claimant was transferred to the Treasury Back Office and among her duties and responsibilities was to ensure prompt transmission of related swift messages and confirmations as well as processing of inward and outgoing RTGS messages.
67. By January 2013, the Claimant's salary had risen to Kshs.147,000/= and Kshs.156,000/= by 20th March, 2014.
68. Documents on record leave no doubt that the Claimant was a diligent employee of the Respondent.
69. It is also not in dispute that on 2nd July, 2015, the Claimant mistook the sum of USD 6,000,000 relating to Citi Bank as 6 million South African Rands to Dubai Bank based on past transactions and credited the amount to Dubai Bank.
70. It is also common ground the two banks entered into an arrangement under which the sum of Kshs.48,180,000/= received by Dubai Bank would be treated as a commercial loan payable by 27th July, 2015 at 12% interest, an arrangement which fell through as Dubai Bank went into receivership notwithstanding demonstrable attempts by the Respondent to recover the money.
71. This transaction culminated in the summary dismissal of the Claimant on 22nd October, 2015.
72. The notice to show cause/notification of disciplinary hearing accused the Claimant of;
- “Erroneous processing of a payment to Dubai Bank that resulted to a financial loss of Kshs.48,180,000/= (forty eight million, one hundred eighty thousand).
73. The notice also stated that;
- “This charge arises out of your actions/performance/behaviour on 2nd July, 2015 at Kenya Re Head Office.”



74. The dismissal letter dated 22nd October, 2015 accused the Claimant for gross negligence, carelessness, improper performance of her work and blatant failure to follow due processes contrary to the employment contract.
75. The Claimant was accused of having failed, refused or neglected to confirm receipt of funds before payment.
76. In her statement to the Banking Fraud Investigation Department dated 13th November, 2015, the Claimant states as follows;

“I received print-outs swift messages. One of the messages was MT910 showing the ordering institution as Citibank South Africa Sandton ZA. I looked at it and interpreted it to be for Dubai Bank due to the ordering institute which was City Bank South Africaas per how Dubai Bank usually sends their funds. I called the dealer Mr. Robert Gatobu and asked him if he had done a deal with Dubai Bank and informed him that I had received ZAR (South African Rands 6m (ZAR 6,000,000).

I therefore requested him to confirm with Dubai Bank if it was their money . . .”
77. From the statement, it is evident that the Claimant did not discover the mistake until one Mary did on 3rd May, 2015.
78. It is common ground that Dubai Bank Ltd did not refund the amount even after promising to do so and was put under receivership on 14th August, 2015 and liquidation was subsequently recommended and the sum of Kshs.48,180,000/= was not recovered.
79. As CPL Samuel Epara found and as admitted, the Claimant misinterpreted Swift Message MT910 from Citibank New York of USD6,000,000 as South African Rands for Dubai Bank Ltd.
80. The Banking Fraud Investigation Unit recommended that the issue be treated as civil though Dubai Bank Ltd had a fraudulent intention.
81. The Swift Message on record has a reference part, Sender and Receive details Citibank N.a NewyorkUSA and the Respondent respectively and value date, currency code and amount. The date is listed as 1st January, 2015, Currency USD Dollars) and Amount 6,000,000. The ordering institution is Citi Bank South Africa Sandtonza.
82. Prima facie, had the Claimant been more careful, she would have noticed that the currency was US Dollars not South African Rands.
83. Similarly, a second look at the document would have cleared any impressions created by the 1st sighting before the call to Mr. Gatobu was made.
84. According to RWI, the Claimant’s failure to interpret the Swift Message she had sighted constituted negligence on her part.
85. According to RWI, the concerns raised by the staff meeting on 22nd July, 2015 as regards insufficient human capacity was after the fact as the horse had bolted.
86. The Audit Report availed by the Respondent dated 5th September, 2015 states that the control lapse identified on the Claimant’s desk is that the Claimant failed to confirm the accuracy of the swift message when preparing documents for authorization.
87. Strangely, the authorising processor failed to do so as well.



