



Kinyanjui v Rural Electrification & Renewable Corporation (Cause E709 of 2022) [2024] KEELRC 1824 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1824 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E709 OF 2022**

SC RUTTO, J

JULY 12, 2024

BETWEEN

LUCY KINYANJUI CLAIMANT

AND

**RURAL ELECTRIFICATION & RENEWABLE
CORPORATION RESPONDENT**

JUDGMENT

1. Through a Statement of Claim which was amended on 12th September 2023, the Claimant avers that she was employed as a Finance Officer on or about 15th October 2010. She avers that she rose through the ranks and was promoted to the position of Principal Accountant. That in 2015, she received a new role to prepare financial statements for state corporations and donor projects. From the record, the employment relationship started to go downhill on 8th August 2022 when the Claimant was issued with a Notice to Show Cause in which it was alleged that she had approved irregular payment invoices with payment certificates of survey projects that did not exist amounting to Kshs. 430 million.
2. She was suspended and the ensuing disciplinary proceedings culminated in her summary dismissal on 6th September 2022. Referring to her termination from employment as unlawful and unjustified, the Claimant has prayed for the following reliefs against the Respondent:
 - a. A declaration that the dismissal of the Claimant was unjustified, unfair and unlawful.
 - b. A declaration that the Respondent was pursuant to the applicable law to wit, Articles 35, 41 and 47 of *the Constitution* under obligation to provide the Claimant with copies of the internal audit report dated 20th July, 2022 and all the relevant payment invoices and payment certificates referred to in the show cause letter dated 8th August, 2022 to enable her adequately respond to the accusation against her and prepare for the disciplinary hearing.



- c. A declaration that by failing to provide the Claimant with copies of the internal audit report dated 20th July, 2022 and all the relevant payment invoices and payment certificates referred to in the show cause letter dated 8th August, 2022, the Respondent subjected the Claimant to an unlawful and unfair process contrary to Articles 27, 35, 41 and 47 of the Constitution and the Employment Act, 2007.
 - d. A declaration that the decision to terminate the Claimant's employment as contained in letter ref. no. REREC/BHRC/08/03 dated 6th September, 2022 is unfair, unlawful and not based on any valid grounds and therefore illegal, null and void.
 - e. A declaration that the acts of the Respondent were in violation of the rights of the Claimant under Articles 28, 41 of the Constitution of Kenya,
 - f. An order of reinstatement of the Claimant with all salary, allowances, benefits and privileges within seven (7) days of the judgment herein.
 - g. Maximum compensation of Kshs. 3,430,800.00 being the equivalent of twelve months' wages/ salary for unfair, unjustified and unlawful and of summary dismissal.
 - h. General damages of Kshs. 20,000,000.00 for the violation and or breach of the Claimant's Constitutional rights to equal treatment and benefit of the law, right to information, fair labour practices and fair administrative action under Articles 27, 35, 41 and 47 of the Constitution respectively.
 - i. Costs of the claim together with interests on the sum awarded at court rates.
 - j. Any other or further relief that this Honourable Court may deem fit and just to grant.
3. The Claim did not go undefended. Through its Statement of Response dated 6th December 2023, the Respondent has averred that it considered that the Claimant negligently performed her duties in that she approved irregular payment invoices together with payment certificates of survey for projects that did not exist and failed to detect and report fraud. In the Respondent's view, the termination of the Claimant's employment was fair and valid. On account of the foregoing, the Respondent prays that the Court dismisses the Claim herein with costs.
 4. During the hearing which proceeded on 11th March 2024, both parties called oral evidence.

Claimant's Case

5. The Claimant testified in support of her case and at the outset, sought to adopt his witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside the Statement of Claim as her exhibits before Court.
6. The Claimant averred that on 8th August 2022, while discharging her duties, she received a show cause and suspension letter both dated 8th August 2022. She was required to show cause within seven (7) days why summary dismissal should not be preferred against her for gross misconduct.
7. She contended that while the show cause letter stated that it had been issued on the basis of the allegations set out in the internal audit report dated 20th July 2022, the Respondent neither attached the internal audit report to the show cause letter nor supplied it to her.
8. That further, whereas the show cause letter stated that the accusations against her related to irregular approval of payment invoices together with payment certificates of survey for projects that did not exist



amounting to Kshs. 430 million, the Respondent neither attached nor enclosed any single payment invoice and payment voucher that she allegedly approved irregularly.

