



**Onderi v Mini Bakeries (Nairobi) Limited (Cause E716 of 2021)
[2023] KEELRC 3248 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3248 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E716 OF 2021
JK GAKERI, J
DECEMBER 6, 2023**

BETWEEN

DENNIS OMBUI ONDERI CLAIMANT

AND

MINI BAKERIES (NAIROBI) LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim alleging unfair termination of employment by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent on 8th November, 2007 as a charge hand baker at a salary of Kshs.10,799/= and served diligently and was subsequently promoted to the position of Assistant Operations Manager. That on 6th December, 2019, Mr. Jack Otieno, the Assistant Operations Manager, Dandora Branch, Donholm and Kariobangi called the Claimant and notified him that he had been informed to report to the Eastleigh Branch to relief one Thomas Nyarige for 2 weeks owing to emergency leave and there was no handover.
3. That one Mr. Charles Murunga would stand in for the Claimant at the Highridge, Kirinyaga and Orindoor branches and a handover took place.
4. That the verbal communication and transfer was contrary to the Respondent's leave and official schedule for December 2019.
5. It is the Claimant's case that although he reported to the Eastleigh Branch on the afternoon of 6th December, 2019, he was at Barclays Bank, Ngong with the Sales team on 7th December, 2019, at Kenya Power & Lighting Co. Ltd (KPLC) on 8th December, 2019 and Stima Plaza on 9th December, 2019 with Mr. Okoth and only took stock on the afternoon of 10th December, 2019 and noted the huge variance in ingredients and informed Mr. Okoth, the incoming Manager.



6. The variances precipitated various decisions including a recommendation that Mr. Thomas Nyarige and Mr. Wandera, the outgoing Assistant Operations Manager and Branch Manager respectively to step aside for 3 days.
7. That the Claimant authored a letter dated 13th December, 2019 on the happening at the Eastleigh Branch from 6th December, 2019 to 13th December, 2019 and made several recommendation which precipitated an internal audit on the same day and notices to show cause were then served on Mr. Thomas Nyarige and Mr. Wandera on 21st December, 2019 and 14th December, 2019 respectively.
8. The Claimant further avers that he recorded a witness statement on 8th January, 2020 with the Deputy Security Officer, Mr. Edwin Wainaina, who on 16th January, 2020 filed a complaint at the Pangani Police Station and on 31st January, 2020, the Claimant and four others were summoned to Pangani Police Station, arrested and released on police cash bail and charged on 3rd February, 2020 for activities between 1st and 13th December, 2019, despite having joined the branch on 6th December, 2019.
9. That the police did not conduct any independent investigations in the matter but relied on statements recorded by the Deputy Security Officer.
10. It is the Claimant's case that he was charged for the anomalies he had unearthed in his letter dated 13th December, 2019.
11. That the Claimant's counsel's demand letter dated 6th February, 2020 led to a notice to show cause dated 12th February, 2020 which he responded to on 20th February, 2020 and was invited for a hearing on 22nd February, 2020 and employment was terminated on 28th February, 2020 without a valid reason and no opportunity to appeal.
12. The Claimant prays for;
 - a. A declaration that termination of the Claimant's employment was without a valid reason and thus unfair and illegal.
 - b. The Claimant's dues,
 - i. 3 months' salary in lieu of notice Kshs.465,000.00
 - ii. Salary for February 2020 Kshs.155,000.00
 - iii. Pension arrears February 2020 Kshs.8,450.00
 - iv. Unpaid leave days (52) Kshs.209,716.00
 - v. Leave travelling allowance Kshs.9,000.00
 - vi. 12 months' salary Kshs.1,860,000.00Total Kshs.2,538,864.00
 - c. Costs of this suit.
 - d. Interest.
 - e. Such orders and or directions as the court may deem fit to grant to meet the ends of justice.



