



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1795 OF 2017

DARIUS KISEU MWAMBURI.....CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT

JUDGMENT

Introduction

1. It is common cause that the Claimant was in the employment of the Respondent from 3rd February 1992, to the 23rd February 2016, when his employment was terminated by the Respondent. Charging that the termination was a product of a decision that was unlawful, without a justifiable cause and without following due process, he has approached this Court for the following reliefs against the Respondent;

- a) A declaration that the Claimant's dismissal was unfair, unjustified, unlawful and null and void.
- b) Twelve (12) months' salary as compensation for unfair termination of employment at Kshs. 237,339 per a month.
- c) Costs of this suit.
- d) Interest on (b) and (c) above at Court rates.
- e) Any other relief that this Honourable Court shall deem fit to grant.

2. Upon being served with summons to enter appearance, the Respondent did file a memorandum of appearance dated 10th January 2018, and a memorandum of defence dated 23rd January 2019. The Respondent denied the Claimant's claim and his entitlement to any of those reliefs put forth in the statement of claim.

3. When this matter came up for hearing, the parties decided to give the same an approach that could aid an expeditious disposal. They moved Court to adopt their respective witness statements as their evidence in chief. They briefly testified on the contents of the statements and the documents that had been filed under the respective lists of documents. The Claimant and the Respondent's witnesses were then subjected to cross examination and re-examination.

The Claimant's case

4. It was the Claimant's case that he came into the employment of the Respondent, as a support staff on the 3rd February, 1992, through a letter of appointment. The terms and conditions of the employment relationship that was thereby created flowed from the letter of appointment, the Respondent's operations manual, the micro credit banking manual and the staff manual.

5. The claimant asserted that throughout the period he was in the service of employment of the Respondent, he was continuously appraised and his good performance saw him get promoted to, and serve the Respondent in, various capacities at various times, namely: -

- a) In 1994, he was promoted to the position of a Teller, Clerical grade and remained in this position until 1996.
- b) In the year 1997, he was promoted to the position of Chief Teller, Athi River Branch.

- c) In the year 2006, he was promoted to the position of section head, Maua Branch where he worked till 2008.
- d) In 2009, he was elevated to the position of supervisor, Meru Branch, where he worked until the year 2012.
- e) In 2013, he was promoted further, to the position of operations manager, Kibera Branch.
- f) In 2014, he was transferred and promoted to the position of manager, Voi Branch.

6. The Claimant stated that on or about the 15th October 2015, the Respondent issued him with a letter dated 1st October, 2015, accusing him that he wilfully by negligence or carelessness performed his work which it was his duty to perform properly in that: -

1) He approved fraudulent loans presented by Business Banker, Stephen Kioko for A/C Numbers 0110922220550, 01109222205700, 01109222205800, 01109222228300, 01109222228400 and 01109222228300, 01109222228400 and 0110922222850, despite the fact that the accounts were less than three months old and without approval from Head office.

2) He failed to ensure that the applicants of the loans had the ability to repay, as investigations revealed that the loan files in respect of the applicants did not have statements from other banks which were used to evaluate their turn over as was required for accounts that were less than three months' old. He failed to confirm that all the information that was provided in the loan applications was correct. The full details of the purported guarantors were not captured in the information forms.

7. In sum the letter expressed that the Claimant contravened the provisions of the Bank's operations manual and occasioned a loss of KShs. 2,571,000 to the Respondent. The Claimant got required to show cause why disciplinary action could not be taken against him. The letter was produced as exhibit – exhibit. 11.

8. Through his letter dated 6th October 2015, the Claimant responded to the Respondent's above stated letter, exhibit. 12. In this letter he asserted that he approved the loans on the premise that the businesses banker had thoroughly appraised and undertaken a kyc [know your customer] on the customers while sourcing them and presented the files to him for discussion as the bank's procedure dictated. The appraiser being a trusted loans employee, he trusted his works and was convinced that he had done due diligence. The Claimant blamed the business banker for the fraud, and denies that he was negligent or careless.