9. According to the Claimant, she failed to understand and adequately respond to the charges that she was facing.
10. The Claimant further averred that the letter of suspension required her to immediately hand over her laptops, iPad and keys together with other critical gadgets under her care. She was further prohibited from accessing the Respondent's premises with immediate effect.
11. The Claimant further averred that vide a letter dated 15th August 2022, she requested the Respondent to supply her with the internal audit report dated 20th July 2022 to facilitate the preparation of her response to the show cause and the disciplinary hearing. That it was her expectation that the Respondent would halt the disciplinary process until the crucial documents she had requested for were supplied.
12. It was the Claimant's contention that the Respondent did not provide her with a copy of the internal audit report that claimed she had irregularly approved payment invoices and payment certificates amounting to Kshs. 430million. She was therefore unable to understand and effectively answer the charges against her.
13. That despite the fact that the Respondent failed to provide her with the internal audit report and the payment invoices as well as payment forming the basis of the disciplinary process, she responded to the show cause vide her letter dated 15th August 2022.
14. The Claimant further stated that the show cause letter did not identify any specific payment certificate or invoice that she allegedly approved irregularly. According to her, this denied her an opportunity to understand and respond to allegations against her with precision.
15. That on 31st August 2022, she received a letter dated 30th August 2022 inviting her for a disciplinary hearing on 2nd September 2022. She was informed through the said letter that the Respondent was in receipt of her response but the same was unsatisfactory and unacceptable. She was also informed that she had another chance to respond to the show cause. She was given twelve (12) hours to furnish her response and in any event not later than 1st August 2022 by 8.00 a.m which date actually preceded the date of the letter.
16. The Claimant further contended that by the time she received the letter dated 30th August 2022, the twelve (12) hours window within which she was to put in a response had long lapsed. Vide her Advocate's letter dated 1st September 2022 she requested the Respondent to adjourn the disciplinary hearing.
17. The Respondent responded to her request and stated that the scheduled hearing of 2nd September 2022 would proceed as planned and that her attendance was expected.
18. She attended the disciplinary hearing on 2nd September 2022 without the Respondent providing her with a copy of the internal audit report, the payment vouchers and invoices as well as the payment certificates despite numerous requests thereto.
19. The Claimant averred that at the hearing, she was required to comment on the contents of the internal audit report, payment invoices and payment certificates that she had neither seen nor supplied with. According to the Claimant, the hearing was a travesty on her rights to fair labour practices and natural justice as she was humiliated, ridiculed and insulted based on documents whose contents she did not know.



20. She further averred that the conduct of the Respondent in the whole disciplinary process was shrouded with secrecy and ambush.
21. That vide a letter dated 6th September 2022, the Respondent summarily dismissed her from employment on grounds that she had allegedly failed to execute her duties as a Principal Accountant thereby occasioning loss of funds.
22. She was informed in the said letter that she had been found culpable of failing to identify the internal control gaps, implementing the internal control systems, ensuring risk-based processes, and detecting and reporting fraud. There was however nothing on record to show that she had the capacity to either detect or do all of these.
23. She appealed against the decision to summarily dismiss her from employment. The Respondent purported to hear her appeal dated 14th October 2022 for hardly forty-five (45) seconds on 16th November 2022 and dismissed it on 6th December 2022 without addressing and or considering the grounds of appeal.
24. In the Claimant's view, the Respondent's decision to terminate her employment is not only unfair and unlawful on the basis of violation of due process but is also a nullity as it is not anchored on any valid ground.
25. That she is aged over 52 years and has worked hard, diligently and with utmost honesty. She is pained and hurt that after working for over 32 years in public service, the Respondent would terminate her employment through a predetermined disciplinary process that is characterized by failure to provide crucial documents and ambush.
26. The Claimant further averred that the unlawful and unjustified termination of her employment on grounds of unsubstantiated misconduct has unfairly dented and destroyed her reputation, standing and career as an accountant of over 33 years' experience. It is unlikely that she will secure another employment in the very competitive field of accounting given her age.