Respondent's case

13. In its response to the Memorandum of Claim dated 5th October, 2021, the Respondent admits that the Claimant was its employee from November 2007 and his consolidated salary was Kshs.155,000.00 as at the date of termination of employment.
14. It is the Respondent's case that the Claimant had been a problematic employee which accounted for the countless warning letters and surcharge.
15. That the alleged transfer of the Claimant by one Rob Baraka who was not his supervisor had not been approved by the Respondent and one Charles Murunga had not been called in to stand in for the Claimant at the stated branches and any arrangement was between them and the Respondent was not privy to it.
16. The Respondent admits that the Claimant's meetings on 7th, 8th and 9th took place as well as the stock take on 10th December, 2019.
17. It is the Respondent's case that the Claimant's recommendations in his letter dated 13th December, 2019 was a scheme to cover up irregular activities at the branch.
18. That the four employees, namely Geoffrey Okoth, Richard Wandera both Branch Managers and the Claimant and Thomas Nyarige, Assistant Branch Managers worked in cohorts to clear cash shortfalls by capital injunction via Mpesa on 13th December, 2019 in two tranches of Kshs.44,200/= and Kshs.45,000/=.

Claimant's evidence

19. The Claimant testified that he did not sign the minutes of the disciplinary hearing as the words attributed to him were not his.
20. On cross-examination, the Claimant confirmed that he was an Assistant Operations Manager for 2¹/₂ years and was incharge of Operations and was required to do stock take daily.
21. It was also his duty to check the fuel consumption of the generator (once a week) whenever it run and worked from 8.00 am to 6.00 pm.
22. That he reported to the Operations Manager and the Senior Operations Manager.
23. The witness confirmed that an Assistant Operations Manager could not give directions.
24. It was his evidence that he was called by one Jack Otieno, an Assistant Operations Manager to take over the Eastleigh Branch and confirmed the same with another Assistant Operations Manager, Mr. Murunga, but did not call or confirm with Rob Baraka on the relieving of Mr. Thomas Nyarige and there was a leave schedule for Managers.
25. The Claimant testified that he went to the Eastleigh Branch on 6th December, 2019 at around 2.00 pm but did not take stock and took over without knowledge of the status of the branch and no handover took place.
26. He testified that he was away on 7th, 8th and 9th December, 2019 and there was no one standing in for him.
27. That he notified his superiors of the anomalies he found but was unsure as to whether his letter reached the Head Office. The witness admitted that he had no authority to request an employee to step aside and did not notice anomalies in the cashflow.



28. That he raised a Deduction Form for Mr. Richard Wandera, for the amount missing.
29. That his letter dated 13th December, 2019 was a report of what he found at the branch and auditors reported to the branch on the same day.
30. Regarding the Generator book for December 2019, the witness admitted that although a day had 24 hours, on 10th December, 2019, records showed that the generator run for 39.25 hours and 24 hours per day from 5th – 9th December 2019.
31. The witness admitted that it was his duty to verify the entries made by Richard Wandera and signed the same. That a total of Kshs.50,208/= was recorded as having been used on 10th December, 2019 and the Claimant was unaware of the capacity of the generator or for how long it could run without a break.
32. That the copies of receipts provided were not fabricated and his signature was verifiable.
33. The Claimant confirmed that he had received the warning letters on record, at least 11 of them between July 2008 to May 2016.
34. The letters accused him for poor or improper discharge of duties, underweight bread, absenteeism and sleeping at work among others.
35. On re-examination, the Claimant testified that he and Jack Otieno were of the same rank and he was communicating the boss's instructions.
36. That the insertion of 240 on the Generator book on 10th December, 2019 was by Mr. Okoth, the Manager.
37. That he had no warning letter since he was promoted on 28th August, 2018 and some of the letters were not his.

Respondent's evidence

38. RWI, Mr. Justus Kitheka confirmed that he joined the Respondent in August 2013 in Internal Audit. He testified that his Supervisor, one Eustace Kariuki called him and informed him about an anonymous call. It was his testimony that he does 2 to 3 audits per week and his Audit Report on record was dated 17th December, 2019. He disowned the report by Mercy Kariuki as it was produced for a different purpose and Mercy Kariuki's Report was not produced in court as evidence.
39. The witness testified that he conducted the audit from 13th to 16th December, 2019 and the Branch Manager (BM) then was Mr. Geoffrey Okoth and the Claimant was the Assistant Operations Manager (A.O.M) and the changes from the previous holders took place without authority and the Respondent lost Kshs.162,348/=.
40. RWI confirmed that he checked the generator records and the amount of diesel stolen amounted to Kshs.136,151.54.
41. On re-examination, the witness testified that the Branch Manager fills in the Generator book and the Operations Manager verifies the entries and it was signed and verified.
42. RWII, Mr. Stephen Wambua confirmed that he joined the Respondent in October 2018 as a Human Resource Officer is incharge of the Nairobi region and based at the Head Office, that the Respondent had no Human Resource Officers at the branches. That the Branch Manager forwarded all human resources issues to the Head office.