9. After this, the Respondent through its letter dated 11th January 2016, invited him to appear before the staff disciplinary hearing panel for the Monday, 18th January 2016. The letter was received by the Claimant on the 15th January 2016. He produced the invitation letter as his exhibit No. 9.

10. The disciplinary hearing was held on the 18th January 2016. The Claimant produced the minutes thereof as his exhibit No. 8.

11. The Claimant states that subsequently through a letter dated 22nd February 2016, the Respondent terminated his employment with immediate effect in accordance with the provisions of clause 14 of the staff manual. He was to be paid one (1) month's salary in lieu of notice. The reasons for the termination being that he either wilfully or by negligence allowed or facilitated loss by approving fraudulent loans presented by business banker, Stephen Kioko for the accounts hereinbefore mentioned. Too, that he negligently approved the fraudulent loans a day or two after the accounts were opened without seeking approval from the Head office as per procedure. Lastly that he failed to note that the loan files had glaring irregularities, a thing he would have done had he checked the loan application documents keenly. The termination letter is exhibit No. 6.

12. The Claimant stated that prior to receiving the termination letter, he had received another letter dated 22nd February 2016, from the Head Cost Region, the letter in content was a world apart from the termination letter. It expressed that the Claimant was being put in a Performance Improvement Plan. He further states that he was given terms and conditions to comply with by April 2016, and he had undertaken to oblige.

13. The Claimant asserted that the allegation that he facilitated fraudulent loans amounting to Kenya Shillings Two Million Nine Hundred Thousand (KShs. 2,900,000) was false and unfounded.

14. The claimant stated that he was not in anyway responsible for the loss that the Respondent suffered, and that he did not wilfully or negligently perform or fail to perform any of his duties leading to a loss on the part of the Respondent.

15. The Claimant further contended that the act by the Respondent of terminating his services was unlawful, without a justifiable cause and without following the due process. The decision amounted to a unilateral and unfair termination of employment contrary to the tenets of natural justice, and legitimate expectation.

16. The Claimant further states that on the 3rd March 2016, he wrote a letter complaining about the manner in which his employment was terminated and requested the Respondent to rescind their decision, undertaking to meet the conditions that had been set by the Respondent's Head of Coast Region. He however received no response.

17. He further contended that he was discriminated against by the Respondent. That his employment was terminated without any reason. His former colleagues who ought to have been held Responsible for the loss did not get the treatment he got over this incident.

18. Cross examined by Ms. Obonyo, the witness stated that the work of a branch manager is to oversight the branch. He is normally the

person last in the line of approval of facilities. He further stated that there were investigations over the matter by the bank's security department.

19. He admitted that he was served with a notice to show cause letter, and that all through he knew the contents thereof. He had worked with the bank for 24 years, so he was well conversant with the bank procedures.

20. The Claimant stated that KYC (know your customer) is done by the business banker. He should be the one to know his customers. When he introduces a customer to the bank, he must have ascertained the details of that customer.

The Claimant's submissions

21. Counsel for the Claimant submitted that the Claimant in a letter dated 6th October, 2015 in response to the notice to show cause confirmed that he had approved the loans based on the discussions he had with the business banker and on the strength that, the know your customers processes had been conducted properly. That before he approved the loans all the documentation for the subject accounts were in the files and satisfactory.

22. It was further submitted that the Respondent's witness in her testimony did confirm that the loan files were opened by and left at all material times in the custody of, the business banker. That she admitted that there is such a possibility that the business banker might have tampered with the loan files by removing documents that he had shown the Claimant.

23. It was further submitted that the Respondent's investigations report at page 18 to 19 revealed that the Claimant should have flagged the accounts in question for being suspicious. Further that in the report the Respondent confirmed that the operations manual volume IV section 5 (opening accounts) did not provide for how marketed accounts should be opened. This was a systemic flaw. The witness confirmed that the accounts opening officer working under an operations manager was responsible for accounts opening and not the branch manager.

24. Counsel urges this Court to find that the shortcomings in the Respondent's systems as well as mistakes of other employees of the Respondent cannot and should not be visited on the Claimant.

