



**Sati v Barclays Bank of Kenya Limited (Cause 437 of 2017)
[2022] KEELRC 13223 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13223 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 437 OF 2017
K OCHARO, J
OCTOBER 31, 2022**

BETWEEN

TIMOTHY JOHN SATI CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. At all material times the claimant was an employee of the respondent bank, having come into the employment in the year 2000. The employer -employee relationship between the two was one that was smooth until on or about the June 20, 2016 when it got into headwinds that eventually led to the fall of the relationship. Contending that his summary dismissal was wrongful and unfair, the claimant has sued the respondent seeking for the following reliefs: -
 - a) Twelve [12] months' compensation for unfair termination at Kshs 3,534,846.00.
 - b) One month pay *in lieu* of notice.
 - c) Staff loans to continue at staff rates until full payment and the claimant be given the option of 40% discount early payment.
 - d) Compensation for the interest on the aforesaid sums at court rates from the date of termination.
 - e) That the respondent whether by itself, or its servants or agents advocates or any other person acting for and or on their behalf be restrained by an order of injunction from repossessing, offering for sale, selling, transferred, disposing of or in any way alienating or encumbering his family house on LR 21638/20.



- f) Damages for loss of career.
 - g) General and aggravated damages including exemplary damages for libel.
 - h) Cost of the suit and interest thereon at court rates.
2. The claimant's claim was initiated through a memorandum of claim dated March 6, 2017, which was filed contemporaneously with his witness statement, and a list of documents dated same day, under which the documents that he intended to place reliance on in fortification of his claim were filed.
 3. The respondent filed a response to the memorandum of claim dated May 9, 2017, together with a witness statement by one Vaslas Odhiambo. It subsequently with leave of the court filed a list of documents dated October 7, 2021, and documents thereunder, documents that as shall be shown hereunder, were its documentary evidence. Following the filing of those documents, the claimant filed a supplementary list and bundle of documents dated October 19, 2021.
 4. The court directed the parties to file their written submissions, a direction that they obliged.

The Claimant's Case.

5. At the hearing, the claimant urged the court to adopt his witness statement hereinabove mentioned as part of his evidence in chief, and the documents under the two lists admitted as his documentary evidence. He briefly testified in court in chief, clarifying on those matters of the witness statement and documents, that he thought needed clarification, before being cross examined by the respondent's counsel.
6. It was the claimant's case that he came into the employment of the respondent in the year 2000 as a clerk. Thanks to his outstanding professional performance, he rose through the ranks to the position of Team Cash Manager as at the year 2013.
7. The claimant served in the above stated position up until the time he was summarily dismissed by the respondent. as at October 31, 2016, his salary was Kshs 294,573.00.
8. In his position he managed a team of thirteen employees who handled 15 of the respondent's products which included Direct Debit, Mpesa Bulk Payment, Bank Direct Cash in Transit, Manual Income/ Common Collection, among others. Under his leadership, his team transacted over 3 billion in a day across the products and significantly improved in its income collection by 4% per month in 2016.
9. During his tenure he did and achieved so much, for the respondent bank. Among them, he developed operation performance review analysis for both the respondent's Corporate Service Centre [CSC] and the treasury operation, which indicated the controls, initiatives, financial and productivity trends. As a result of this he was awarded the "Star of the month of August 2009".
10. Throughout, his performance was appraised as excellent. The last such an appraisal being that in the year 2015 where he was rated "good."
11. On the June 20, 2016, the respondent's security personnel ejected him from office, taking away his personal belongings including his mobile phone and laptop without giving him any reasons for their action. They harassed him.
12. On the same date, the respondent issued him with a letter, suspending him from employment pending investigations. In the letter, the respondent accused him of failing to act diligently in the performance of his duties and as a result reviewed, confirmed and passed payment of several fraudulent standard file interface payments. The letter required him to report to the respondent's premises once every week to



- sign an attendance register. It was also contained in the stated letter that the respondent was to update him on the progress of the investigations.
13. He contended that over the months of July, August, September and October 2016, he did not receive any information from the respondent regarding the investigation other than letters dated July 19, 2016, August 19, 2016, September 20, 2016 and October 19, 2016, all captioned “Notification of suspension pending investigation” which prolonged his suspension from work.
 14. The claimant stated that on the September 5, 2016, the respondent sent him a letter dated September 5, 2016, through which he was informed that he was required to attend a disciplinary hearing at the respondent’s premises on the September 14, 2016. It was alleged that the action was as a result of the investigations on fraudulent payments on the Standard Interface Files [SFI].
 15. The claimant asserted that upon receipt of the above stated letter, he requested for the investigation report from which the respondent had drawn the conclusion that he was involved in the alleged fraud. He was never given the report. This notwithstanding, he attended the disciplinary hearing on September 14, 2016.
 16. It was his case that, at the stated hearing, he expressly informed the respondent that there were no clear allegations that had been levelled against him prior to the hearing and that he was not involved in any of the frauds that were put forth in the suspension letter.
 17. The respondent did not provide any evidence on how he would have benefitted financially or in any other manner from the alleged fraud.
 18. He further stated that during the disciplinary hearing, he gave a structural break-down of his role in the respondent’s business and the different products that he would oversee and make sure that they were working correctly. He informed the panel that his team’s role was but not limited to handling of Mpesa Bulk Payments, a product which enabled the respondent’s corporate customers to make payments to a group of people at a specific time. He further explained to them how the product worked and his role in the process.
 19. The Mpesa Bulk Payment commenced when a customer made an application for an amount which would then be sent to the designated official at cash management – who would then forward the application form to a cash management maker. The maker involved would then log in to the Mpesa Portal and process the customer file on the Mobile Bulk Portal. The team leader will then separately send the verified individual entries and the summary of the total number of debits and credits to the [Standard File Interface]. SFI team who will carry out their due diligence which includes and not limited to sign-offs, limits and system rules.
 20. The claimant further testified that he did not have any accounts streamed to him neither did he have a [Standard File Interface] SFI user password. His role was purely to supervise the team and ensure that they were working as expected just as he was supervising the performance of the other 14 products that were being handled by the team.
 21. The claimant asserted that a question was posed to him concerning how he ensured that the makers and checkers were working correctly and his answer to the panel was that he always relied on the team leader’s reconciliation reports and snap checks on the different products and the integrity of the team in carrying out their functions, as he did not have authority and or a hands on one in the processing of the Standard File Interface [SFI] files.
 22. The claimant stated that he had raised a concern upon joining the team, on the operation of the checking system in his team, however, the respondent responded by confirming that the files his team