Respondent's Case

27. On its part, the Respondent called oral evidence through two witnesses being Ms. Sophia Githuku and Mr. Hassan Alhaji Yusuf Suleiman. Ms. Githuku who testified as RW1, was the first to go. She started by identifying herself as the Respondent's General Manager, Human Resources & Administration. She proceeded to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.
28. It was RW1's evidence that the Respondent's General Manager of the Internal Audit Directorate reviewed payments made from January 2022 to July 2022 to three (3) companies, namely: Universal Land Services, Geospatial Engineering and Theodore Surveys. The internal audit revealed that the Respondent had lost amounts to the tune of Kshs. 430 million which payments were made for survey projects that did not exist.
29. As the Principal Accountant, the Claimant was responsible for approving payment of invoices, verifying payment vouchers in accordance with the laid down financial procedures, policies and regulations, approving payment of invoices, identifying and applying internal control systems with respect to approval of payments, and ensuring risk-based processes.
30. The Claimant was required to be vigilant in her duties to ensure that only verified and authentic payments were made.



31. RW1 further stated that the Respondent considered that the Claimant had negligently performed her duties in that she approved irregular payment invoices together with payment certificates of survey for projects that did not exist and failed to detect and report the fraud.
32. The Respondent consequently instituted disciplinary proceedings against her.
33. By a letter dated 8th August 2022, the Claimant was suspended from duty pending completion of the disciplinary proceedings. She was also issued with a Notice to Show Cause dated 8th August 2022, inviting her to respond to the allegations therein. The Claimant provided a response through her lawyers on 15th August 2022.
34. By a letter dated 30th August 2022, the Respondent invited the Claimant to a disciplinary hearing to be held on 2nd September 2022. She attended the disciplinary hearing on 2nd September 2022 and made oral representations on the Notice to Show Cause.
35. According to RW1, the Respondent is a public institution which is required to uphold the highest standards of financial integrity. There is an expectation that any officers hired are diligent, ethical and can leverage on their competencies to safeguard taxpayer funds.
36. As Principal Finance Officer of the Respondent, the Claimant had overall supervisory control over the approval of payments and was responsible for approving payment of invoices. Her responsibilities included identifying internal control gaps, implementing internal control systems and detecting and reporting fraud. She was thus required to be vigilant in her duties such that only verified and lawful payments were made.
37. RW1 further averred that the Respondent's Board considered the Claimant's representations and the evidence before it and concluded that she had negligently performed her duties. Pursuant to Section 44 (g) of the [Employment Act](#) 2007, it was recommended that the Claimant be summarily dismissed from employment.
38. The decision to terminate was communicated to the Claimant by a letter dated 6th September 2022 which also informed the Claimant of her right to appeal.
39. Upon the termination of the Claimant's contract of employment on 6th September 2022, the Claimant's terminal dues were computed to Kshs. 250,886.88.
40. RW1 further stated that by a letter dated 14th October 2022, the Claimant appealed her dismissal. On 3rd November 2022, the Respondent invited her for an appeal hearing scheduled for 16th November 2022.
41. She attended the appeal hearing. The appeal panel considered the appeal and resolved to uphold the summary dismissal. The Claimant was notified of the outcome of the appeal by a letter dated 6th December 2022.
42. According to RW1 the Respondent had reasonable cause to take out disciplinary proceedings against the Claimant and followed due process. That further, the Respondent has lost trust in the ability of the Claimant to undertake these duties and the remedy of reinstatement is thus not tenable in the circumstances.
43. In RW1's view, the Claimant is not entitled to the orders sought.
44. Mr. Hassan Alhaji Yusuf Suleiman who testified as RW2, identified himself as the Respondent's General Manager, Internal Audit. Similarly, he sought to adopt his witness statement to constitute his evidence in chief.