43. The witness confirmed that the Claimant worked for the Respondent for over 10 years and was paid Kshs.237,400/= as terminal dues.
44. That notice pay was computed at Kshs.130,000/= and for only two (2) months, leave days were 22.5 at Kshs.5,000/= per day Kshs.112,500/=.
45. That the Claimant's leave for 25 days was approved on 13th March, 2020 and the termination letter was issued on 12th March, 2020, the approval came after termination of employment.
46. The witness testified that in December 2019, the Claimant was incharge of Orindoor, Highridge and Pangani branches and worked at the Eastleigh branch and the Head Office was aware that he was at Eastleigh.
47. The witness testified that he was unaware of when the Claimant reported to the Eastleigh Branch or whom he was replacing or any stock report dated 10th December, 2019.
48. Surprisingly, the witness testified that he was unaware of the allegations against the Claimant or any other person but was aware of the fact that some employees were subjected to disciplinary action.
49. The witness confirmed that he did not constitute the disciplinary panel but Rob Baraka and Kitheka in auditor were members and the Claimant did not sign the minutes for unexplained reasons.
50. On re-examination, the witness testified that house allowance was a non-cash benefit and was not considered in the computation of notice pay.
51. That the employee had a Sacco loan which was deducted from his dues.
52. RWIII, MR. Edwin Wainaina confirmed that he joined the Respondent in 2019 as a Security Manager and his duties included conduct of internal investigations.
53. That he recorded 9 statements for purposes of the investigation of the anomalies at the Eastleigh Branch.
54. That Wandera and Nyarige were called to Eastleigh by the Claimant to answer to the queries and there were disagreements between the Managers and Geoffrey Okoth had been called to take over the branch.
55. That Mr. Wandera had alleged that he had a confrontation with the Claimant.
56. The witness testified that according to Nyarige's statement, he proceeded on leave from 4th – 8th December, 2019 and the Claimant was called to Eastleigh on 6th December, 2019 and was unaware of who was on duty from 4th – 6th December, 2019.
57. That a copy of the letter by Mr. Okoth to the Management was not availed to the witness and Mr. Wandera's statement did not state that a deduction form was raised as confirmed by the Auditor's Report.
58. The witness testified that according to Sunguti's statement, a disagreement arose because of the anomalies and Mr. Wandera had to refund monies to cover up the anomalies.
59. The witness admitted that he reported the anomalies to the police against the Branch Manager and Assistant Branch Manager and 4 persons were arrested, namely Richard Wandera, Geoffrey Okoth, Thomas Nyarige and Dennis Onderi, as there was an ongoing handover and take over but only 3 persons were charged by the police.
60. Geoffrey Okoth was not, the witness could not tell why.



61. That he was unaware of any document forwarded to the Head Office by the Claimant.
62. The witness testified that he had not met the Claimant prior to the statement taking session.
63. On re-examination, the witness testified that he had no reason to fix the Claimant and not even his supervisor had ulterior motives.
64. That the letter dated 13th December, 2019 had no acknowledgement by the Respondent and he never came across it during the investigations.