- was handling were impermeable of any interference, which clearly was not the case as someone was able to breach the same and commit the fraud. He did explain this to the disciplinary panel.
23. The claimant stated that he was not at work on the diverse date[s] on which he was accused of approving the alleged fraudulent payments as he was away on an official training organized by the respondent. he explained this to the disciplinary panel, however, the respondent went ahead to terminate his employment, and subsequently dismiss his appeal against the decision to terminate. The claimant tendered an email from his manager authorizing him to attend the meeting on June 13, 2016.
 24. It was his view that the decision to terminate his employment was predetermined as the reasons that were given for the same were unfounded, false, erroneous, unreasonable and actuated by malice. There were no clear allegations that were levelled against him.
 25. The claimant testified that when one is out of office attending to a meeting[s] he cannot access the system, and this applied to him on the material time.
 26. It is when he came back from the meeting that he received the suspension letter indicating that between 13th – 16th June there were fraudulent transactions in his department.
 27. He received the termination letter on the October 31, 2016. The termination letter came in four months after the disciplinary hearing.
 28. The claimant contended that he was targeted from among his peers and subjected to the disciplinary hearing that resulted to his dismissal when other persons who ought to have been put under the disciplinary procedure were exempted from the same.
 29. The disciplinary hearing took the nature of a conversation. The panel was trying to understand what happened. He was not answering to any charges.
 30. The claimant contended that according to the respondent's policies and procedures, one would only be dismissed after getting two warnings and put on a performance improvement plan. He was not given any warning.
 31. In his evidence under cross-examination by Mr. Masese for the respondent, the claimant testified that the fraudulent transaction that was in issue was for a sum of Kshs ten [10] million. However, he was not given any report detailing how the money was fraudulently lost.
 32. He reiterated that when the alleged fraud was committed, he was not in office. He could not effect any transaction, therefore.
 33. Caleb Ngunjiri, Mr Wamaitha, Irene Muhoho and Ann Gituru, were all his team members. He had worked with them for 3 years.
 34. Michael Ngunjiri and Wamaitha Irene were being assigned duties by the Centre Manager. The manager signed the job roles. Michael reported to him [the claimant] directly.
 35. The claimant testified that his role was supervisory, and to ensure that his team worked correctly. He would rely on reconciliation reports by the team leaders and snap checks. To ensure the good performance of his team, he had regular meetings with them.
 36. The daily entries were so many one would not be able to do entry per entry confirmation. Hence, he would do a global reconciliation.
 37. He expressed to his seniors that the system was failing them as it was exposing the bank.



38. Irene Muhoho and Michael Ngunjiri were directly reporting to him. They were team leaders and concerned with verifying and uploading entries. Caleb was reporting to them.
39. The claimant testified that during the investigations, he was informed that a fraud had been committed by Caleb. He asserted that he had no other relationship with Caleb other than a professional one.
40. The investigation report revealed that the system was not working well. The responsibility to report its lapses fell on the audit team.
41. In his evidence in re-examination the claimant testified that when he reported back from the training, he was treated like somebody who had already been dismissed. He was not given access to the office or his desk.
42. The claimant contended that he was neither a processor or authorizer in the system. He was not even a SFI user.
43. An SFI file would have 50 to 100 transactions the files would come in bulk. At the end of the month the bank would undertake snap checks and audit risk assessments, by independent people from a set up team. They are the ones who could identify weaknesses concerning a product. Prior to the incident the snap checks and reconciliation reports did not identify any anomaly regarding his department.
44. The claimant further testified that the processor and others would make the entries and then the team leader and others would do a global reconciliation and forward the same to him.
45. The respondent was aware that the SFI system had issues from time to time and this is clearly reflected in the recommendations in the panellists' decision on his appeal. They recommended an improvement of the system.
46. The claimant contended that he was neither given the investigation report prior to the hearing or a summary thereof as was required by the disciplinary, capability and Grievance Tool Kit.
47. Though the investigation report makes relevance to sms messages between him and Caleb, the alleged messages were not revealed to him.

The Respondent's Case

48. The respondent presented Mr Vaslas Odhiambo, its Head of Employment Relations, to testify on its defence against the claimant's case. The witness urged the court to adopt his witness statement, and the respondent's documents filed herein, as part of his evidence in chief, and the respondent's documentary evidence, respectively.
49. The witness stated that on June 18, 2016, the respondent's Africa Forensics & Security (AFS) department received a request from its Corporate Service Centre (CSC) Manager, to carry out investigations into a matter concerning a disputed and potentially irregular outward transfer of Kshs 10,010,000.00. The management operation section, was copied on all successful and frustrated files submitted to the fraudulent recipient account domiciled at Consolidated Bank of Kenya.
50. Subsequently, the claimant was suspended on June 20, 2016 pending investigations. The investigators carried out their investigations after interviewing the persons of interests, including the claimant and concluded that the claimant was negligent in the performance of his work because, though he had been copied all along in the fraudulent transactions, he did not conduct the required due diligence, otherwise the fraud, would have been discovered.