25. It was further submitted that the Respondent did not establish by evidence that the Claimant fundamentally breached his obligations under the employment contract, as required by the provisions of section 44 (3) of the Employment Act. In this submission counsel sought fortification in the decision in *Jacob Kelly Omondi Onyango vs National Bank of Kenya (2021) eKLR*, where it was stated;

“Under section 43 (1) and 45 (2) of the Employment act, the employer has the burden of proving that the reason for dismissing an employee was valid and fair in relation to the employee's conduct, capacity and compatibility, or in relation to the employer operational requirements. In the present case the Respondent has not done so on a preponderance of evidence.”

26. Considering the Respondent's witness' testimony that the opening of accounts and loan files were responsibilities of the account opening officers and business bankers, respectively, the dismissal of the Claimant was not anchored on a valid and fair reason.

27. Counsel further submits that it is clear the minutes of the disciplinary committee – exhibit 7 do not have any recommendation[s] or decision on the action that was to be taken against the Claimant. There is no document placed before Court from which the recommendation[s] or decision would be discerned.

28. It is not in good faith that the Respondent has not disclosed the recommendation[s] or decision by the committee, considering the fact that there are two letters addressed to the Claimant purported to be flowing from the disciplinary proceedings, which letters express completely different actions on the Claimant.

29. It was submitted that the letter by the Head - Coast Region, while cognizant of the short falls within the Respondent's system, communicated certain terms and conditions that the Claimant was to meet in order to improve his performance. The Claimant committed himself to abide by those terms and conditions.

30. This was changed to his prejudice when he was served with a termination letter, without having been heard first on the change.

31. The Claimant has been held responsible for the fraudulent activities and or negligence of his co-worker namely the business banker, who was the facilitator of the alleged fraudulent loans.

The Respondent's case

32. The Respondent in defence to the Claimant's case, justification and fortification of the contents of the response to the Claimant's memorandum of claim, presented one witness (Leah Kerich) to testify. The witness urged Court to adopt her witness statement as her evidence in chief. The Court adopted the same as such. She produced the documents that were filed under the list of documents dated 23rd January 2019 as the Respondent's exhibit 1 – 9.

33. The witness introduced herself to Court as the Respondent's Employee Relations Advisor, having joined the Respondent on the 3rd December 2018. She stated that the Claimant was required, at all material times to, ensure that credit was administered as per the credit guidelines, have integrity when undertaking his duties and to be thorough in execution of the same.

34. She stated that on 8th of July 2015, 9th July 2015 and 15th July, 2015 the Claimant in his capacity as a branch manager of the Respondent's Voi branch, approved loans on accounts that were less than three (3) months in operation. This contrary to the Respondent's Micro Credit Banking Manual which required him to seek approval from the Head office, in such a situation.

35. The witness stated that the account holders defaulted in the repayment of the facilities, attracting an investigation which revealed that all the three (3) accounts were irregularly opened and all the loans in respect thereto were irregularly approved. The investigation further revealed that there were three other accounts opened on diverse dates of June 2015, that had similar characteristics to those that were under investigation.

36. The witness further asserts that the loan application forms were not supported by the necessary documentation, and in particular how the customers could repay the loans.

37. The witness stated that when the Claimant was asked about his role in the suspected fraud, he admitted having approved the loans upon basis of KYC (know your customer), that had been conducted by the business banker and not on his evaluation as a manager.

38. Upon premise of the investigation report and the recommendations therein, the Respondent commenced disciplinary action against the Claimant issuing a notice to show cause, which notice the Claimant responded to in detail.

39. Based on an admission of negligence on his part, the Claimant was invited to a disciplinary hearing through an invitation letter (at page 13 of the Claimant's documents). The letter expressly informed him of his right to representation at the disciplinary hearing.

40. Following the invitation, the Claimant attended the disciplinary hearing where the charges levelled against him were discussed and the Claimant given an opportunity to respond to the same. The witness went ahead to state that the Claimant had an opportunity to review the minutes of the meeting, commented on the same in writing, before appending his signature thereto.