Claimant's submissions

65. As regards the applicable law, counsel cited the provisions of Section 24(1) of *Labour Institutions Act*, 2007 and Section 20 of the *Employment and Labour Relations Court Act*, 2011 or the rules of evidence and Sections 41, 42, 43(1) and 45(2) (4) and (5) of the *Employment Act*, 2007 on the principles governing fair termination of employment.
66. Counsel submitted that the court had discretion to rely on the statements recorded by the Respondent for purposes of the investigation before the Claimant and his colleagues were charged and cited the sentiments of the court in *Leland I. Salano V Intercontinental Hotel (2013) eKLR*.
67. On procedural fairness, counsel submitted that the Respondent did not accord the Claimant procedural fairness as it did not inform him of his right to review or appeal and thus had no opportunity to do so contrary to the provisions of Section 4 of the *Fair Administrative Action Act*, 2015 and urged the court to so find.
68. On substantive justification, counsel argued that the letter of termination was verbose on the reasons for termination of the Claimant's employment.
69. That the author appear to have relied on the minutes of the disciplinary hearing against the Claimant which the Claimant did not sign.
70. Counsel maintained that the Claimant only raised the deduction form against Mr. Wandera and nothing more transpired. That RWII was untruthful.
71. Counsel further submitted that the Respondent had failed to prove that it had a valid reason to terminate the Claimant's employment.
72. As regards the reliefs sought, counsel submitted that the Claimant was entitled to the declaration as termination was substantively and procedurally unfair, three months' notice, salary for February 2020, unremitted pension February 2020, 52 leave days, leave travelling allowance, compensation, certificate of service, costs and interest as prayed for in the Memorandum of Claim.

Respondent's submissions

73. Counsel isolated two issues for determination on whether termination of the Claimant's employment was unfair and illegal and entitlement to the reliefs sought.
74. On termination, counsel submitted that Claimant had 15 warning letters between 2008 – 2020 and admitted the same and further admitted that he had altered records using a red pen and signed against the changes and the invoices and receipts he produced in court had no indication that they were associated with the Respondent in any way and the scheme was intended to facilitate embezzlement of funds.



75. Reliance was made on the provisions of Section 43(1), 45(2) and 41 of the *Employment Act*, 2007 as well as the sentiments of the court in Anthony Mkalla Chitavi V Malindi Water & Sewerage Co. Ltd (2013) eKLR as well as Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (2014) eKLR on the essence of procedural fairness in termination of employment and the mandatory nature of Section 41 of the *Employment Act*, 2007.
76. Counsel submitted that the Respondent had a valid and fair reason to terminate the Claimant's employment.
77. On the reliefs sought, counsel submitted that since the Claimant had failed to prove unfair or unlawful termination of employment, he was not entitled to any of the reliefs.
78. Reliance was made on the decisions in Meshack Auta Ongeru V Nyamache Tea Factory Co. Ltd (2019) eKLR and Reuben Kipkoech V Board of Management Moi Kipsitit Girls Secondary School (2019) eKLR to buttress the submission.

Findings and determination

79. As correctly submitted by both counsels, for a termination of employment to pass muster, the Respondent must demonstrate that it had a substantive justification for the termination and conducted it in accordance with a fair procedure as aptly captured by the Court of Appeal in Naima Khamis V Oxford University Press EA Ltd (2017) eKLR and Walter Ogal Anuro V Teachers Service Commission (2013) eKLR.
80. The sentiments of the court in these cases echo the essence of the provisions of Sections 43, 45(2), 41 and 45 of the *Employment Act*, 2007 on the requirement to prove a valid and fair reason for termination and fair procedure.
81. The sentiments of the court in Antony Mkala Chitavi case (Supra) and Mary Chemweno Kiptui (Supra) cited by the Respondent's counsel are spot on.
82. The issues that commend themselves 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.

Reason for termination

83. On termination, it is common ground that the Claimant joined the Respondent in 2007 and rose to the position of Assistant Operations Manager in 2018.
84. It is also not in dispute that from 2008 to 2016, the Claimant had more than 10 warning letters including a suspension for various reasons including theft, falsifying records, absenteeism, improper or poor discharge of duties or performance and underweight bread.
85. Strangely, the Claimant did not respond to any of the letters on record to explain the circumstances or exculpate himself.
86. However, contrary to the Respondent's submissions, the Claimant had no warning letter or caution from the time he became an Assistant Operations Manager.
87. According to the Claimant, one Jack Otieno Ooko called him on 6th December, 2019 and told him to meet him at the Eastleigh Branch at 2 pm where he told him to stand in for Mr. Nyarige for 2 weeks as