45. It was RW2's evidence that sometime in August 2022, the Respondent's Internal Audit Directorate reviewed payments made by the Respondent from January 2022 to July 2022 to three companies, namely: Universal Land Services, Geospatial Engineering and Theodore Surveys.
46. He told the Court that he is the one who undertook the audit which revealed that payments to the tune of Kshs. 430 million were made to the three survey companies for survey projects that did not exist.
47. According to RW1, all projects undertaken by the Respondent are given reference numbers in the Respondent's SAP system. The reference number is quoted on the payment documents such as invoices and payment certificates.
48. The internal audit revealed that the reference numbers provided in the payment documents being the invoices and the payment certificates did not exist in the SAP system.
49. That further, a review of the payment documents revealed that the Claimant had cleared and authorized the irregular payment vouchers.

Submissions

50. Upon close of the hearing, both parties filed written submissions. It was the Claimant's submission that there was no valid reason to warrant termination of her employment and that the Respondent violated procedural fairness in dismissing her.
51. Placing reliance on the case of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR* and *Rebecca Ann Maina & 2 others vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR*, the Claimant argued that failure by the Respondent to supply her with crucial documents constitute a violation of Section 41 of the *Employment Act, 2007* and Articles 35, 41 and 47 of *the Constitution*. That on this ground alone, the decision to dismiss her from employment was procedurally unfair and unconstitutional.
52. The Claimant stated in further submission that the Respondent did not provide any evidence to show that the internal audit report, irregular payment invoices together with certificates that formed the basis of the disciplinary action were supplied to her.
53. It was her further submission that the process leading to her summary dismissal was procedurally unfair as the Respondent neither substantiated the charges in the show cause nor adequately explained the reason for which they were considering termination of her employment. In support of this argument, the Claimant placed reliance on the case of *Munir Sheikh Ahmed vs National Bank of Kenta (2020) eKLR*.
54. Urging the Court to find that her termination process was unlawful, for want of procedure, the Claimant submitted that in the absence of the internal audit report dated 20th July 2022 and details of the specific payment invoices and payment certificates amounting to Kshs. 430 million, she was not given the reason for the disciplinary process and a fair chance to defend herself.
55. It was the Claimant's further submission that whereas the Respondent alleges that she negligently performed her duties by failing to, detect fraud and identify the risks associated with the Respondent's internal control system, no evidence has been tendered to indicate that it was her duty to do so or that she had the capacity to do so.
56. That further, the Respondent has not proved that she was adequately trained and had the capacity to detect and address any fraud that would have arisen from the payment certificates and invoices.
57. In the Claimant's view, the accusations against her were based on non-existent documents.



58. On the other hand, the Respondent submitted that there was no obligation on its part to prove beyond reasonable doubt that the Claimant was negligent in the performance of her duties before it could take disciplinary action against her. On this score, the Respondent placed reliance on the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others (2019) eKLR.
59. It was the Respondent's further submission that the Claimant's conduct was manifestly negligent and incompatible with the fundamental terms of her employment, especially bearing in mind that her role was in the accounting department. That as a result of the Claimant's actions, there was an irretrievable breakdown of trust that is essential in an employer-employee relationship.
60. Referencing the cases of Judicial Service Commission vs Gladys Boss Shollei & another (2014) eKLR, Lucy Nyambura Mbugua vs The Avenue Group (2019) eKLR and Robert Kenga & another vs Ocean Sports Resort (2015) eKLR, the Respondent submitted that it has discharged the burden of proving that the termination was fair and for valid reasons.
61. With regards to the Claimant's assertion that she was not supplied with the audit report, the Respondent posited that it was not able to provide the said report due to its confidential nature. It was further submitted that the audit report contained sensitive material concerning the Respondent, other employees of the Respondent and its operations. To buttress this argument, the Respondent invited the Court to consider the determination in the case of Leland I. Salano vs Intercontinental Hotel (2013) eKLR.
62. In the same breath, the Respondent further argued that there is no basis for the Claimant to allege that she was prejudiced by the absence of the audit report as the allegations were clearly set out in the show cause letter and discussed at length during the disciplinary hearing.
63. Citing the case of Bett Francis Barngetuny & another vs Teachers Service Commission & another (2015) eKLR the Respondent submitted that it had followed due process.