41. The witness asserted that the representation by the Claimant at the disciplinary hearing was unsatisfactory, prompting the Respondent to terminate his employment vide a letter dated 22nd February, 2016.

42. She states that the Respondent is a stranger to the unstamped and unsigned letter to the Claimant purportedly from its Coast Regional manager. The letter was never issued and that even if it was legitimate, the Respondent reserved the right to overrule it.

43. All the employees who were involved in the fraud and found culpable, faced sanction. They were sacked.

44. It was further stated that the Claimant's acts and omissions amounted to grounds for summary dismissal under Clause 10.9(xii) and 10.9 (xv) of the Respondent's Human Resource Manual. The Claimant violated various provisions of the Respondent's Business Code of Conduct and Ethics Manual. He had previous warnings.

45. The witness stated that the Respondent had valid reasons for the Claimant's termination and that the same was conducted in line with due process as stipulated in law, the Respondent's Human Resource Manual and in accordance with the tenets of natural justice.

46. Cross examined by counsel for the Claimant, the witness stated that largely accounts are opened by the accounts officer, but sometimes it depends on who introduced the customer to the bank. The accounts in issue are loan accounts. They were sourced by the business banker. Before one applies for a loan, he must have a customer account which is normally opened by the accounts officer.

47. In her evidence in cross examination the witness further stated that the loan accounts are opened by the business banker and the files in regard thereto kept by him. There are loans which require a final approval from the Head office such as the ones that were the subject matter of the termination - accounts that were less than 3 months in operation.

48. Asked as to who disburses the facility sums the witness stated that it is the business banker, after all approvals. She further stated that after the disbursement of the facility sums, withdrawals were done from the customers' accounts, but as to who made the withdrawals, she could not tell.

The Respondent's submissions

49. In their written submission the Respondent's counsel submitted that in his evidence the Claimant acknowledged his vast experience within the banking industry and his knowledge of the Respondent's banking procedures and systems. That his position as the Bank manager was to oversee all loan disbursements. He was the final person to approve all loan applications before seeking the Head office approval.

50. It was further submitted that accounts running less than 3 (three) months were not eligible for loan disbursements. Further that the Claimant approved the loans based on the policy know Your Customer, despite the fact that he did not know the customers.

51. That during cross examination, the claimant did admit that he was issued with a show cause letter, he was able to respond to it and that he attended a disciplinary hearing.

52. Counsel also submitted on what she considers the take away from the Respondent's evidence, that accounts are opened by business bankers; they are integral in the inception stages of opening the accounts; that a business banker does not approve loans as that is the responsibility of the manager who seeks approval from the Head office; loans on accounts that were less than 3 months in operation, had to be finally approved by the Head office.

53. Counsel identifies two issues as the issues for determination in this matter, and proceeded to submit on them, namely; whether the Respondent had a valid reason to dismiss the claimant and whether the Claimant is entitled to the reliefs sought.

54. Pursuant to section 43 (2) reasons for termination are matters that the employer genuinely believed to exist, it was submitted.

55. As regards the standard of proof in, and Court's approach in determining, matters like the instant one, the Respondent's counsel cited the Court of Appeal decision in *Kenya Revenue Authority vs= Reuwel Waitthaka Gitahi and 2 others [2019] eKLR* thus;

“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 “genuinely believed to exist” causing it to terminate the employee’s services. That is a partly subjective test. In the case of Bamburi Cement Limited vs= William Kilonzi [2016] eKLR this Court expressed itself on the nature of proof required as follows:

“The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47 (5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing..... The test to be applied is now settled. In the case of the Judicial Service Commission vs= Gladys Boss Shollei, Civil Appeal No. 50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in Mc Kinley vs= B. C. Tel. (2001) 2 S.C.R. 161

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, “that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.

Similar guidelines are to be found in Halsbury’s Laws of England, 4th Edition, Vol. 16 (1B) para 642, thus; -

“... In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

56. It is submitted that using the parameters set in the cited matter, it is not difficult to conclude that the Respondent had genuine reasons to terminate the Claimant’s employment.