- he was attending to personal matters. Mr. Jack Otieno was the Assistant Operations Manager for the Dandora, Donholm and Kariobangi branches.
88. From the statement recorded by Mr. Edwin Wainaina, it is clear that the Claimant did not enquire as to where the instructions came from and does not appear to have had any challenges standing in.
 89. Puzzlingly, Mr. Jack Otieno Ooko's statement makes no reference to the call to the Claimant on 6th December, 2019.
 90. From the evidence on record, it is unclear as to who requested the Claimant to report to the Eastleigh Branch as Mr. Geoffrey Okoth stated in his statement that he was asked by his superior Mr. Hussein, the Operations Manager on 4th December, 2019 and was to report on 5th December, 2019 and did so and found Mr. Onderi, the Claimant at the Eastleigh Branch. He also states that he found Wandera there on 6th December, 2019 and the Claimant arrived at around midday.
 91. Both the Claimant and Mr. Geoffrey Okoth are in agreement that there was no handover of the Eastleigh Branch from Mr. Wandera and Thomas Nyarige to them as the incoming team and no documents were exchanged or signed.
 92. It is also not in doubt that the stock take undertaken on 3rd December, 2019 by Mr. Nyarige and on 10th December, 2019 by the team including the Claimant revealed anomalies in various items and Mr. Geoffrey Okoth was hesitant on the take over and had to be persuaded by Mr. Nyarige.
 93. Puzzlingly, after the stock take, the Claimant called Mr. Jack Otieno and Mr. Nyarige to the Eastleigh Branch.
 94. Mr. Geoffrey Okoth testified that he prepared a draft letter to the management on the anomalies but gave the letter to the Claimant.
 95. From the statement by Mr. Geoffrey Okoth, it is evident that the letter allegedly done by the Claimant on 13th December, 2019 was drafted by Mr. Geoffrey Okoth who had concerns about the branch and was dated on the date the Internal Auditor commenced investigations from around 6.00 am.
 96. This may have led to the letter being dispatched to the Head Office, if indeed it was, as no evidence was availed.
 97. The Claimant admitted that he had been to the Head Office on 11th December, 2019 to consult one Jackson Asera, the Senior Operations Manager on the issues at the Eastleigh Branch as Mr. Nyarige had not given him sufficient help.
 98. Strangely, according to the Claimant, the auditor reported to the Branch on 16th December, 2019 but according to Geoffrey Okoth, it was on 13th December, 2019 at around 6.00 am.
 99. The Audit Report is unambiguous that the audit took place on 13th and 16th December, 2019 and the report is dated 17th December, 2019.
 100. No doubt Mr. Geoffrey Okoth's account appears more credible than that of the Claimant.
 101. It is not in contest that the Respondent's Internal Auditor Mr. Justus Kitheka conducted an investigation at the Eastleigh Branch from 13th December, 2019 and filed a report dated 17th December, 2019 for the period 1st December, 2019 to 13th December, 2019.
 102. According to the report, the Branch Manager and Assistant Operations Manager were Mr. Richard Wandera and Thomas Nyarige.