51. The witness in his oral testimony in chief stated that at page 11 of the investigation report, it is reflected that the authorizers were unanimous that there was negligence on their part. They were supposed to oversee correctness of the entries. Further that one of the authorisers blamed the line manager for not praying his role well.
52. The witness further testified that among those people who were under the supervision of the claimant was one Caleb Natembeya, the master mind of the fraudulent transaction. His role was to prepare the files that were supposed to be uploaded. The uploading was being done into the SFI.
53. He further testified that the claimant didn't at any time make a report that the system had gaps that would be exploited to the detriment of the respondent Bank by employees.
54. On September 5, 2016, the claimant was invited for a disciplinary hearing that was slated for September 14, 2016. The claimant attended the hearing and was accorded an opportunity to be heard. At the conclusion of the disciplinary hearing, the respondent was convinced that the claimant was fully culpable as he was copied on all successful and frustrated files submitted to the fraudulent recipient. He did not perform his duties with the diligence and the care expected of his role, and consequently arrived at a decision to summarily dismiss him.
55. The witness testified that on October 31, 2016, the respondent terminated his services on the basis that the claimant breached, terms and conditions of his contract of employment, bank polices and procedure, as he confirmed and passed for payment several fraudulent SFI payment files. This was gross misconduct, that would attract and indeed attracted summary dismissal, as an appropriate sanction.
56. The witness stated further that on the November 2, 2016, the claimant lodged an appeal against the decision of summary dismissal. Through its letter dated November 7, 2016, the respondent invited the claimant for an appeal hearing which was held on November 16, 2016. After the hearing, the appeal committee upheld the decision and recommended that his services be terminated. The decision by the committee was communicated to the claimant on November 17, 2016.
57. The witness asserted that in accordance to the respondent's Human Resource Policy, the respondent issued the claimant with a notification of suspension pending investigations dated June 20, 2016, duly informed him of the allegations against him and continued to pay him salary in full in addition to other contractual benefits. He was heard on the allegations, and informed of his right to accompaniment by a colleague or union representative during the disciplinary hearing. His representations were duly considered by the Disciplinary Committee, and an evaluation thereof made before the decision.
58. The witness alleged that all through the claimant was kept abreast of the progress of the investigations, through letters that were periodically sent to him. According to the witness, the investigations were completed within a reasonable time, considering that the issue under the investigation was complicated and required more time than investigations on not complex issues would normally take.
59. The witness stated that the claimant's claim that he was defamed is unfounded. An employee cannot allege to have been defamed through a termination letter which is given by the employer. There is no evidence that the letter was published to a third party.
60. The respondent offered the claimant a house loan. The loan was given through a contract that was entered by him and the respondent, separate from the employment contract. It is pursuant to the loan agreement that the respondent disbursed the moneys to the claimant and charged property known as LR No 21630/20, as security for the repayment of the loan.
61. The claimant defaulted in repaying the loan. As of February 24, 2017, the claimant had an outstanding balance of Kshs 12,848,419.25 which the respondent counterclaims. The witness contended further



- that once a person ceases to be an employee of the respondent, preferential interest rate applicable to employees cease to be in favour to such employee.
62. It was asserted that the respondent followed the law in dismissing the claimant on ground of breach of employment contract. The respondent did not breach any statutory rights of the claimant particularly his right to dignity and reasonable working conditions.
 63. The claimant failed to act diligently in executing his contractual duties, the contention that he had a legitimate expectation of working until retirement stands on lose ground as his employment was governed by terms and conditions which if breached would lead to termination of his employment. He was aware that in case of breach of contract, his employment would be terminated.
 64. Cross examined by counsel for the claimant, the witness stated that he came into the employment of the respondent on the November 16, 2016, and that at this time the claimant had already been dismissed. The witness further stated that the claimant's role was to supervise those who were under his department.
 65. The witness testified that when the claimant was employed in 2008, he was as a treasury operations. In 2016, he was in cash management, as the manager in charge.
 66. The investigations report did not mention the claimant in any manner as one of the beneficiaries of the fraudulent transaction. At page 11 of the report, it was stated that all the authorizers accepted that they had a duty to check the correctness of the transactions report but they didn't. The witness confirmed that employee cannot access the system while out of work.
 67. The witness admitted that though the investigations report mentions of text messages between the claimant and Caleb, in the report, there is no extract of the messages exhibited.
 68. The witness testified that personally he was not aware that during the material time, there was a systemic lapse. However, he could tell from the panellists' recommendations at the conclusion of the appeal hearing proceedings, that they appreciated the process failure, which needed to be worked on. Too, that other systemic features needed review.
 69. The witness stated that the responsibility of making entries on the system did not fall on the claimant. He admitted that he was not conversant with the workings of different departments of the respondent bank.
 70. In his evidence under re-examination the witness stated that when the claimant was asked about his relationship with Caleb, he responded that the same was only professional. That however he admitted that they would on occasions have a drink together.
 71. His dismissal was on account of failure to oversight properly as a manager, not because he was alleged to have benefited from the fraudulent transaction. That though the authorizers acknowledged a failure on their part, the claimant had a duty to ensure compliance.

The Claimant's Submissions.

72. The claimant's counsel stated that his submissions revolves around the thematic areas hereunder, namely:
 - (i) The claimant's termination by the respondent did not comply with the provisions of section 43 and 45 of the [Employment Act](#), 2007 because it was not premised on a valid reason.
 - (ii) The claimant was not involved in any fraudulent transactions in respect of the Standard File Interface Files (SFI files). That the claimant was away for training on the days on which the



said fraud happened. That the claimant could not access the respondent's system when not in office.

- (iii) The investigation report neither implicates the claimant nor list him as a beneficiary of the alleged fraudulent transaction in respect of the SFI files. The claimant was neither a user nor a processor of the SFI system. The claimant's role was limited to signing the Global Reconciliation Report and could only verify the snap checks once per month.
 - (iv) The respondent subjected the claimant to a procedurally unfair dispute resolution process which constituted a breach of sections 41 and 45 of the Employment Act, 2007, articles 47 and 50 of the Constitution and the tenets of natural justice, as:
 - a) The claimant was never issued with a warning letter as per the respondent's disciplinary and grievance tool kit.
 - b) The claimant was never issued with a copy of the investigation report before the disciplinary hearing.
 - c) The claimant was not given adequate information on the specific charges facing him before the hearing.
 - (v) The claimant's termination was premised on malice.
 - (vi) The respondent's termination letter date October 31, 2016 was defamatory.
73. The claimant's counsel identifies the following issues as those that emerge for determination in this matter:
- a) Whether the disciplinary process by the respondent was procedurally unfair and premised on an invalid reason;
 - b) Whether the claimant's termination was marred with malice occasioning, injury to reputation, malicious falsehood and libel; and
 - c) Whether the claimant is entitled to the reliefs sought.
74. It was argued that the termination of the claimant's employment was unfair. Section 45 of the Employment Act, 2007 sets out the legal test for substantive and procedural fairness in termination of employment. Section 45 (2) provides that:
- (2) A termination of employment by an employer is unfair if the employer fails to prove;
 - a) That the reason for the termination is valid
 - b) That the reason for the termination is a fair reason
 - (i) Related to the employee's conduct, capacity or compatibility
 - (ii) Based on the operational requirements of the employer and
 - c) That the employment was terminated in accordance with fair procedure