88. At this juncture, the salient issue for determination is whether the Respondent had a valid and fair reason to terminate the Claimant’s employment in October 2015.
89. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reasons 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.”
90. The summary dismissal letter relies on Clause 9.2.4 of the Employment Contract dated 2nd June, 2016 and Section 44(4)(c) of the *Employment Act*, 2007;
- “an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract, to have performed carefully and properly.”
91. It is common ground that the Claimant misconstrued US Dollars 6 million for South African Rands on 2nd July, 2015 which culminated in her summary dismissal in October 2015.
92. In *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*, the Court of Appeal explained the provisions of Section 43(2) of the *Employment Act*, 2007 as follows;
- “ . . . reasons for termination are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract. For example poor performance, insubordination and lack of loyalty are some of the grounds . . .
93. Relatedly, in *Kenya Revenue Authority V Reuwel Withaka Gitahi & 2 others (2019) eKLR*, the Court of Appeal stated;
- “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 it genuinely believed to exist causing it to terminate the employee’s services. That is a partly subjective test.”
94. Finally, in *Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR*, the court stated that;
- “ . . . All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.
95. The foregoing sentiments comport with the sentiments of Lord Denning MR in *British Leyland (UK) Ltd V Swift (1981) I.R.L. R 91* on the band of reasonableness test as follows;
- “ . . . a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate. I do not think that that is the right test. The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered in all these cases there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably take a different view.”



96. As adverted to elsewhere in this judgement, the Claimant admitted that she mistook US Dollars 6,000,000 for 6,000,000 South African Rands on 2nd July, 2015 at about 9.30 am while on duty at her desk as the ordering institute was Citibank South Africa. The Claimant appear to have assumed that the currency was South African Rands which was not the case and does not appear to have confirmed the details thereafter, setting in motion a concatenation of events that led to the Liquidation of Dubai Bank Ltd and the Claimant's summary dismissal.
97. Having been in the Treasury Back Office since 1st December, 2009, the employer was entitled to assume that the claimant was aware of the mantra of attention to details but failed in this instance.
98. Although neither the Audit Report nor the BIFU recommendation expressly state that the Claimant was negligent, the Audit Report faults her for failing to confirm the accuracy of the swift message.
99. In light of the amount involved, the Respondent expected the Claimant to be more vigilant than she demonstrated in this instance.
100. In the court's view based on the totality of evidence, the court is persuaded that the Respondent had reasonable grounds to believe that the Claimant's conduct demonstrated want of care.
101. Accordingly, it is the finding of the court that Respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant's employment.
102. Section 45(1) of the *Employment Act*, 2007 provides that;
1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer is unfair if the employer fails to prove –
 - a. that the reasons for termination was valid.
 - b. that the reason for termination is a fair reason.
103. Similarly, Section 47(5) of the *Employment Act*, 2007 provides that;
- 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.

Procedure

104. Following the incident, the claimant was suspended from work on the 20th August 2015 to pave way for investigations of the erroneous processing of payment to Dubai Bank. The suspension was extended three times on the 24th September 2015, 30th September 2015 and 7th October 2019 as the investigations was still underway.
105. On the 18th September 2015 the Claimant was served with a notice to show cause. The notice doubled up as a notification for the disciplinary hearing scheduled for 22nd September 2015. At the time of the disciplinary hearing the claimant stated that she was not supplied with the investigation report which would have aided her in the preparation of her defence.
106. On the 22/10/2022 the Claimant was summarily dismissed from employment for gross negligence, carelessness, improper performance of work and failure to follow due process.