103. That Auditor found many anomalies and inconsistencies such as less white flour, bread variance of 116 loafs of bread, white ingredient, 29 pieces yeast 31 packets, route crates 988 pieces, 35% of the total number at the Branch, parking material, 54,802 pieces, high prevalence of underweight and generator fuel purchase amounting to Kshs.162,348.00.
104. The audit found that in the case of polybags, adjustments had been made to take care of the differences between the book stock, an error that had not been identified earlier.
105. Needless to underline, the stocktake by Onderi and others raised anomalies too and a deduction form was raised.
106. The Respondent relied on the Audit Report and the statements by the interviewees to report the matter to the police on 16th January, 2020 which led to the arrest of 2 Branch Managers and two Assistant Operations Managers on 31st January, 2020 and charge on 3rd February, 2020.
107. The notice to show cause dated 12th February, 2020 which the Claimant received on 13th February, 2020 accused the Claimant of the anomalies unearthed by the audit and in particular his stewardship from 6th December, 2019 when he took over from Mr. Nyarige as no stock take took place from 6th December till 10th December, 2019, which the Claimant is accused of.
108. That the short unearthed, could have occurred earlier but were never canvassed by the Claimant and he was suspected of being in collusion with Mr. Nyarige.
109. The Claimant was accorded 4 days to prepare and furnish a written response and an oral hearing was slated for 18th February, 2020 at 10.00 am.
110. The letter sets out the right to avail a witness or person to argue the defense or give evidence at the hearing and right to be heard orally.
111. The letter makes no reference to the report it is based on being availed to the Claimant for purposes of preparing his defence.
112. The termination letter dated 4th March, 2020 accused the Claimant of the same grounds as the notice to show cause as well as the findings of the disciplinary committee that;
 - i. The Claimant signed the cash flows dated 3rd December, 2019 on 6th December, 2019 when he took over the branch without checking and the same had alterations to hide the shorts discovered at the branch yet he was not involved in the verification.
 - ii. The Claimant's stock take on 10th December, 2019 revealed 3 anomalies which included ingredients which had a short fall of 6 pieces polybags 31,958 and the crate record book mismatch. That the Claimant closed the cash flow for the day for polybags only and management was not informed.
 - iii. The Claimant failed to audit the generator fuel consumption as required and the generator had run for 24 hours from 5th December to 10th December.
113. From the evidence on record, it is clear that Mr. Thomas Nyarige had applied for and proceeded on leave from 4th December to 18th December, 2019 but was summoned by the Claimant to explain the anomalies the stock take on 10th had revealed which led to Mr. Wandera being called upon to make good the short fall and paid Kshs.45,000/= in cash and later by Mpesa as confirmed by Mr. Sunguti's statement who was present at the time.



114. It is unclear why the Claimant and others present including Mr. Thomas Nyarige, Jack Otieno and Geoffrey Okoth resolved to have Mr. Richard Wandera make good the anomalies found as opposed to escalating the matter to the Head Office. Why were they not eager to report the anomalies to their supervisors? which ultimately came to light after the audit?
115. Closely related to the foregoing, it is common ground that although the Claimant admitted that he took over at the Eastleigh Branch on 6th December, 2019, he was out of the workplace on 7th, 8th and 9th December, 2019 and resumed duty on 10th December, 2019 when he did the stock take after one week since the last one conducted by Mr. Nyarige on 3rd December, 2019.
116. Worthy of mention are the copies of receipts the Claimant attached in his Further List of Documents dated 24th January, 2023. The receipts were intended to explain or show that fuel for the generator was indeed purchased.
117. Strangely, the receipts are photocopied on each other and only reveal the date and the amount paid. The name of the service station is deliberately concealed and the cash vouchers are dated 14th December, 2019.
118. From the copies provided, it is unclear whether the receipts and the vouchers relate to the Respondent's generator's fuel purchases on 10th December, 2019.
119. Strangely, although the claimant testified that he refused to sign the minutes of the disciplinary hearing because the words attributed to him were not his, he responded to questions or comments at least 14 times and did not specify the portion or sentence which was not his.
120. It is not credible that the person taking the minutes failed to capture his responses in all instances including those of his witness who appeared to appreciate the issues being discussed.
121. Finally, it is common ground that the Claimant was arrested and charged on 3rd February, 2020 for the offence of stealing by servant, although, neither party testified on the status of the criminal case or its fate.
122. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by the provisions of Section 43(2) of the [Employment Act](#), 2007 and relevant case law as follows;
123. Section 43(2) 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.”
124. Equally, in *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR, the court stated as follows;

“In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.”



125. The foregoing sentiments of the court are consistent with the sentiments of Lord Denning MR in *British Leyland (UK) Ltd V Swift (1981) I.R.L. R 91* as follows;

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him the dismissal was fair. It must be remembered in all these cases that there was a band of reasonableness within which an employer might reasonably take one view; another quite reasonably take a different view . . .

If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair though some other employer may not have dismissed him.”

126. Finally, in *Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 others (2019) eKLR*, the Court of Appeal was unambiguous that;

“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.”