57. That the Claimant was in a position which required him to exercise due diligence, and oversee all loan applications and approvals. This is what his job description entailed. He was in a sensitive position that required immense honesty and exhibition of integrity. The claimant breached a fundamental condition of his employment. A reasonable employer would be justified in finding that the circumstances in this matter were that they would attract suspicion and a breach of trust that led to the dismissal of the employee.

58. It was submitted that the Respondent engaged a fair procedure in terminating the Claimant’s employment. Following the incident, the Respondent commenced investigations, and the Claimant was called upon to provide his side of the story. This he did through his letter dated 19th August 2015, Respondent’s exhibit 1. The investigations yielded the report – exhibit. 2 dated 8th September 2015.

59. The Claimant was issued with a notice to show cause and eventually heard by a disciplinary committee. All through the claimant knew the charges that were against him. Citing the Court of Appeal decision in *Kenya Ports Authority vs= Fadihl Juma Kisuwa [2017] eKLR* where the Court stated;

“The duty to hear an employee is limited to the employer explaining to the employee clearly the nature of accusations for which it is contemplated that his employment be terminated and an opportunity for the employee to make representations.”

Counsel submitted that the Claimant was heard and given an opportunity to make representations.

60. It was further submitted that the claimant cannot be availed the compensatory relief that he has sought since he did not establish either procedural and/or substantive, unfairness in the termination. Counsel submits that however, should this Court find that the Claimant is entitled to any compensation then as dictated by the provisions of section 49 (4) (b) and 45 (4) (k), it should consider the circumstances in which the termination took place and the conduct of the employee, and the extent it caused or contributed to the termination.

Analysis and determination

61. The Court identifies the following issues as from the pleadings and evidence by the parties, as the issues that emerge for determination in this matter.

- (i) Whether the termination of Claimant's employment was procedurally fair.
- (ii) Whether the termination of Claimant's employment was substantively fair.
- (iii) Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's employment was procedurally fair.

62. In the case of *Lydia Mora Obara vs= Tusker Mattresses [2021] eKLR* this Court stated;

"31. Section 45 of the Employment Act 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, if a termination of employment were to be considered fair."

63. In *Janet Nyandiko vs= Kenya Commercial Bank Limited 92017] eKLR*, the Court held, and which holding was cited with approval by the Court of Appeal in the case of *National Bank of Kenya vs= Anthony Njue [John [2019] eKLR*, thus;

"Section 45 of the Employment Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. 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 or alternatively that the employer did not act in accordance with justice and equity."

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize 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. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41....."

64. Section 41 of the Employment Act, 2007 supplies the structure of procedural fairness, it provides;

"(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the 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 considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during 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 representations 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."

65. In the case of *Prof. Macha Isunde vs= Lavington Security Guards Limited [2017] eKLR*, the Court of Appeal stated;

"There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) –

Prove the reasons are valid and fair (section 45) – prove that the grounds are justified (section 47 (5), amongst the other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

66. The Respondent's counsel submitted, and it is not in contestation that all through the Claimant was informed of the allegations against him through a notice to show cause letter, that he was given an opportunity to respond to the notice in writing. Thereafter he was invited to a disciplinary hearing where he was heard. In the invitation letter dated 11th January, 2016, it was brought to the attention of the Claimant that he had a right to be accompanied to the said hearing by a fellow employee of his choice, but as can be discerned from the minutes of the disciplinary proceedings, he opted not to have a representative.

67. Up to here, yes, there was compliance with the requirements of procedural fairness. **However, the question that arises and in the circumstances of this matter is, in considering presence or absence of procedural fairness, where does the Court stop? Is it at the point where the disciplinary panel receives representation from the employee and or his or her representative, or at a further point?**

68. I pose this question because there appears to be a general view or impression as can be gathered from most decisions of this Court, that it is well with an employer once he or she demonstrates that the employee was informed of the accusations against him, accusations upon which the employer intends to terminate the employment of, or summarily dismisses the employee, informed of his right to be accompanied by a shop steward (if the employee is a member of a trade union) or a colleague of his choice (if he is not such a member), and that the

employee and/or his representative were given an opportunity to make a representation(s) on the accusations.