107. It is worth noting that the claimant was accorded two days to respond to the notice to show cause and simultaneously prepare for the defence hearing, the fact that he had not been provided with the investigation report notwithstanding.
108. In determining this issue, the court is guided by the provisions of Section 41 of the *Employment Act, 2007* which prescribe the mandatory procedure to be complied with by any employer considering termination of an employee's employment or summary dismissal.
109. As adverted to elsewhere in this judgement, the fair procedure contemplated under the Section 41 has four components, namely; the notification- the employer must notify the employee of his or her intention, and the grounds on which the intention is founded. Second, the hearing - the employer must accord the employee adequate opportunity to prepare and defend himself against the charges levelled against him, third, right of accompaniment- the employee has the right to be accompanied to the hearing by a colleague of his choice or a union representative. Such person must be present when the charges are explained to the employee. Lastly, the employer has to consider the representation(s) made by the employee and or the person accompanying employee before making a decision.
110. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal isolated the elements of procedural fairness in the following words;
- “It is our view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with ...
- Four elements must thus be discernible for the procedure to pass muster:
- i. An explanation of the grounds of termination, in a language understood by the employee.
 - ii. The reason for which the employer is considering termination.
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
 - iv. Hearing and considering any representations made by the employee and the person chosen by the employee.”
111. From the evidence on record, it is clear that the Claimant was issued with and received a notice to show cause/notification of disciplinary hearing on 18th September, 2015 and the hearing was slated for 21st September, 2015 at 11.00 am. The notice required the Claimant to make a written response to explain why disciplinary action should not be taken against her on account of the incident on 2nd July, 2015. The response was required before the hearing date.
112. In sum, the Claimant was accorded two days to prepare and submit a written response to the charges and prepare for the hearing including briefing her witnesses, if any, and consulting a colleague to accompany her to the hearing.
113. On cross-examination, the Claimant maintained that she was not accorded enough time to prepare.
114. Was the reason given sufficient or reasonable in the circumstances? The court is not persuaded it was.
115. The Claimant was facing exceedingly serious allegations which torpedoed her career in banking and required reasonable time to prepare a written response to the charge and prepare for the hearing as by law required. It is trite that, what is reasonable time is a question of fact and varies from case to case.



116. Granted that the Claimant had been on suspension, it behooved the Respondent to accord her reasonable time.
117. Accordingly, the court finds that the Claimant was not accorded sufficient time to respond to the allegations and prepare for the hearing.
118. The foregoing comports with the sentiments of Ndolo J. in *Rebecca Ann Maina V Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR, cited with approval by Wasilwa J. in *Benjamin Mwendwa Nduati & 4 others V East Africa Portland Cement Co. Ltd* (2016) eKLR as follows;

“I agree with counsel for the respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defense. The employee is also entitled to documents in possession of the employer which would assist them in preparing their defense. The employee is further entitled to call witnesses to buttress their defense.”
119. The court expressed similar sentiments in *Ruth Adhiambo Apindi V Unilever Kenya ltd* (2020) eKLR on sufficiency of time to prepare for the hearing and right to documentation.
120. In *Lilian Muchungi V Green Belt Movement* (2022) eKLR, Ocharo Kebira J. was emphatic that;

“The right to fair hearing, which is part of procedural fairness in matters termination of an employee’s employment requires that an employee be given reasonable time to prepare for his or her defence adequately . . .

I would still hold that the notice of two days was not sufficient for preparation of an intelligible defence. The holding in *David Muhoro V Ol Pejeta Ranching Ltd* (2014) eKLR cited above is squarely applicable in this matter.”
121. The foregoing decisions and others leave no doubt that fair hearing requires that the employee be accorded sufficient time to prepare for their defense in order to enable them make a meaningful defense to the charges made against them.
122. Puzzlingly, the respondent failed to exhibit signed minutes of the disciplinary hearing.
123. Relatedly and significantly, the Claimant was suspended to pave way for investigation and surprisingly no report was provided to Claimant or filed in court. RWI, Moses Alango confirmed on cross-examination that the investigation was concluded but the report was not filed in court. The witness made reference to an audit report on record dated 4th September, 2015 which he admitted was one of the documents that was relied upon in the decision making process to terminate the Claimant’s employment.
124. With neither the investigation nor the Audit Report, how was the Claimant expected to mount a worthwhile defense against the charge she was facing?
125. It is trite that provision of the evidence the decision maker will rely on to the accused person is an integral part of the right to fair hearing.
126. By denying the Claimant these documents, the respondent impeded her right to a fair hearing and thus violated her rights.