75. Counsel stated that it is trite law in employment and labour relations in Kenya that the termination of an employee's employment should be based on genuine, valid and fair grounds, if not the employee has the right to challenge the reasons for termination, and this is what section 43(1) of the *Employment Act* dictates.
76. Further that termination of employment is unfair if it is not grounded on a valid and fair reason; further a reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. No doubt, the termination of the claimant's employment was on basis of an invalid ground. To buttress this submission, reliance was placed on the Court of Appeal decision in *National Bank of Kenya v Anthony Njue John* [2019] eKLR, in which the court affirmed the finding of this court that the claimant's termination was not premised on a valid reason and stated as follows:
- “Section 45 of the Act... In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility.”
77. The respondent accused the claimant of involvement in fraud and gross misconduct. Specifically, the correspondence from the respondents read in part as follows:
- a) The letter of notification of suspension pending investigation dated June 20, 2016: “The bank is currently conducting investigations in respect to your review, confirmation and passing for payment of several fraudulent SFI payment files. On June 13, 2016 of Kes 10,010,00.00 in favour of Woodlands Estate Welfare Group; On June 15, 2016 of Kes 620,000.00 and on June 16, 2016 an SFI file of Kes 46,240,000.00. On June 16, 2016 a further SFI transaction files of Kes 81,764,256.00.
- b) The termination letter dated October 31, 2016:
- “Reference is made to the disciplinary hearing conducted on September 14, 2016 regarding to your review, confirmation and passing and passing for payment of several fraudulent SFI payment files.”
78. The investigation report prepared by Africa Forensics & Security, on the request of the respondent, does not implicate the claimant in any fraudulent transaction. further, the said report, does not mention the claimant as a beneficiary of the fraudulent transaction neither does it give any mention of his involvement in the same. In sum, the investigation report does not establish a link between the alleged fraud with the claimant.
79. The respondent sought inspiration from the case of *Teresia Wanjiru Ndegwa v Barclays Bank Ltd* [2016] eKLR where the claimant had been accused of fraud by the respondent just like in this case, where court stated;
- “29. The investigations report did not establish any link, even a tenuous link between the claimant and the application for the Kshs 500,000/- loan application at Gilgil branch.
30. The respondent's witness categorically stated that his investigations did not show any involvement by the claimant in regard to the loan application. ...the



court reaches the conclusion that the respondent has failed to discharge the burden placed upon it by sections 43 and 45 of the *Employment Act*, 2007 and finds the termination of the claimant's employment substantively unfair."

80. It was further submitted that respondent has neither proved nor tendered evidence before this court to prove the allegations of fraud or of gross negligence against the claimant. Additionally, as illustrated above, the investigation report does not establish even a tenuous link between the claimant and the alleged fraudulent transactions.
81. Further, during the dates of the alleged fraudulent transactions, the claimant was attending a training approved by the respondent and hence could not have confirmed, reviewed and approved the fraudulent transactions. The email dated June 10, 2016 from the claimant to the respondent's center manager informing him that he would be away on training from June 13, 2016 to June 15, 2016, is testament.
82. It was contended that the claimant had raised concerns on the respondent's system with the respondent but the same remained unresolved. Further, the respondent's own disciplinary body stated in their recommendations after part of the disciplinary proceedings that the respondent's system was deficient and needed improvement. It is now trite law that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems, and then visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and system. To bolster this submission, reliance was placed on the case of *Grace Gacheri Muriithi v Kenya Literature Bureau* [2012] eKLR, in which the court held;

"..... the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or in jury to the employer attributable to the deficiency in the employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of sub article 41(1) of the *Constitution* that provides for the right of every person to fair labour practices. Further, the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

83. On this first proposed issue, it was summed up that the respondent did not prove that the reason for termination was valid, in absence that, the termination should be held unfair.
84. On procedural fairness, counsel submitted that the termination of the claimant's employment was carried out in a manner that was procedurally unfair. Section 45 of the *Employment Act*, 2007 sets the legal test for procedural fairness in termination of employment. Section 45 (5) states:

In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the industrial court shall consider –

- a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- b) The conduct and capability of the employee up to the date of termination;



- c) The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and procedural requirements set out in section 41.
 - d) The previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - e) The existence of any previous warning letters issued to the employee.
85. It was argued that the process leading to the claimant's termination was flawed in the manner the disciplinary process was carried out, and therefore unfair as it did not meet the threshold provided for under section 45 of the *Employment Act*, 2007 for the following reasons:
- a) Failure to issue a first written warning and a subsequent final written warning in the first instance before proceeding to dismiss the employee.
 - b) Failure to issue the claimant with documents he requested that were necessary for him to rely on during the disciplinary hearing, ie. the investigation report.
- Reliance was placed on the case *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR.
86. Further reliance was placed on the Court of Appeal decision in the case of *University of Nairobi v Onjira John Anyul* [2021] eKLR where the court dismissed the appellant's appeal and upheld the decision in *Onjira John Anyul v University of Nairobi* [2019] eKLR wherein the court had quoted with approval the holding in the Canadian Supreme Court case of *Baker v Canada (Minister of Citizenship & Immigration)* SCR 817 6, thus;
- “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”
87. In the upshot, the disciplinary process by the respondent was procedurally unfair, the court should declare the termination of the claimant's employment unfair.
88. On the issue of whether the termination was marred with malice, occasioning injury to reputation and libel, it was submitted that whereas generally in employment cases the processes preceding and subsequent to termination by an employer do not give rise to libel, in instances where the process of termination was marred with malice, then the court has the power to find that the process occasioned libel on an employee. In this case the claimant's termination was done maliciously, and falsely, it therefore constituted the torts of deceit, injury to reputation, malicious falsehood and defamation.
89. Further, the respondent's letter of termination dated October 31, 2016, addressed to the claimant was defamatory and intended to lower the reputation of the claimant. The respondent wrote the following words in the said letter:
90. It was submitted that the said words in the letter in their material and ordinary meaning meant and were understood to mean as follows:
- a) That the claimant is ignorant of his professional duties and obligations to the extent of occasioning the alleged problem of fraud of company money;



- b) The claimant is an irresponsible person and cannot responsibly discharge his duties; and
- c) That the claimant is negligent and cannot diligently discharge any duty.

As a result of the above, representations by the respondent, the claimant was greatly injured in his credit, character and reputation as the said letter will forever be in reach of employees of the respondent.