69. This general view or impression can only hold water if one reads section 41 of the Employment Act in isolation from the other provisions of the Act, the provisions of the Fair Administrative Actions Act, relevant international standards, and the constitution and more specifically those that relate to fair hearing.

70. I am of the view that in considering procedural fairness depending on the circumstances of a matter, a Court has to go to a further point. The point at which the termination letter is drawn up and delivered to the employee.

71. Any action to be undertaken by an employer on the affected employee must be one that must be seen to flow from a decision of the disciplinary panel, or a body to which the panel/committee makes a recommendation if the Human Resource Policy of the employer so provides. The long and short of this is that at the conclusion of the disciplinary hearing there must be a clear and definite decision made on all the allegations that were the subject matter of the hearing. A termination letter or any other action must be drawn from the decision, just like a decree is drawn from a decision of Court, if I may draw an analogy. This could be a legitimate expectation of any reasonable employee who has undergone a disciplinary process.

72. The Claimant tendered the minutes of the disciplinary hearing in evidence as exhibit 8. The Respondent did not produce any, but chose to rely on what the Claimant had produced. From the document it is not difficult to see that they are only reflective of the deliberations that were, nothing beyond that. The minutes do not have any verdict.

73. Imperative to state that just as an employee is entitled to a right to be informed of the charges against him, in a clear manner, the right to adequate time to prepare for his representation on the charges, the right to be accompanied by another employee, and the right to make a representation, he has an as much right to a reasoned decision by the disciplinary committee or panel.

74. In absence of any evidence that the panel reached a clear and reasoned verdict that can be seen at the conclusion of the disciplinary hearing minutes, one can safely conclude and I do, that there was not procedural fairness at this point.

75. The circumstances of this matter are peculiar, making one want to clearly see what the panel pronounced on the matter. The Claimant testified that upon conclusion of the disciplinary hearing, he was put on what one can call a performance improvement plan. He received a letter dated 22nd February 2016, from Head - Coast Region, exhibit 7, a letter to this effect.

76. A keen look at the letter reveals that the same is captioned **“Disciplinary Hearing and Branch business”**, and that it refers to the disciplinary hearing of 18th January, 2016. The letter is clear on the areas in which the Claimant was to improve on, by the 26th April 2016; notable is the undertaking by the Bank (Respondent) to arrange credit training for the Claimant, and attach him to credit analysis department. The letter read in part (see last page);

“We have agreed;

- a) That you will take charge of all the affairs in the branch and ensure compliance is enforced.**
- b) You will ensure the bankers and the whole branch generates the desired business and fully exploits the potential in Voi market.**
- c) That you will ensure that PAR is below 5% and at worst 7% for MCU.**
- d) That we will arrange credit training for you. Attach you to credit analysis department.**

That in the event that the branch does not meet this target by end of April 2016, the Bank will take whatever disciplinary action it deems fit against you.”

77. The letter refers to the disciplinary hearing, one cannot be faulted to state that the contents therein flow from the verdict of the panel. Critically looking at the areas touched on items (a) to (d) thereof, they largely address the faults that landed the Claimant before the panel.

78. One could garner an impression that the letter was anchored on a verdict out of the disciplinary hearing.

79. The Claimant asserted that he received the letter on the 22nd February 2016, earlier than the termination letter. From the onset he was categorical that he was to place reliance on the letter to demonstrate that the process of terminating his employment was unfair. The Respondent was put on notice.

80. Surprisingly the respondent through its witness made this casual answer in her witness statement turned evidence in chief.

“17. In response to paragraph 12 of the claim, the Respondent submits that it is a stranger to the unstamped and unsigned letter to the Claimant Purportedly from the Coast Regional manager. No such letter was issued and even if it was legitimate the Respondent reserved the right to overrule it.”