Analysis and Determination

64. Flowing from the pleadings filed by both parties, the evidentiary material before the Court and the opposing submissions, the issues falling for the Court's determination can be distilled as follows:
 - a. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant;
 - b. Whether the Claimant was accorded procedural fairness prior to termination;
 - c. Is the Claimant entitled to the reliefs sought?

Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant

65. As can be discerned from the letter of summary dismissal dated 6th September 2022, the Claimant was terminated from employment on grounds that she approved irregular payments on various dates between January 2022 and July 2022, occasioning loss of more than Kshs. 430 million to the Respondent.
66. The letter of summary dismissal further noted that the Claimant failed to execute her responsibilities as the Principal Accountant occasioning financial loss to the Respondent by failing to identify gaps, implement the internal control systems, ensure risk-based processes, detect and report fraud.



67. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
68. Fundamentally, the Respondent was required in this case to prove that the reasons leading to the termination of the Claimant's employment, were fair and valid and related to her conduct.
69. Disputing the reasons ascribed for her termination, the Claimant has contended that the Respondent did not tender any evidence to show that she irregularly approved any invoices and payment certificates. That further, the Respondent did not provide evidence of the alleged internal audit report dated 20th July 2022. It was the Claimant's further contention that the Respondent did not tender evidence to demonstrate that she had the capacity to detect and prevent fraud in the circumstances of the case herein.
70. According to the Respondent, the reference numbers provided in the payment documents being the invoices and the payment certificates did not exist in the SAP system. The Respondent further contended that the Claimant had cleared the payments in an irregular manner.
71. In support of its case, the Respondent exhibited copies of the spreadsheet showing the payments allegedly made by the Claimant, payment documents in respect of cheque no. 74431 to Universal Land Surveyors, cheque nos. 74437 and 77902 to Theodore Surveys, cheque nos. 74434 and 77806 to Geospatial Engineers and Business Consultants.
72. At the outset, it is worth pointing out that from the evidence on record, there is no way of confirming the Respondent's assertions that the reference numbers provided in the invoices and the payment certificates did not exist in the SAP system. Indeed, the Respondent did not lead evidence in whatever form or manner to prove this assertion. This being the case, the Court has to turn to the payment documents exhibited, for answers.
73. A perusal of the payment documents exhibited by the Respondent with respect to payments made to the three entities in question, that is, Universal Land Surveyors, Theodore Surveys, and Geospatial Engineers and Business Consultants, constitute an Invoice, Route Survey Certificate of Completion, Survey Delivery Note and a duly signed contract with each of the service providers.
74. It is also notable that all the Survey Delivery Notes exhibited were signed as delivered by the service provider and received by an employee of the Respondent.
75. Further, the Route Survey Certificates of Completion bear the signatures of a surveyor, a Design engineer and a Chief Manager, Design. In addition, they all bear the receiving stamps of the Respondent's surveyors. Further to that, there is a note with the following remarks "Premises confirmed".
76. In addition to the foregoing observations, it is also evident that the cheque payment vouchers were authorized by the Claimant after the same had been prepared and checked by other persons. On this issue, RW2 told the Court during cross-examination that the payment process involves five (5) stages and that authorization where the Claimant comes in, was the fourth stage. She was therefore the fourth person in the process. RW2 further stated that the final person in the process was responsible for executing the payments.