91. The court was urged to be persuaded by the holding in *Naqvi Syed Omar v Paramount Bank Limited & another* [2015] eKLR, in which the court expressed itself as hereunder on its jurisdiction to handle matters employment defamation;

“ 5. The 1st respondent’s view narrows the jurisdiction of the court while both the *Constitution* of Kenya, and the *Employment and Labour Relations Court Act*, broaden the jurisdiction. Article 162 [2] [a] of the *Constitution* which contemplates the creation of this court, defines the material jurisdiction of the court to include all disputes relating to employment and labour relations. The article does not say contractual disputes, between employers and employees; it states all disputes relating to employment and labour relations. Section 12 of the *Employment and Labour Relations Court Act* refers to article 162 [2] [a] of the *Constitution* and " the provisions of this Act, or any other written law which extends jurisdiction to the court relating to employment and labour relations.....”

In the case of *Hakika Transporters Services Limited v Kenya Long Distance Truck Drivers and Allied Workers Union* [2015] e-KLR, the court held the view that section 12 is inclusive. It is not an exclusive list of the dos and don’ts of this court. The court has assumed jurisdiction and determined claims for employment related defamation The manner of dismissal and the negative publicity attached to the claimant had the potential to damage his employability. potential employers in the industry in which the claimant was a long-time servant, would find his attractiveness diminished”.

92. Further reliance was placed on the decision in the case of *Gilbert Kambuni Ongeri v Kenyatta National Hospital Board* [2018] eKLR in which Hon Lady Justice Hellen Wasilwa awarded damages of Kshs 4,000,000.00 for employment defamation. The court held;

“ There is however, proof by way of the letter written by the respondents through its director appendix 13 which the claimant aver contain falsehoods meant to defame him. The letter is full of details which the claimant was never asked to respond to and the same were authored when claimant had already been dismissed.

It is my finding that the letter contains defamatory information and I therefore find that the character of the person of the claimant was defamed by the actions of the respondent.

In the circumstances having found as above, I find for the claimant and I award him as follows: -....

General damages for defamation Kshs 4,000,000/”

93. On the reliefs sought, the claimant submitted that as the termination of his employment was unfair he is entitled to the compensatory relief contemplated under section 49[1][c] of the *Employment*



Act, to an extent of the maximum awardable under the provision, twelve months gross salary, Kshs 3,534,876.00.

94. The claimant's employment contract provided for issuance of one-month notice prior to termination of said contract, notice which was never issued. He should be granted Kshs 294,573.
95. The claimant contended that he is entitled to general damages for loss of career, including aggravated and exemplary damages, for malice and unfair treatment being Kshs 10,604,628.00, and urged this court to be persuaded by the case of Emmanuel Kuria Wa Gathoni v Commissioner of Police & another [2017] eKLR. It was submitted that in the circumstances of the matter, the claimant is entitled to general and aggravated damages for deceit, injury to reputation, and malicious falsehood. To support the submissions on the entitlement, reliance was placed on the decision in case of Gilbert Kambuni Ongeru v Kenyatta National Hospital Board [supra].
96. It was argued that the termination letter from the respondent to the claimant was conveyed through the centre manager in the presence of third parties therefore there is reasonable possibility that a third party would access the libellous contents of the termination letter. Accordingly, that would amount to publication.
97. Justifying the claimant's claim for exemplary damages, the court was urged to find the decision in the case of Rookes v Barnard [1964] AC 1129, useful. In the case, Lord Devlin enunciated circumstances when a court of law can award the damages, namely;
 - (i) In cases of oppressive, arbitrary or unconstitutional action by the servants of the government.
 - (ii) Cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
 - (iii) Where exemplary damages are expressly authorized by statute.

The Respondent's Submissions

98. It was the respondent's submissions that from the material placed before this court, there is ample evidence that the claimant was negligent in discharge of his duties. The claimant was team leader reconciliation. He was in charge of a team that carried out the fraudulent transactions.
99. As the manager he oversaw the operations in the mpesa bulk product. It was his evidence that he was supposed to offer support to his team to ensure that all products were running as they should. The investigation report produced in court indicated one of the authorizers working under the claimant had blamed him for not providing proper guidance which confirms the fact that the claimant was not keen in the discharge of his duties.
100. It was argued that the claimant had a colleague working under him and whom he was close with. This employee by the name Caleb Natembeya was involved in creating facsimile of genuine authorizers and sometimes alter the Barclays integrator and at some point, generate his own. Caleb had wired funds to various wallets. Investigations revealed that this was being made possible because there was lack of controls.
101. During investigations it was again discovered that Caleb was very close to the claimant. Sometimes they could go out for drinks. The phone details indicated regular contact between the two. Since he was the line manager the buck stopped at his door. He failed to oversee the department and maybe report any fraudulent activities.



102. The respondent's counsel submitted that the termination of the claimant's employment was procedurally fair. On September 5, 2016, the claimant was invited for a disciplinary hearing which was to take place on the September 14, 2016. The claimant attended the hearing and was given a chance to be heard.
103. That during the disciplinary hearing, the claimant admitted that at some point he was not very keen, and that sometimes he was not counter checking transactions before carrying out reconciliation. The excuse that when the relevant fraud happened, he was not within the station is not sustainable and convincing, it was his duty to ensure that systems were working properly.
104. It was argued that during the appeal hearing, the claimant did not challenge the fact that several fraudulent activities were happening under his department. He should shoulder responsibility flowing from the happenings in his department.
105. During the appeal and the minutes are testament, the claimant admitted that his role was to sign and review the work of the processor. It was his responsibility to authorize payment of sums of above one million shillings. The appeal proceedings brought it to bare that indeed the claimant was not keen in the performance of his duties. He used to sign reconciliations without going through to see if they were accurate. He unconvincingly tried to, shift blame to the team alleging that it was not qualified and, lack of support from his superiors.
106. Upon conclusion of the disciplinary process, it was established that the claimant was fully culpable as he was copied on all successful and frustrated files submitted to the fraudulent recipient. He did not perform his duties with the diligence and the care expected of his role and it was recommended that he be summarily dismissed.
107. The respondent submitted further, that his employment having been terminated, preferential staff rates on the loan that he had picked during his tenure with the respondent would no longer be applicable. To buttress this submission, reliance was placed on the case *Benjamin Nduati & others v EAPC*, Cause No 1267 of 2013.
108. The respondent summed up its submissions by stating that the termination of the claimant's employment was procedurally fair and with a valid reason. It urges that the claimant's case be dismissed.