127. From the foregoing, the irresistible finding of the court is that the respondent has failed to discharge the burden of proof under Section 47(5) and 45(2)(c) of the *Employment Act*, 2007, the consequence of which is that the summary dismissal of the claimant on 22nd October, 2015 was unfair for want of procedural propriety as held by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (Supra)* as follows;

“From the foregoing, termination of employment may be substantively and/or procedurally unfair . . . On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”

128. Finally, RWII confirmed on cross-examination that the investigation report was not sent to the claimant and investigations continued even after the hearing on 22nd September, 2015.

Whether the claimant is entitled to the reliefs sought 12 months salary compensation

129. Having found that the Claimant’s employment was unfairly terminated, the claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007.

130. In determining the quantum for compensation the court has taken into consideration the fact that the claimant worked for the respondent for 10 years in various positions. That during that time of employment she rose through the ranks and was awarded bonuses for her diligence service. That prior to this incident she had not received a warning letter nor subjected to disciplinary hearing and expressed her wish to continue in the respondent’s employment by filing an appeal.

131. However, the claimant substantially contributed to the termination of employment.

132. In the circumstance the Court is satisfied that the equivalent of 5 months salary is fair compensation.

Service pay

133. The claimant prays for service pay for the 10 years she worked for the Respondent but admitted on cross-examination that she was a member of the National Social Security Fund, as evidenced by her payslip.

134. The prayer for service pay is unsustainable by virtue of the provisions of Section 35(6)(d) of the *Employment Act*, 2007.

The prayer is dismissed.

Salary in lieu of notice.

135. Having found that termination of the Claimant’s employment by the respondent was substantively justifiable and the claimant substantially contributed to the termination, the prayer for pay in lieu of notice is unsustainable and is declined.

General damages for defamation

136. The claimant alleges to have been defamed by the respondent by preferring criminal charges against her which damaged her career progress despite the wealth of experience she had acquired. However, the Claimant provided no evidence of the alleged defamation or how her career was damaged by the Criminal Case No. 1078 of 2016, the fact that the claimant was acquitted notwithstanding.



137. It is trite that defamation is the publication of a representation which lowers a person's image in the estimation of right thinking members of the society generally or which subjects the person to hatred, ridicule, contempt and may be libel or slander.
138. The Claimant has not demonstrated what form the defamatory presentation took nor provide particulars such as the defamatory representation, reference to the claimant, its publication and when and malice.
139. The claimant admitted that the respondent did not publicize the criminal case and the decision to charge the claimant with others was made by the ODPP, BIF termination notwithstanding.
140. In sum, save for the allegation, no evidence has been provided. The prayer is declined.
141. The prayer for apology is equally declined as is the prayer for damages for breach of employment contract as it is unavailable in termination of employment. Similarly, the Claimant tendered no evidence of entitlement to punitive or exemplary damages under the test in *Rookes V Barnard & others* (1964) AC 1129 and *Obonyo & another V Municipal Counsel of Kisumu* (1971) EA 91.

Whether the respondent is entitled to the remedies sought in the counter claim?

142. In its counter claim, the Respondent prayed for the sum of Kshs.664,079/= being an outstanding loan balance together with interest from the date of termination being 22nd October, 2015.
143. In its pleadings, the respondent stated that the Claimant's outstanding debt was Kshs.6,022,898.73. It is common ground that the claimant sold the security to the mortgage, Property No 18 Block 16 on LR No. 127115/288 Mlolongo and deposited Kshs.6,000,000/= and a further Kshs.100,000/= into the savings account that was used to clear up the outstanding mortgage.
144. The respondent has not demonstrated to the Court how it arrived at the alleged outstanding balance of Kshs.664,079/=.
145. The respondent ought to have availed documentary evidence of the Claimant's Mortgage Account to demonstrate how the alleged loan balance arose.
146. RWIII admitted that he had no evidence of the loan account or how much the Claimant borrowed.
147. In the absence of such evidence, the court has no option but to dismiss the prayer for want of proof.
148. In the end, judgement is entered in favour of the Claimant against the Respondent as follows;
 - a. Equivalent of 5 months' salary.
 - b. Costs of this suit.
 - c. Interest at court rates from date of judgement till payment in full.
149. For the avoidance of doubt, all other prayers are declined as explained herein above.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH 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