127. The court is guided accordingly.

128. From the evidence on record, it is discernible that the Claimant was not too enthusiastic about taking stock of the Eastleigh branch.

129. As adverted to elsewhere in this judgement, the Claimant reported at the Branch on the afternoon of 6th December, 2019 but no stock take was done until 10th December, 2019 because on 7th he was attending a Sales meeting at Ngong while on 8th and 9th December, 2019, he spent the entire period at the Kenya Power & Lighting Company Limited, at Stima Plaza sorting out the power issues, which do not appear to have been resolved by 10th December, 2019.

130. Having been aware that the last stock take took place on 3rd December, 2019, it was incumbent upon the Claimant to take stock as he and Mr. Geoffrey Okoth were taking over the branch from Mr. Wandera and Nyarige.

131. Similarly, having signed the cashflow in relation to the stock take by Nyarige on 3rd December, 2019, the Claimant may have been aware of the anomalies.

132. Finally, the Claimant was part of the group that decided that Mr. Wandera should make good the short fall by paying cash as opposed to escalating the matter to the Operations Manager, Mr. Rob Baraka or other Senior Manager of the Respondent.

133. From the foregoing reasons, the court is satisfied and finds that the Respondent had a valid and fair reason to terminate the Claimant’s employment on 4th March, 2020.

Procedure

134. As correctly submitted by the Claimant’s counsel, the provisions of the *Employment Act, 2007* prescribe a mandatory process to be complied with by the employer before termination of the employment contract.



135. The Court of Appeal reinforced this position in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR as follows;
- “ . . . A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”
136. Needless to belabour, the specific elements of procedural fairness have been elaborated upon in various decisions of this court and the Court of Appeal such as *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR where the court identified key elements as reason(s) for which termination of employment was being considered, explanation of the grounds in a language understood by the employee in the presence of another employee of the employee’s choice, and hearing and considering any representations made by the employee and/or the person chosen by the employee.
137. While the Claimant’s counsel submitted that the termination of employment was procedurally flawed in that it was belated and the Claimant was not notified of the right of review or appeal among others, counsel for the Respondent maintained that the provisions of Section 41 of the *Employment Act*, 2007 were complied with as the Respondent issued a notice to show cause and the Claimant was invited and attended a hearing and termination of employment followed.
138. In this case, it is common ground that the stock takes conducted at the Eastleigh Branch on 3rd and 10th December, 2019 revealed anomalies and an audit was conducted between 13th and 16th December, 2019 by Justus Kitheka which also found anomalies in relation to bread stock, white flour, white ingredients, yeast, gunny bags and crate balance.
139. Based on the audit report, the Respondent issued a notice to show cause to the Claimant dated 12th February, 2020 on the anomalies.
140. The Claimant was accorded 4 days within which to prepare his written defense and prepare for a hearing scheduled on 17th February, 2020 at 10.00 am.
141. Significantly, although the Respondent informed the Claimant of his right to attend the hearing accompanied by a neutral person/witness of his choice who could help him argue his defense, the Respondent did not avail copies of the document(s) it would rely upon at the hearing.
142. It is not in contest that the notice to show cause to the Claimant was grounded on the Auditor’s report dated 17th December, 2019 authenticated by the author and reviewer on 22nd January, 2020 and the Respondent’s witness admitted as much at the hearing, yet a copy was not sent to the Claimant and the Respondent adduced no evidence that it availed the same during the hearing.
143. The Claimant may have had questions to the internal auditor based on the report and who was present at the hearing.
144. The report was the centre piece of the disciplinary hearing and thus central to the dispute and the Claimant ought to have been given a copy.
145. It need hardly be emphasized that the right to be furnished with the evidence the accuser will rely on is an integral part of the right to a fair hearing.
146. The foregoing has been underscored in legions of decisions.



147. In *Postal Corporation of Kenya V Andrew K. Tanui* (Supra) the Court of Appeal expressed itself as follows;

“ . . . The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. . . .”

148. In *David Wanjau Muhoro V Ol Pejeta Ranching Ltd* (2014) eKLR, Rika J. was unambiguous that;

“The principle of fair hearing requires the employee has sufficient opportunity to prepare. This entails . . . The right to documentation. The employee must be given the documents the employer intends to rely on at the hearing as well as other documents the employee may request. . . .”