Analysis and Determination

109. Before I delve deeper into the issues that I consider presenting themselves for determination in this matter, I deem it imperative to state the role of the court in matters like the instant one where the parties have taken positions that are diametrically opposed, on principal issues. This court in the case of *Lydia Moraa Obara v Tusker Mattresses Limited* [2021] eKLR, expressed the role, thus;

“

- “ 41. In determining the appropriateness of dismissal this court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of fairness of the dismissal rests with the employer. In the persuasive decision, in *Theewaterskloof Municipality v Salga* [2010] 10 BLLR 1216[LC], South Africa Labour Court, Tip AJ aptly sums up this as follows: -
 “The core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of employee challenge of it. That



requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair.”

110. From the pleadings, the evidence and the submissions by the parties herein, the following issues present themselves for determination by this court, thus,

- a) Whether the dismissal of the claimant from employment was procedurally fair.
- b) Whether the dismissal of the claimant was substantively fair.
- c) Whether the claimant has made a case for employment defamation.
- d) Whether the claimant is entitled to the reliefs sought or any of them.

Whether the dismissal of the claimant from employment was procedurally fair.

111. Section 45 of the *Employment Act*, 2007, dictates that no employer shall terminate the employment of an employee unfairly. Section 45[2] [c], provides the foundation for insistence on engagement of a fair procedure, in the process leading to an employer's decision to dismiss an employee from employment or terminate an employee's contract of employment. Absence of procedural fairness in the process, will definitely result to the dismissal or termination being deemed unfair, by dint of the provision.

112. The answer as to what constitutes a fair procedure is found in the provisions of section 41 of the *Employment Act*, which provides;

“[1]. Subject to section 42[1], an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance, or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is preferring termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

[2]. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44[3] or [4] hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subSection [1], make.”

113. To my mind, this provision is in sync with the provisions of the *Constitution* of Kenya 2010, regarding the right to fair hearing, and those of the *Fair Administrative Action Act*.

114. Adherence to the procedure set out in section 41 is mandatory, non-adherence, has a consequence on the termination or dismissal, in the case of *National Bank of Kenya v Samuel Nguru Mutonyi*, [2019]eKLR, the court held;

“We fully adopt the above position in law that the Bank ought to have invoked when contemplating termination of the claimant's employment. None of the above procedures were outlined by DW1 as having been undertaken by the Bank before terminating the claimant's employment. We find no basis for interfering with the judge's finding that the procedure employed by the bank to terminate the claimant's employment was unprocedural”



115. In *Pius Macha Isundu v Lavington Security Guards*, [2017]eKLR the Court of Appeal stated:

“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal burden on employers in matters summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43] – prove that the reasons were valid and fair [section 45]- prove that the grounds are justified [section 47[5]] among other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination.”

116. In this court’s assessment, the fair procedure contemplated under section 41 of the Act is a total sum of three components; the notification component, the employer must notify the employee that he or she is intending to terminate the employee’s contract and the grounds on which intended action is premised; the hearing component, the employee must be accorded an opportunity to explain himself on the grounds in company of colleague or shop floor steward of his own choice and; the consideration component, the employer must before making a decision, consider representations by the employee, otherwise there won’t be any justifiable reason for according him an opportunity to be heard.

117. It is through the above lens that this court shall interrogate whether or not there was procedural fairness in the process leading to the separation the subject matter herein.

118. There is no contest that through a letter dated 5th Monday 2016 captioned “notification of interview arrangements” the respondent wrote to the claimant.

“Following completion of investigations into your review, confirmation and passing for payment of several fraudulent SFI payment files, I write to advice that a disciplinary hearing has been arranged for 9.00 am on Wednesday, September 14, 2016 and which you are required to attend without fail. It will be held at Barclays West End- Bogoria Meeting Room.....”

119. In cross examining the respondent’s witness, counsel for the claimant made the caption an issue. However, looking at the contents of the letter as a whole, it is difficult not to conclude that clearly it informed the claimant that the invitation was for attendance of a disciplinary hearing on the date stated and over a charge stated therein. The ground for the intended action was with sufficiency spelled out in the letter. The unclear caption notwithstanding, I am of the view that the notification [information] component of fair procedure, was present therefore.

120. Following the invitation, the claimant attended the disciplinary hearing on the September 14, 2016. Hearing that resulted to the decision for the termination of his employment. The claimant contended that though the alleged investigation was the basis for the disciplinary process against him, the respondent did not give him a copy of the investigation report to enable him prepare adequately for his defence against the charge[s]. Put in another way, he asserted that he was not supplied with crucial material that was in the possession of the respondent to enable him prepare, and make the representation contemplated under section 41 of the *Employment Act*, adequately. He asserted that this was notwithstanding the fact that he had requested for the report before the hearing date.

121. The court has carefully gone through the minutes of the disciplinary hearing, true as the claimant alleges and it is even captured therein, that though he had requested for the investigation report, it had not been availed to him. A right to prepare for the representation must be real and not illusionary. Where an employee has requested for a document[s] necessary for him to prepare to respond fully to the allegations, the employer must provide the employee with the document[s] within reasonable



time, not unless for sufficient cause not to. Considering the allegations that were levelled against the claimant and the circumstances of the matter in general, this court is of the view that the investigation report was a key document that needed to be given to him to enable him prepare for his defence. The respondent did not in evidence or through submissions address the failure. One can therefore conclude and this court does so, that there was no sufficient reason shown why the claimant was not given the report when he requested for the same.

122. The court has further considered the course that the disciplinary hearing took, clearly, the claimant was not asked specific questions from the investigation report, questions specifically related to the specific charge[s], that the claimant had been invited to answer to during the disciplinary hearing. It is this court's view that where the employer decides to give the disciplinary hearing an approach of a question-and-answer session, the questions asked should be questions that are specific to the charge, and that will attract and answer[s] that will amount to an explanation on the charge. The question-and-answer approach, is an approach which is controlled in the sense that it is guided by the questions asked, to an extent therefore, that if the questions are not properly asked by design or otherwise, the employee will be blurred from making an adequate defence on the charge[s]. His right to making a representation shall not be real. The purpose for which procedural fairness is insisted on as was aptly captured in the Canadian case of *Baker v Canada [Minister of Citizens & Immigration]* [supra], shall be illusory.
123. By reason of the premises, I am persuaded by the claimant that the termination of his employment was not procedurally fair.