77. Bearing in mind the foregoing observations and noting that the Respondent failed to lead evidence in whatever form or manner to prove that the reference numbers provided in the payment documents did not exist in the SAP system, the Court is unable to discern the manner in which the Claimant was negligent in approving the payments in question.
78. Coupled with the foregoing, the Respondent failed to produce the audit report that was alluded to by RW2. As it is, the material before the Court does not support a case of negligence against the Claimant and does not reveal the acts and omissions she allegedly committed in the performance of her duties with respect to the payments in question.
79. Further, the Respondent failed to prove the manner in which the Claimant failed to identify the internal control gaps and hence detect the fraud. On this account, I cannot help but question whether the Respondent was essentially admitting that there were internal control gaps and that if there was fraud, the same was systemic.
80. Granted, the Respondent was not required to prove beyond reasonable doubt that the Claimant had occasioned the loss of Kshs 430 million or was negligent in the performance of her duties. Be that as it may, it was required to prove the allegations against the Claimant on a balance of probabilities.
81. From my analysis of the facts and the evidence on record, I am led to conclude that the Respondent has failed to prove on a balance of probabilities that the Claimant failed to execute her responsibilities as the Principal Accountant thereby occasioning a loss of Kshs. 430 million.
82. Accordingly, this Court arrives at the inescapable conclusion that the Respondent has failed to satisfy the requirements of Section 43(1) read together with Section 45(2) (a) (b) of the Act and as such, it has not proved that it had a valid and fair reason to summarily dismiss Claimant from its employment on the grounds advanced.

Procedural fairness?

83. Over and above proving the reasons for termination of employment, an employer is required to further prove that it accorded an employee procedural fairness prior to terminating his or her employment.
84. This position is aptly captured under Section 45(2) (c) of the Act which stipulates that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the Act provides for notification and hearing. In this regard, the employer is required to notify the employee of the reasons for which it is considering terminating the employment contract and to also grant the employee an opportunity to make representations in response to allegations levelled against him.
85. In this case, the Claimant's disciplinary process was commenced on 8th August 2022 when she was issued with a Notice to Show Cause and placed on suspension pending further investigations. It was at that point that the Claimant was notified of the allegations raised against her.
86. What is striking is that the allegations raised against the Claimant in the Notice to Show Cause are quite general and lacking in particulars. In this regard, the Show Cause merely put the Claimant on notice that the Respondent was considering terminating her employment based on irregular payment invoices of survey projects that do not exist amounting to Kshs. 430 million for Geospatial Engineers and Business Consultants, Universal Land Services and Theodore Surveys.
87. Further, the Notice to show cause does not indicate the period in respect of which the payments were allegedly made.



88. In the case of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR, the Court of Appeal found that the allegations against the employee in that case were too general hence termed his termination as unfair. The learned Judges thus held:

“As also rightly found by the learned trial Judge, no evidence was placed before court to show that the Respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the Respondent only knew in general terms, the allegations he was to face and counter...In the circumstances, therefore it cannot be said that the termination process was fair.” Emphasis mine

89. I subscribe to the position taken by the Court of Appeal in the above case. Nothing would have been easier than for the Respondent to fully disclose the details of the payments allegedly made by the Claimant.

90. In view of the foregoing, it is more than probable that the Claimant was disadvantaged and was not in a position to effectively defend herself against the allegations levelled against her. Indeed, it is not surprising that her response to the Notice to Show Cause which was done through her Advocates, was also quite general.

91. What is also notable concerning the Claimant’s disciplinary process is the notice period and supply of documentary evidence she had requested. In this regard, the Claimant was invited for a disciplinary hearing on 2nd September 2022 through a letter dated 30th August 2022. The record bears that the Claimant wrote to the Respondent on 1st September 202 through her Advocates, requesting for more time as she deemed the notice insufficient. Through the same letter, she sought to be furnished with documentary records to allow her to defend herself during the hearing. In response, the Respondent addressed the Claimant through its letter dated 1st September 2022 and declined to grant her an extension and made no mention of the documentary records requested.