149. On appeal, the Court of Appeal held inter alia;

“ . . . There was no reason given as to why the Respondent could not have been supplied with a copy much earlier and in good time . . . That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore, it cannot be said that the termination process was fair.”

150. Closely related to the forgoing and as submitted by the Claimant’s counsel, the Claimant was not afforded the opportunity to appeal or review the decision to terminate his employment.

151. The right to appeal or have a decision reviewed is an essential ingredient of the right to be heard and it behoves the employer to notify the employee of the entitlement and where applicable the duration within which the same is exercisable.

152. It is for the employee to determine whether or not to appeal or have the decision reviewed.

153. For the foregoing reasons, it is the finding of the court that termination of the Claimant’s employment was procedurally flawed and thus unfair.

Appropriate Reliefs

154. Having found that termination of the Claimant’s employment was procedurally unfair, the appropriate reliefs are as follows;

a. Declaration

155. Having found that termination of the Claimant’s employment was procedurally flawed, a declaration that termination was unfair is merited.

b. The termination letter dated 4th March, 2020 received by the Claimant on 12th March, 2020 catalogued his final dues as follows;

- i. Salary up to 25th February, 2020
- ii. Two month’s salary in lieu of notice.
- iii. Leave/pro rata leave earned but not utilized
- iv. Leave travelling allowance



- v. Pension contribution refund
 - vi. Any other due benefit up to the date of termination
 - vii. Certificate of service.
156. As regards pay in lieu of notice, having found that the Respondent had a valid and fair reason to terminate the Claimant's employment, the claim for pay in lieu of notice is unsustainable and is declined.
157. On salary upto 25th February, 2020
The prayer is merited and is awarded as admitted by the Respondent, Kshs.155,000/=.
158. Pension arrears February 2020
The refund is merited as admitted by the Respondent.
159. As regards 52 unpaid leave days, the Claimant tendered no evidence as to when the days accrued bearing in mind that his entitlement was 26 working days every 12 months of service.
160. Neither the written statement nor the oral testimony adduced in court make reference to any outstanding leave days or when they accrued.
161. However, the Respondent is bound to pay for any untaken leave days and proportionate leave travelling allowance as appropriate.

Certificate of Service

162. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.
- c. 12 months compensation
163. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is entitled to the relief provided by Section 49(1)(c) of the [Employment Act](#).
164. In determining the quantum of compensation, the court is enjoined to take into consideration the relevant circumstances itemised in Section 49(4) of the [Employment Act](#), 2007.
165. In this case, the court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent from 8th November, 2007 to 25th February, 2020, a duration of about 12 years and 3 months which is a long time and rose from a charge hand baker to an Assistant Operations Manager.
 - ii. The Claimant did not express his wish to remain in the Respondent's employment and did not appeal the Respondent's decision.
 - iii. The Claimant substantially contributed to the termination of employment by inter alia not taking stock on taking over the Eastleigh Branch and when he did, he dealt with the anomalies selectively and did not involve his supervisor. Similarly, he signed Mr. Nyarige's stock take conducted on 3rd December, 2019 on 6th December, 2019 without verification and failed to audit the fuel consumption by the generator as required.
 - iv. As adverted elsewhere in this judgement, between July 2008 to May 2016, the Claimant had in excess of 9 warning letters ranging from poor performance, improper discharge of duties,



anomalies, delegation of duties, poor record keeping, underweight bread, absenteeism, sleeping at the work place and suspension for 7 days.

However, the Claimant had no recorded warning or caution from the date he became Assistant Operations Manager.

166. In the circumstances, the court is satisfied that the equivalent of 2 months' gross salary is fair.
167. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair for want of procedural propriety.
 - b. Salary upto 25th February, 2020, if not paid.
 - c. All prayers admitted by the Respondent as per its termination letter.
 - d. Equivalent of 2 months gross salary.
 - e. Certificate of service to be issued within 30 days.
 - f. Costs of this suit.
 - g. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF DECEMBER 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