81. I get the witness as saying that the document was a forgery, a very heavy indictment on the Claimant. In this situation one could reasonably expect the Respondent to cause the Head - Coast Region to testify to the letter and support the Respondent’s position that the

Respondent was a stranger to the letter, and that the same was forged and that the contents thereon did not flow from the decision of the disciplinary committee. This was a vital witness, the Respondent ought to have called him as a witness to testify. They did not. I cannot help but draw an adverse inference that had it called him, he could have confirmed that the contents of his letter were informed by the decision of the committee.

82. Further, the Respondent could be taken to be stating that the Claimant committed a criminal offence. One would expect to be told that the matter was reported to the police for investigation. Forgery is a serious offence. This never happened.

83. Then the Respondent's witness makes the "even if the letter was legitimate the respondent reserved the right to overrule it," remark. This remark is astonishing. In a legal labour relations system like ours which has since obliterated the common law way of employers of terminating an employee's employment, which accords employees expansive rights and protection, and which is constitutionally inspired and equity spirited, with due respect the kind of thinking like the Respondent's will have no room.

84. If the Respondent decided to "overrule" the letter, since that amounted to an act Prejudicial to the Claimant, then under the provisions of the Fair Administrative Actions Act & Article 47 of the Constitution he was entitled to be notified and heard.

85. If the Respondent were to terminate his employment, then, it would only happen after the period that was put forth in the letter and upon a negative appraisal. However, it should not be forgotten that an employer has a heavy obligation placed upon him, by the law in matters dismissal on account of poor performance.

86. It is apparent that though the termination letter is dated 22nd February 2021, the process of its dispatch commenced on 24th February 2016. The Claimant had already received the letter by the Head – Coast region. He had bound himself to act on the terms and conditions that were set thereon. If the letter was meant to cancel, "overrule" or recall the earlier letter, then there was need to have an express statement in it.

87. The two officers who did these conflicting letters, were doing it on behalf of the Respondent. It has not been asserted that the Head – Coast region did not have authority to do what he did.

88. Section 45 (4) gives this Court a platform to interrogate whether or not the employer in terminating the employment of the employee did act in accordance with justice and equity. The section provides;

"4. A termination of employment shall be unfair for purposes of this part where: -

a) the termination is for one of the reasons specified in section 46; or

b) it is found out that in all the circumstances of the case, the employer did not act in accordance with Justice and equity (emphasis mine) in terminating the employment of the employee."

89. To terminate an employee's employment yet the employer cannot manage to show the decision from which the letter of termination flowed; have two conflicting letters of action, all said to flow from same disciplinary hearing; and to issue a termination letter, therefore with the "capital sanction" of summary dismissal after an earlier letter to the employee had expressed a lesser sanction (being put on performance improvement Plan) is all testament that the Respondent did not act with justice and equity. Consequently, I find that the termination was unfair upon basis of section 45 (4) (b).

Of whether the termination was substantively fair.

90. Section 44 of the Employment Act, 2007 stipulates when summary dismissal can occur, thus;

"1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.

(2)

(3) subject to the provisions of this Act, an employer may dismiss an employee summarily when the employer has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service."

91. What happened here was a summary dismissal, however whether or not the conduct of the Claimant was one that fundamentally breached his obligations arising under the contract, I shall delve into, shortly hereinafter.

92. Section 43 of the Employment Act places an obligation upon the employer to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

93. Section 44 (4), provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal of an employee. However, it is imperative to state that the list therein is not an exhaustive list. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has characteristics such as I will demonstrate shortly hereinafter. The section stipulates;

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters of the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justiciable or lawful grounds for the dismissal if–

- a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**
- b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;**
- c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**
- d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**
- e) an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;**
- f) in the lawful exercise of any power or arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or**
- g) an employee commits, or on reasonable and sufficient grounds is suspected to having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”**

94. It was the Respondent’s case that the Claimant’s acts and omissions that were in issue, during the investigations, at the notice to show cause level and disciplinary hearing, amounted to grounds for summary dismissal in their nature and under clause 10.9 (iii) and (10.9) (xv) of the Respondent’s Human Resource Manual which provides thus;

“10.9 Any of the following offences on the part of an employee shall constitute gross misconduct and/or serious neglect and shall justify summary dismissal;

(xii) if an employee either wilfully or by negligence allows or facilitates loss, destruction or damage of any bank property/cash;

(xv) if an employee approves by signing or facilitating approval of any payment without following the established bank procedures.”