92. In the case of Nebert Mandala *[Ombajo vs Institute of Certified Public Accountants of Kenya \(ICPAK\), Nakuru Civil Appeal No. 62 of 2018](#)*, the Court of Appeal had this to say with regards to the adequacy of the notice in disciplinary hearings: -

“The respondent has not justified the urgency in undertaking the disciplinary proceedings on the 4th March, 2014 when the letters were only written on 3rd March, 2014. [27] Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee’s life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could. Any prejudice to the respondent by having the appellant in his place of work could easily have been addressed by sending the appellant on compulsory leave, or interdicting him during the pendency of the disciplinary hearing, so that both the appellant and the respondent would have had time to reflect on and prepare to address the issues arising in the disciplinary process. [28] The fact that the appellant nonetheless, did his best to respond to the allegations made against him and attended the disciplinary proceedings on the due date, did not ameliorate the prejudice that was caused to him by the inadequate notice. It was oppressive, unfair, and unjust, for the respondent to serve the appellant with a letter for a disciplinary hearing that was to take place the next morning. Such haste reduced the disciplinary hearing to a mere formality to achieve that



which the respondent had already predetermined. There was no procedural justice and this vitiated the whole disciplinary process.”

93. I reiterate and apply the above determination to the instant case. With the short timeframe given, it is highly probable that the Claimant did not have time to process the allegations levelled against her and prepare adequately. This is further bearing in mind that the allegations raised against the Claimant were grave in nature and threatened to destroy her career.
94. As it is, the Respondent did not stand to suffer any prejudice by giving the Claimant sufficient notice to appear for the disciplinary hearing. After all, the Claimant was on suspension hence did not pose any threat by her presence at the workplace. What was the rush for?
95. In addition to the short notice, the Respondent declined to grant the Claimant access to the documentary evidence as requested. According to the Respondent, the audit report contained sensitive material concerning other employees and its operations.
96. Granted, this may have been the case. However, the Respondent had the option of redacting the information it considered sensitive. Why didn't it exercise this option?
97. Article 35(1) (b) of *the Constitution* guarantees every person the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.
98. On this issue, my thinking accords with the determination in the case of *Katiba Institute vs Presidents Delivery Unit & 3 others* [2017] eKLR where it was held that:

“ 32. *The Constitution* therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access... [34]. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by *the Constitution* and is protected by the same Constitution.”

99. I further subscribe to the position by the Court in the case of *Rebecca Ann Maina & 2 others vs Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, thus:

“ 34. I agree with Counsel for the Respondent that internal disciplinary proceedings are non judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence...”

100. In light of the foregoing, I cannot help but conclude that the Respondent violated the Claimant's constitutional right to access information and indeed, did not advance any valid grounds to justify this violation.
101. Additionally, I do not hesitate to find that failure by the Respondent to furnish the Claimant with the relevant documentary evidence to allow her mount her defence, impaired her right to a fair hearing.



102. Further to the foregoing, the Respondent's tone in the Notice to Show Cause, and letter suspending the Claimant gives the impression that her fate had been predetermined. I say so because of the following expression contained in the two aforementioned documents:

“The Corporation finds you in contravention of the Employment Act 2007 clause 44 (g)...”

103. In addition, the letter dated 30th August 2022, inviting the Claimant for the disciplinary hearing is couched in part:

“The Board's Human Resource Committee during its meeting held on 30th August 2022, deliberated on your response. It is the opinion of the Committee that as a Principal Finance Officer, you neglected to implement and adhere to the Finance policy which requires officers of your calibre..... Further to this, you also failed to verify payment vouchers in accordance with the laid down procedure...as a result, your neglect of duty occasioned a loss of more than”

104. My interpretation of the foregoing expressions by the Respondent is that the Claimant's summary dismissal was already predetermined and that the disciplinary hearing scheduled for 2nd September 2022 was merely cosmetic.

105. If I may add, the mere fact that an employer issues an employee with a Notice to Show Cause, invites him or her to tender a reply thereto and thereafter grants the employee an opportunity to appear for a disciplinary hearing does not in itself automatically amount to a fair hearing.

106. The entire disciplinary process ought to embody the elements of a fair hearing such as prior and adequate notice, comprehensive particulars of the allegations in question, grant of a request for an adjournment where sufficient grounds are advanced, and right to access information, materials, and evidence to be relied upon by the employer in arriving at its decision.

107. Taking into account the totality of the circumstances herein, the evidence on record as well as the spirit of Section 41 of the Act, I am led to conclude that the Respondent failed to comply with the requirements of procedural fairness in effecting the Claimant's termination. In the end, the Claimant was not accorded a fair hearing.

Reliefs?

108. The Claimant has prayed for an order of reinstatement into employment with full salary, allowances, benefits and privileges. Under the Employment Act, the remedy of reinstatement is provided for under Section 49(3) (a). The factors to be considered by a court of law when deciding whether to grant an order reinstatement, are spelt out in Section 49(4) as follows:

- a. the wishes of the employee;
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c. the practicability of recommending reinstatement or re-engagement;
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer:



- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - h. the value of any severance payable by law;
 - i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - j. any expenses reasonably incurred by the employee as a consequence of the termination;
 - k. any conduct of the employee which to any extent caused or contributed to the termination;
 - l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.
109. Arguing in favour of her reinstatement, the Claimant pleaded that her unjustified termination has unfairly dented and destroyed her reputation, standing and career as an accountant with over 33 years of experience. She has further pleaded that it is unlikely that she will secure another employment in the very competitive field of accounting given her age.
110. The Respondent has argued against any order of reinstatement and termed it untenable. In this regard, the Respondent has pleaded that the relationship and trust between the parties has irretrievably broken down. The Respondent has further submitted that the Claimant held a senior role in the Accounting Department which is a sensitive docket that requires a significant level of trust and confidence between the employer and the employee. In the Respondent's view, the breakdown of trust and confidence between the parties is irreparable.
111. Having considered the rival position taken by both parties over the issue and guided by the considerations set out under Section 49(3) of the Act, it is this Court's view that the remedy of reinstatement would not be suitable in the circumstances.
112. On this score, I will follow the determination in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, where the Court held that reinstatement has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. The Court proceeded to underscore some of the key principles that ought to be applied in considering reinstatement as a remedy. For instance, the traditional common law position that courts will not force parties in a personal relationship to continue in such a relationship against the will of one of them. In the Court's view, that will engender friction, which is not healthy for businesses unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.
113. In light of the foregoing and considering that the Claimant held a relatively senior position at the Respondent Corporation, I am not persuaded that reinstatement is a practical remedy in the circumstances.
114. To this end, the order that commends itself in this case, is an award of damages for unfair termination. As the Court has found that the Claimant's termination was without substance and did not accord



with the requirements of a fair hearing, she is awarded maximum compensation equivalent to 12 months of her gross salary.

115. In arriving at this award, the Court has taken into account the length of the employment relationship, the fact that the Respondent failed to prove that indeed, there was a valid and fair reason to warrant the Claimant's dismissal from employment, the totality of the circumstances attendant to the Claimant's termination from employment as well as the Claimant's prospects of securing comparable or suitable employment with another employer.
116. The separate claim for general damages for violation of the Claimant's constitutional right is declined. As was held in the case of *G M V vs Bank of Africa Kenya Limited* [2013] eKLR, violation of every conceivable contractual statutory and constitutional right does not deserve a separate award of damages.
117. And further, in the persuasive South African decision of *Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G. Dun and others*, Appeal Case No. JA 65/205, it was determined that the purpose of compensation is to make good the employee's loss and not to punish the employer.
118. I fully concur with the above precedents and find that the maximum compensation is adequate in the circumstances.

Orders

119. It is against this background that I enter Judgment in favour of the Claimant against the Respondent in the following manner:
 - a. A declaration that the Claimant's termination from employment was unfair and unlawful.
 - b. The Claimant is awarded compensatory damages in the sum of Kshs 3,430,800.00 being equivalent to twelve (12) months of her gross salary.
 - c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
120. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Rapando

For the Respondent Ms. Muthiani

Court Assistant Millicent Kibet

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 had been guided by Article



159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