Whether The Termination was Substantively Fair.

124. Unlike procedural fairness which relates to the procedure adopted by the employer leading to the decision to terminate the employee's employment, substantive fairness relates to the decision itself. Section 43, 45 and 47 [5] of the *Employment Act*, 2007, speak to substantive fairness. Section 43 requires of an employer in a dispute emanating from termination of an employee's employment, to prove the reason for the termination. Section 45, placed a legal obligation on the employer to go further than proving the reason and place proof before court that the termination was with a valid and fair reason. And section 47[5] demands of the employer to prove that the termination was justified. It is here that this court must state that the enactment of the *Employment Act*, 2007, dislodged the common law principle that an employer would terminate an employee's employment without cause.
125. As indicated hereinbefore, through its letter dated September 5, 2016, the respondent wrote to the claimant and informed him of the accusation against him. The letter read in part.

“..... Following completion of investigations into your review, confirmation and passing for payment of several fraudulent SFI payment files, I advise that disciplinary hearing has been arranged.....”

And the termination dated October 31, 2016 read;

“Reference is made to the disciplinary Hearing conducted on the September 14, 2016 regarding to your review, confirmation and passing for payment of several fraudulent SFI payment files. I am satisfied that you acted contrary to your terms and conditions of employment, bank policies and procedures.”

126. From the wording of the stated letters, there can be no doubt that they are in the tone that the claimant was being accused, and dismissed on account of having had, an active involvement in the stated activities- review, confirmation, and passing for payment of fraudulent SFI payment files. Further that the investigations centred on the active involvement. It is therefore not difficult to state that



since the investigations activity and the resultant report were the fountain from which the decision by the respondent to commence disciplinary proceedings against the claimant flowed from, this court expected to see from the report a clear demonstration of the claimant's active involvement in the activities forestated. However, a thorough consideration of the investigations report does not reveal such an active involvement or at all. The respondent's witness testified that the fraudulent activities were done through the respondent's bulk payment system, systems must have traces, and where the traces aren't, in matters where for example certain entries are in dispute, as is here, explanations for lack of the same given. One expected in the instant matter, where the claimant was clearly accused of active involvement in the activities stated, of the respondent to tender evidence obtained from its system demonstrating his active participation in those activities. None was tendered.

127. From the material before this court, the activities that were the subject matter of the accusation were alleged to have been carried out on specific dates, dates that appears to have been successive. The claimant's case was that on those days, he was out of his station of work on an official seminar, with the knowledge of the respondent. The claimant stated further that it is inconceivable that he was involved as alleged in the fraudulent activities, yet the activities were systemic and therefore impossible for him to have carried out while out of the station. In his testimony under cross examination, the respondent's witness admitted that on the material dates, the claimant was out of his station of work for the stated reason, and consequently, there is no way he would have accessed the system. The implication here being that the claimant's assertions found fortification in the respondent's own witness's evidence.
128. In the context of section 45 of the *Employment Act*, a valid reason in my view, would be that reason whose true existence is demonstrable, supported by genuine facts, and circumstances. A fair reason being one that is bona fides. By reason of the premises above, the respondent's failure to demonstrate to the satisfaction of this court or at all the active involvement of the claimant or at all in the subject activities, his contention, and admission by the respondent, that he was out of station on the material dates, and therefore would not be able to access the system for any transaction, I conclude that the reason for the dismissal was not valid and fair.
129. The respondent's witness placed a lot of effort trying to demonstrate how generally the claimant was negligent in the performance of his duties, and its counsel spent a sizeable part of their submissions to demonstrate that the claimant was negligent in the manner he generally discharged his functions, and that any failures in his department should be visited on him. The line of defence and submissions, ignore the specific charge that was levelled against the claimant. Both do not come to the aid of the respondent's case therefore.
130. In sum, I come to an unavoidable conclusion that the dismissal was substantively unfair.

Whether The Claimant Has Made A Claim For Employment Defamation.

131. The claimant contended that considering the contents of the termination letter, and the circumstances of his dismissal, the respondent is guilty of libel and should be adjudged as such. That consequently, he should be awarded general damages for the libel. I have had considerable difficulty in understanding how a termination expressing to the employee a verdict on the disciplinary hearing can be argued to be defamatory. If this court were to agree with the claimant's thinking, and freely hold that the contents of the termination letter were defamatory, then for sure all termination letters would be deemed defamatory, as they will always largely express, the verdict flowing out of a disciplinary hearing, in a manner that is critical and negative of the claimant's conduct, or performance or, capacity and or compatibility. That is their expected nature. However, this is not to say that there cannot be a tort of employment defamation.



132. In the case of *Enock Nyakundi Onchwari v The National Authority for Campaign Against Alcohol and Drug Abuse*, Nairobi ELRC cause No 2036 of 2017 this court expressed itself, thus;

“213. Employment defamation may occur both during employment such as in an investigation or disciplinary action related to an employee’s or after employment when an employer is asked to comment on an employee’s work record or qualifications. Often defamation cases are brought in conjunction with unfair, and or wrongful termination claims.”

133. The employee alleging employment defamation bears the duty to prove. He or she must prove that there was publication, and that the words complained of were defamatory. I hold that the claimant did not place before this court any evidence from which publication would be discerned. All that he did was present evidence and submissions which to me were speculative in nature. For instance, alleging that the termination letter would remain in the records of the respondent, and therefore there is a likelihood that it would be read by its employees, cannot be seen in any other way other than being speculation. The claimant placed reliance on the case of *Naqvi Syed Qmar v Paramount Bank Ltd & The Attorney General*, [Supra]. I have considered the circumstances of this case against the cited one, I have no doubt that the two are distinguishable. The judgment in the cited case was premised on the publication was made in both the print and television media. Equally, the circumstances of the case of *Kambuni Ongeru*[supra] are clearly different from those in the instant matter. In the cited case, the libel did not flow from the termination letter, but from a letter that was written after the employee’s dismissal.

134. By reason of the premises, I find that the claimant did not prove his claim for employment defamation.

Whether The Claimant Is Entitled To The Reliefs Sought Or Any Of Them.