95. The Respondent further asserted that the Claimant violated various provisions of the Respondent’s Business Code of Conduct and Ethics Manual, provisions which had undertook to honour. Among these provisions were those related to the duty to, ensure that credit is administered as per the bank’s guidelines, and to comply with prescribed policies, accounting procedures, operating manuals and controls at all material times.

96. Among the Claimant’s conducts that were all through in issue as hereinabove expressed is that he approved loans on accounts that were less than 3 (three) months old, without the necessary approval from the Head office. This contrary to the Respondent’s micro credit Banking Manual (Exh. 3). Clause 3.3 of the manual provides inter alia;

“..... All loan applications of clients who have actively operated our Co-operative Bank account for less than three months must be forwarded to MCB for ratification”.

97. Under cross examination, the Claimant admitted that; in the line of loan approvals at the branch level, he was the last officer in line; he approved the loans in issue; the accounts on which the loans were approved, were of less than 3 (three months) in operation; he was aware of the requirement that in situations like of those accounts ratification of a branch approval by the Head office was a must; and that the acquisition of the loans on some of those accounts turned out to be fraudulent, occasioning a loss to the bank.

98. The Claimant did not offer any evidence to demonstrate why he made the approvals, approved disbursements without referring the applications for the final approval from the Head office. He did not put forth any justification for the approval of the loans on those accounts notwithstanding their condition.

99. It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44 (4) of the Employment Act 2007, or its Human Resource Policy. An employee’s misconduct does not inherently justify a summary dismissal unless it is “so grave” that it intimates the employee’s abandonment of the intention to remain in employment. In *Laws vs= London Chronicle Limited [1959] 2ALL L.R 285* the English Court of Appeal stated the following in page – 287;

“Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”

100. Whether an employee’s misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances, the contextual approach. In *Mckinley vs BC Tel* it was held;

“29. When examining whether an employee’s misconduct justifies his or her dismissal, Courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.”

39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for dismissal for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee’s behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and whether it violated the “essential conditions” of the employment contract or breaches an employer’s faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.”

101. I have considered the circumstances of this matter, including but not limited to the industry that the Claimant was working in, the nature of the relationship between him and the Respondent, the degree of the non-adherence to crucial manual provisions on the part of the Claimant, and the lengthy experience the Claimant had, and find that the dismissal on the account could be valid and fair.

102. Having found as I have hereinabove, I find it not necessary to delve into the other grounds that were the subject of the dismissal, to interrogate whether they constituted a just cause. A finding on them will not change the finding herein above.

103. Consequently, I find that the dismissal was with a valid and fair reason. The dismissal was substantively fair.

Of what reliefs

104. The Claimant sought for a compensatory reward under the provisions of section 49 (1) (c) of the Employment Act, 2007. He sought for a 12 months’ gross salary. Courts have held that an award under this provision is discretionary. The extent of the award shall always depend on the circumstances of each case. In this case I have considered that the dismissal was substantively fair, that the award which I will make herein is as a result of a single procedural mis-step, rendering the dismissal unfair, the conduct of the Claimant and the general circumstances of the matter, and consequently find that a nominal award of one month’s gross salary will serve justice.

105. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms;

a) **A declaration that the dismissal of the Claimant from employment was procedurally unfair.**

b) **A nominal compensatory award of one month’s gross salary – Kshs. 237,339 pursuant to section 49 (1) (c) of the Employment Act.**

c) **Interest on (b) above at Court rates from the date of filing suit till full payment.**

d) **Costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF OCTOBER, 2021.

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF;

MS. MWAMBURI FOR THE CLAIMANT.

MS. OBONYO FOR THE RESPONDENT.