135. The claimant sought for a compensatory relief under the provisions of section 49[1][c] of the *Employment Act*, to the maximum extent contemplated thereunder, twelve months’ gross salary. He contended that he was maliciously and unfairly dismissed. I have carefully considered the circumstances of the claimant’s dismissal, including that the reasons hereinabove basis for my finding that the dismissal of the claimant’s employment was both procedurally and substantively unfair, the fact that the he in my view didn’t contribute to the dismissal, the length of time in the service of the respondent and the industry in which the respondent functions, and therefore he was working, and come to a conclusion that he is entitled to the compensatory relief, to the extent of 10 [ten] months’ gross salary, Kshs 2, 945,730.

136. The claimant further sought for general and aggravated damages, including exemplary damages for, deceit, injury to reputation, and malicious falsehood. Having found as I have that his claim for employment defamation was not proved, this court declines to make any award under this heading.

137. The nature of the contract of employment between the respondent and the claimant was one terminable by a twenty-eight days’ notice pursuant to the provisions of section 35 of the *Employment Act* or in absence of the notice payment in lieu thereof pursuant to the provisions of section 36. There is no doubt that the claimant having been summarily dismissed there was no notice issued. However, having found that the summary dismissal was unfair, both procedurally and substantively, it shall be unjust for this court to fail to direct for the payment in lieu of notice, as failure to so do shall be tantamount to allowing the respondent to benefit from its own wrong doing. As a result, therefore, I award the claimant under this head, a sum of Kshs 294,573.



138. The claimant sought for a direction that the loan[s] outstanding continue to attract interest at the preferential rates, not commercial rates as the termination letter expressed. On the other hand, the respondent contended that once an employee separates with the respondent, any loans outstanding from him or her, gets into attracting interest at commercial rates. The staff preferential interest rates cease to be applicable. In this general position, the respondent is correct to an extent only that it is a general position. It is not a position that applies to every case across the board. How the separation occurred counts. For the reason[s] hereinafter, where the court finds that the termination was wrongful and or unfair, a direction that the loan[s] owed by the employee to the employer, shall continue to attract the staff interest shall be the most just and fair direction that this court can give.
139. To bolster their point, the respondent's counsel further submitted that the loan contract was a contract independent of the contract of employment. Therefore, the termination of the latter contract should not be allowed to have an effect on the loan contract. It matters not how the contract of employment gets terminated.
140. That the loan contract is an independent contract from the contract of employment, and therefore termination of the latter contract in whichever manner it occurs does not have a bearing on the former, is a position that this court does not agree with. No doubt, the terms and conditions of the loan agreement and more specifically, the repayment period and interest rates, are those that flowed from the employment relationship between the respondent as the employer and the claimant as the employee. In the case of *Christopher Onyango & others v Heritage Insurance Co Ltd*, cause No 781 of 2015, the court stated and I agree, thus;

“..... [on] the loans due, the respondent has recalled all of them. However, the employment relationship generates rights and obligations. Such are to be found in the employment contract, human resource policy; and the law. The common denominator is- employment. Within such employment, the claimant enjoyed the benefits of various loans. Such cannot be separated to create a different set of rights outside the employment relationship. In the case of *Bifu v Consolidated Bank of Kenya Limited*, Cause No 900 of 2012 the court held;

“..... The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment.”

141. It is common cause that the staff loan[s] was extended to the claimant at an interest rate of 6% per annum, the loan repayable in 192 monthly instalments drawn from his salary. At the taking of the loan[s] it was the claimants legitimate expectation that he would remain in the employment of the respondent as he discharges his obligations under the loan agreement, servicing the loan in accordance with the terms thereof out of his salary. Where the contract of employment is terminated at the instance of the employer as it was in the instant case, how it was, and upon the employee's legitimate expectation, becomes a vital factor on the terms of the loan agreement, thenceforth. Where the termination is found to have been wrongful, and or procedurally unfair and substantively unjustified, as has been in this case, the legitimate expectation is deemed violated. The effect being that the employer cannot be allowed to start applying the terms of the loan agreement or any of them in as manner that is prejudicial to the employee, but to his or her [employer's] benefit. It is a trite principle of policy that a party shall not be allowed to be a benefit from his or her own wrongs. In the old English case of *Holman v Johnson*



[1775-1803] , mentioned in [Kenya Pipeline Co Ltd v Glencore Energy \[UK\] Ltd](#) [2015]eKLR, Chief Justice Manfield stated;

“The principle of public policy is this, *ex dolo malo no ovitur citor*. No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause appears to arise *ex turpi causa*, or the transgressions of a positive law of the country, then the court says he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

142. It is by reason of the foregoing that this court finds for the claimant, the loan[s] that were taken by the him during the currency of the employment relationship and are outstanding shall continue attracting interest at the agreed preferential rates, till full payment.
143. The claimant asserted that his right to fair labour practice was violated, as his dismissal was actuated by malice and falsehoods. I have carefully considered the circumstances surrounding the dismissal of the claimant, key of them being that he was accused of having perpetrated fraudulent transactions on specific dates, whilst the respondent knew to well that on those dates, he was not off duty attending to an official seminar and had no access to the respondent’s system, as thing that its own witness admitted. Employment relationships are supposed to thrive on good faith, candidness, and forthrightness, I do not think there was such here, courtesy of the respondent’s action. I cannot help but find that the dismissal was ill prompted. The dismissal was therefore, whimsical and unreasonable, breaching the claimant’s right to fair labour practice as contemplated under article 41 of the [Constitution](#) of Kenya. I award him Kshs 100,000 for the violation.
144. In the upshot, judgment is hereby entered in favour of the claimant in the following terms; A declaration that the claimant’s dismissal from employment was unfair.
- a. One month’s salary *in lieu* of notice, Kshs 294, 573.00
 - b. Ten [10] months’ gross salary, Kshs 2,945,730.00, as compensation for unfair termination, pursuant to the provisions of section 49[1][c] of the [Employment Act](#).
 - c. A direction that loan[s] that were acquired by the claimant during the currency of the employment relations and that are outstanding shall continue to attract interest at preferential rates till full payment.
 - d. General damages for breach of the claimant’s right to fair labour practices, Kshs 100,000.
 - e. Interest on the above awarded sums at court rates, from the date of this judgement till full payment.
 - f. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2022

OCHARO KEBIRA

JUDGE

Delivered in presence of

Mr. Masese for the Respondent.

Mr. Oban holding brief for Mwenu for the Claimant.



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 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.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE

