Ndungu v Safaricom Limited (Cause E012 of 2022)
[2024] KEELRC 1801 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1801 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E012 OF 2022

JK GAKERI, J

JULY 11, 2024

BETWEEN

CYRUS WANJOHI NDUNGU ..... CLAIMANT

AND

SAFARICOM LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 12th January, 2022 alleging wrongful termination of employment.

2. The Claimant avers that he was employed by the Respondent on 23rd April, 2007 as a Senior Manager and worked diligently until 15th March, 2021 when his employment was terminated. At the time of termination he was earning a gross salary of Kshs.856,628/=.

3. The Claimant states that he worked diligently and in the best interest of the Respondent and during his employment, he launched the Safaricom Limited Employees Share Option Plan (ESOP) to reward outstanding employees for their performance.

4. The Claimant further avers that the Respondent would set objectives to be achieved within a specified period and provide a budget for the same and an appraisal would be conducted before another set of objectives was prepared.

5. It is the Claimant's case that on the 30th October, 2020 the respondent through a new manager issued the claimant with different and new objectives in the midst of executing the previous objectives.

6. The Claimant states that the second set of objectives were different from the initial ones and the time frame was short but he focused on the areas specified.

7. The Claimant avers that the Respondent did not provide a conducive environment nor consider the deviation of objectives which made it very difficult to achieve the new objectives under the prevailing circumstances.

8. The Claimant alleges that despite the changes the new manager insisted on assessing performance for the months October 2020 to 31st December, 2020 based on the initial budget, target perspectives set out at the beginning of the year.

9. The Claimant further states that when his manager left, he was replaced by a new manager from October 2020, who together with the Chief Finance Officer revisited the process and unilaterally decided that the Claimant had not met the objectives and extended the Performance Improvement Program to December 2020.

10. The Claimant avers that the new Manager's assessment of 65% was arbitrary, erroneous, without justification and an unfair labour practice as the percentage had no basis.

11. The Claimant further states that the manager forwarded the PIP report that did not include the Claimants report to the disciplinary committee.

12. The Claimant avers that on 3rd March, 2021, he was issued with a notice to attend performance hearing and was subsequently dismissed from employment on an account of poor performance vide a letter dated 15th March, 2021.

13. The Claimant states that an appeal against the termination of employment was unsuccessful.

14. It is the Claimant's case that the Respondent caused it be uttered and published or written, printed and published of and concerning the Claimant words to the effect that he was incapable, unsuitable of being a manager with the Respondent which words are untrue.

15. That as a result of the Respondent's actions, the Claimant has been injured in his credit and reputation and has been subject to odium and contempt.

16. It is also the Claimant's case that the disciplinary hearing was premature and convened with ill motive and that it was not properly constituted as there was no Independent Line Manager as required under Clause 7.4 of the Respondents Disciplinary Policy and Procurement Manual.

17. The Claimant states that both the disciplinary committee and the appeal failed to demonstrate that the reason for termination was valid.

18. The Claimant alleges that the Respondent did not follow the substantive and the procedural legal requirements before terminating his employment.

19. Finally, it is the Claimant's case that had his employment not been terminated by the Respondent, he would have worked for the Respondent for a further 9 years therefore prays for Kshs.197,668,751.93 for the 9 years.

20. The Claimant prays for;

    i. A declaration that the dismissal by the Respondent is unfair, unjust and unlawful.

    ii. Damages for unfair, unlawful and wrongful termination of employment services as provided for in Section 49 totalling to 12, 769,973.90 being the equivalent of 12 months' salary.

    iii. 3 months' pay for every completed year pf service (14 years) Kshs.44,694,980.58.

    iv. Dues under ESOP for 4 years based on performance Kshs.7,525,918.94.

v. Bonus for financial year 2021 based on performance (based on 120% KPI) Kshs.2,170,895.55.

vi. General damages for defamation Kshs.4,000,000/=.

vii. Earnings lost due to defamation at the current rate for 108 months Kshs.114,929,764.92.

viii. Pension contribution loss for 108 months Kshs.5,885,690.04.

ix. Airtime Allowance for 108 months Kshs.2,700,000/=.

x. Medical insurance for 9 years Kshs.1,170,000/=.

xi. Life insurance for 9 years Kshs.1,170,000/=.

xii. NSSF employer contribution for 108 months Kshs.21,600,000/=.

xiii. The cost of the suit.

Response

21. In response to the statement of claim, the Respondent filed a response dated 6th December, 2022 confirming that the Claimant had been its employee as a Senior Manager, at a monthly salary at Kshs.856,628.45 and served until 15th March, 2021 when his employment was terminated on an account of poor performance.

22. It is the Respondent's case that according to its Performance Management Policy a "mover" is an employee who fails to meet the set individual business objectives and is required to get into a formal Performance Improvement Plan (P.I.P) so as to improve performance.

23. The Respondent states that the Claimant's performance was reviewed at the end of September 2020 and he had not met the PIP objectives and a recommendation was made for a 3 months extension of the PIP programme to December 2020.

24. The Respondent avers that the PIP objectives related to the Claimants job profile and the respondent provided him with all the resources required to meet the objectives.

25. It is the Respondent's case that regular reviews and discussions were held between the Claimant and the line manager during the PIP process and at the end of the period, the Claimants line manager prepared an assessment report, which was submitted for consideration.

26. The Respondent further avers that despite the extension of the PIP period the Claimant still failed to meet the objectives and scored an overall of 65% which was below the threshold.

27. The Respondent avers that the Claimant was furnished with the PIP assessment report and was invited to attend a virtual performance hearing and allowed to attend the hearing with a colleague employee of his choice.

28. It is the Respondent's case that during the hearing the Claimant admitted to have failed to meet the PIP objectives and failed to give a satisfactory response as to why his performance had not improved despite being given sufficient opportunity to improve.

29. The Respondent avers that after the hearing, the disciplinary committee made a recommendation for termination of the Claimant's employment based on poor performance. The Claimant's employment was terminated vide a letter dated 15th March, 2021.

30. The Respondent avers that the Claimant preferred an appeal against the termination and the decision to terminate his employment for poor performance was upheld.

31. The Respondent maintains that it followed the requisite procedure and observed the principles of natural justice in terminating the Claimant's employment.

32. Finally, it is the Respondent's case that the Claimant is not entitled to the orders and prayers sought in the statement of claim and urges the court to dismiss the claim with costs.

Claimant's evidence

33. On cross-examination, the Claimant testified that he was employed by the Respondent as a senior manager and his duties were as outlined by the Respondent.

34. The witness testified that he was aware of the performance rating scale. Further, the witness testified that he was put on PIP from July to September 2020 by the pervious manager but vide an email dated 13th October, 2020 the PIP period was extended for another three months.

35. The witness testified that he did not agree with the 65% rating and that he was not given ample time to improve his performance.

36. He testified that in his own assessment in January 2021, he had met all the set targets.

37. The witness stated that the line manager's letter on successful completion of the PIP missed out the September assessment. It was his testimony that he did not receive the support that he required.

38. The witness further stated that he had right to be accompanied by a colleague during the hearing held on the 4th March, 2021 and the summary dismissal on poor performance was unfair

Respondent's evidence

39. RW1, Mr. Odhiambo Ooko, on cross-examination confirmed that an employee owns the plan after setting targets and is offered the appropriate support to achieve the set objectives.

40. The witness admitted that the Claimant met some targets but the overall rating was done by the manager. That the performance hearing was for the period October to December 2020 and led to termination of the Claimant's employment as overall, the Claimant was rated as a "mover" which meant below expectations.

41. RW2, Mr. Emanuel Koech, on cross-examination confirmed that he was the immediate supervisor of the Claimant and before him was Ilana before whom was Wangechi. The latter changed departments.

42. The witness testified that the Claimant's performance for 2019/2020 was reviewed in March and he was placed on PIP for 3 months (July to September 2020) and when Wagechi changed department, another PIP was proposed and new targets were set and evaluated at the end of the period and the claimant scored 65% and after attending the performance hearing, a recommendation to dismiss him from employment was reached.

43. The witness maintained that according to the Respondent's Disciplinary Policy and Procedure Manual, a P.I.P comprised 3 calendar months and was extendable on need basis and in the Claimant's case, it was from October to December 2020 but the evaluation was made before the three months lapsed and the period January to March 2021 was not considered.

44. The witness admitted that it was possible to perform less than optimal in December as it is a low month.

45. That the Claimant had accepted the extension of the P.I.P after evaluation by Mr. Ilana.

46. The witness testified on 10th March, 2021, he and the Claimant discussed the objectives and his performance and agreed on all the lines and the score was 65% as computed by the witness.

47. Finally, RWI confirmed that for the period April to June 2020, Wangechi evaluated the Claimant as a mover, which led to the P.I.P from July to September 2021 and as Wangechi had left Mr. Ilana recommended another P.I.P and the Claimant was notified and accepted the same vide email dated 13th October, 2020 from Letoya Mbuthia.

48. On re-examination, the witness testified that targets are usually for a year and a P.I.P is for 3 months.

Claimant's submissions

49. The Claimant's counsel highlighted the following issues for determination;

    i. Whether termination of the Claimant's employment was unfair.

    ii. Whether the Claimants entitled to the orders sought.

50. Counsel submits that termination of the Claimant's employment was unfair and relies on the provisions of Section 43(1) of the *Employment Act*, 2007 that provides as follows;

> " In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

51. Counsel submits that the Claimant was served with a notice for PIP on the 2nd March, 2021 a day to the hearing, to urge that the notice period given was not sufficient.

52. Counsel further submits that the termination letter indicated the Claimant was terminated for poor performance for a whole year being 1st April, 2019 to 31st March, 2020 while the letter inviting the Claimant for hearing indicated that the hearing would cover a period of 2 months from 20th October, 2020 to December 2020.

53. Counsel further submits that the Respondent admitted that P.I.P should be 3 months yet the Claimant was subjected to P.I.P for 2 months' only.

54. Counsel urges that the Respondent's Disciplinary Policy and Procedure Manual required that an employee be issued with a 1st written warning and a final warning letter before being dismissed and in the instant case the claimant was not served with any warning letter contrary to manual.

55. It is counsel's submission that he was terminated without any justification.

56. On the second issue, counsel relies on the holding in Samson Kipkoech Chemai vs Richard Erskine Leaky & 2 others (2017) eKLR where Justice Nduma Nderi stated as follows;

> " However, if the court finds that the contract of service was curtailed unlawfully as it was in the present case, then the employee is entitled to general damages . . ."

57. Counsel submits that the Claimant's employment was unfairly terminated and urges the court to award prayers as sought.

Respondent's submissions

58. Counsel highlighted the following issues for determination;

    i. Whether the termination of the Claimants employment by the Respondent on account of poor performance was substantially justified, fair and lawful.

    ii. Whether the procedure was fair.

    iii. Whether the Claimant is entitled to the reliefs sought.

59. On the first issue counsel submits that poor performance is a valid ground for termination of employment under Section 44 of the *Employment Act*, 2007 and relied on the decision in Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010 where the court observed that;

> " . . . The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance . . ."

60. Counsel submits that the Respondent had put in place mechanisms for measuring performance of employees and the Claimant had a clearly defined job description.

61. Counsel further submits that the targets set for the PIP were in line with the Claimant's job description and areas of improvement identified in the assessment cycle 2019/2020.

62. On the second issue counsel, submits that the Claimant was placed on a Performance Improvement Plan for a period of three months in accordance with the Respondent's policy. It was also submitted that the PIP period was extended and the Claimant attained a rating of 65% which was below the required threshold and he was subjected to a performance hearing and he defended himself.

63. Counsel relies on the holding in Elizer Musambi Nyongesa v Subaru Kenya Limited (2020) eKLR where an employee complained that a notice of less than 24 hours to appear for a hearing was unfair. The court disagreed and held that;

> " Adequate time to prepare for a hearing depends on the circumstances of each case.... He did not seek for more time upon the receipt of the show-cause. He adequately did not ask the disciplinary committee to adjourn the hearing to enable him to bring along a colleague or prepare adequately for the hearing".

64. It is the Respondent's submission that termination of the Claimant's employment on the 15th March, 2021 was procedurally and substantively fair and consistent with the provisions of the law.

65. Counsel urges the court to find that the Claimant is not entitled to the prayers sought in the statement of claim and dismiss the claim with costs.

Analysis and determination

66. The issues for determination are;

    i. Whether termination of the Claimant's employment by the Respondent was unfair.

    ii. Whether the Claimant was defamed by the Respondent.

    iii. Whether the Claimant is entitled to the reliefs sought.

67. On the 1st issue, parties have adopted opposing positions with the Claimant urging that the termination of employment was unfair. The Respondent submits that it was substantively and procedurally fair.

68. As regards termination of employment, both the *Employment Act*, 2007 and the case law are consistent that for termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to terminate the employee's employment and he did so in accordance with fair procedure.

69. The foregoing is fortified by legions of decisions such as Walter Ogal Anuro V Teachers Service Commission (2013) eKLR where Ndolo J. underscored the need to establish a substantive justification for the termination of employment and procedural fairness, a position emphasized by the Court of Appeal in Naima Khamis V Oxford University Press EA Ltd (2017) eKLR.

Reason for termination

70. In the instant case, the Claimant was employed by the Respondent in the 9th February, 2007 as a Senior Manager and his employment was terminated on the 15th March, 2021 on grounds of poor performance having worked for the Respondent for a period of 14 years.

71. Section 45(2)(a) of the *Employment Act* is unambiguous that the employer must prove that it had a valid and fair reason to terminate the employee's employment.

72. In addition, Section 43(2) of the *Employment Act*, 2007 provides that;

> " The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee."

73. In Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR, B.O. Manani J. states as follows;

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

74. Similarly, in Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) eKLR, the Court of Appeal laid it bare that;

> " The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant's services. That is a partly subjective test."

75. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is also guided by the sentiments of Mbaru J. in Jane Samba Mukala V Ol Tukai Lodge Ltd (Supra) as follows;

> " This is important to note as where poor performance is shown to be a reason for termination, the employer is placed at a higher level of proof as outlined under Section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5(8)(c) further outline the policy and practice guidelines that include having a performance evaluation system that can be

used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore, it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated otherwise it would be an easy option for abuse.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee, on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.

Where this procedure as set out under Section 41 of the *Employment Act* is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular . . ."

76. From the evidence on record, it is clear that the Respondent has a performance management system as well as a rating or appraisal system and targets were set and agreed upon between the employee and the Line Manager and evaluated annually.

77. Documents on record reveal that the Claimant's performance for the period 1st April, 2019 to 31st March, 2020 was rated as below expectations and was placed on a P.I.P from July to September and extended from 20th October, 2019 to 20th December, 2020.

78. During the hearing of the case on 4th March, 2024, it emerged that the Claimant did not meet all the targets the P.I.P, a fact he admitted.

79. Although the Claimant had raised the issue of resources and had been advised on what to do, he consented to the P.I.P without any promise that he would receive another employee to assist him meet his targets and the alleged resources appear to have nominally contributed to the failure to meet targets.

80. The termination of employment letter dated 15th March, 2021 is clear that the Respondent terminated the Claimant's employment for unsatisfactory performance for April 2019 to December 2020 even after being placed on a Performance Improvement Plan from 20th October, 2020 to 20th December, 2020.

81. Having been rated as a "mover" from April 2019 to 31st March, 2020 and having shown no remarkable improvement in performance between September to December 2020 under the P.I.Ps, the Respondent had a reasonable basis to believe that the Claimant's performance would not improve.

82. For the foregoing reasons, it is the finding of the court that Respondent has established on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

83. As emphasized by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, Section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory process to be complied by the employer in effecting a termination of employment to ensure procedural fairness.

84. The specific elements of procedural fairness have been elaborated in legion of decisions such as Loice Otieno V Kenya Commercial Bank (2013) eKLR by Radido J. and the Court of Appeal in Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR among others

85. The tenets include; reason(s) for which termination of employment was being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his choice as well as hearing and considering the representations made by the employee and/or the person chosen by the employee.

86. By an internal memo dated 2nd March, 2021, the Respondent invited the Claimant for a virtual performance hearing on the 4th March, 2021 that recommended his termination from employment for poor performance.

87. In Jane Samba Mukala V Ol Tukai Lodge (Supra), Mbaru J. was categorical that;

> " Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of Section 41 of the *Employment Act* which require that such an employee should receive an explanation as to such a reason in the presence of another employee of their own choice".

88. Section 41 of the *Employment Act*, 2007 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 this explanation.

    2. Notwithstanding any other provision of this part, an employer shall before terminating the employment 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."

89. The Claimant's counsel faults the procedure employed by the employer in several respects such as the hearing notice was served one day before the hearing as it was served on 2nd March, 2021 for a hearing scheduled on 4th March, 2021.

90. That the termination was based on performance for the whole year yet the P.I.P related to 2 months only.

91. That the typical duration of a P.I.P was three months yet the Claimants was two (2) months.

92. The Claimant had met his objectives, no 1st warning and warnings were given as provided by the Respondent's Manual and the disciplinary committee was not properly constituted for want of an independent line manager.

93. It is correct that the Respondent accorded the Claimant one day to prepare for his defence in preparation for the hearing which the court finds too short and thus unreasonable in the circumstances, the fact that he did not request for more time notwithstanding.

94. It is trite law that an employee facing charges ought to be given reasonable time to psychologically and materially prepare for the hearing. This enables the employee to reflect on the charges and determine how to formulate and present his or her case and sufficient time to request for any document or

materials he/she may wish to rely on and secure a witness(s), or colleague, if any. One day's notice cannot, in the court's view pass muster.

95. Although the invitation notified the Claimant that he was at liberty to be accompanied by a colleague, it was, in the court's view vitiated by the short duration it accorded the Claimant.

96. Contrary to the Claimant's counsel's submission that the invitation letter referred to the P.I.P only, the internal memo makes reference to the history of the Claimants below per performance from April 2019 to 31st March, 2020 which culminated in the P.I.P by which the Claimant was afforded an opportunity to improve performance.

97. The Respondent cannot be faulted for having made reference to the history of the Claimant's performance.

98. As regards the duration of the P.I.P, the court is in agreement with the Claimant's counsel that it ought to have been 3 months as confirmed by RWII, Mr. Emmanuel Koech, the Claimant's Line Manager at the time and who had discussed the objectives and performance targets of the Claimant before the P.I.P was concluded and subsequently evaluated him.

99. The Claimant did not contest the score of 65% at the evaluation stage and tendered no evidence of having done so in writing as it ought to be.

100. Although the Respondent's Performance Management Policy has no specific duration for a P.I.P, the Respondent's RWII was resolute that a P.I.P was typically for 3 months yet the Claimant was given a 2 months P.I.P as confirmed by both RWI and RWII and no explanation was provided.

101. The invitation to the hearing makes no reference to the period after 20th December, 2020 as it was not part of the P.I.P.

102. Bearing in mind the fact that P.I.P was an opportunity for the Claimant to redeem himself by demonstrating improved performance, it behooved the Respondent to accord him the typical duration of a P.I.P which was three months as in this case the Respondent made its decision on the basis of the two (2) months. In the court's view, the Claimant ought to have been given the three months duration to prove himself. The duration vitiated the P.I.P.

103. Although the Claimant's counsel contends that Claimant met the P.I.P targets as at the end of September under one Wangechi, the Acting Chief Finance Officer, Illana Darcy indicated that he had not and to ensure fairness, the Claimant was placed on another P.I.P and consented to the objectives and performance targets.

104. The Respondent cannot be faulted in that respect.

105. It is also notable that the Respondent did not issue the two warnings provided for by its Disciplinary Policy and Procedure Manual which perhaps would have underscored the seriousness of the Claimant's situation. It is a procedural requirement of the Respondent's Manual and if it served no purpose, it ought not have been provided for.

106. Finally, on the composition of the Disciplinary Committee, it is true that Clause 74 of the Respondent's Disciplinary Policy and Procedure Manual required an Independent Line Manager and the committee in the Claimant's case had none and no explanation was provided.

107. To its credit, during the hearing, the Respondent explained the charges to the Claimant and heard him and determined his appeal.

108. The totality of the foregoing is that the Respondent has failed to prove on a balance of probabilities that the procedure it adopted in terminating the Claimant's employment met the legal threshold rendering the termination of the Claimant's employment procedurally unfair.

Whether the Claimant was defamed

109. According to Winfield and Jolowicz on Torts, 13th Edition; 1990 at page 404 defamation is the publication of a statement which reflects on a person's reputation and tends to lower him and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or void him.

110. In Parmitter V Coupland (1840) 6 M & W 105 at 108 Parker B. defined defamation as a statement or representation "which is calculated to injure the reputation of another by exposing him to hatred contempt or ridicule".

111. Whether or not a representation or statement is defamatory depends on whether it:

    i. Is defamatory in the ordinary or natural meaning or by innuendo;

    ii. Was published or made known to at least one other person; and

    iii. Makes reference to the person directly or indirectly.

112. The Claimant avers that the Respondent caused to be uttered, written, printed and published words to the effect that he was incapable and unsuitable of being a manager with the respondent, which words were untrue.

113. The Respondent vehemently denied the Claimant's allegations and stated that its internal disciplinary proceedings were conducted in accordance with the law and the termination letter was not sent to a third party.

114. Puzzlingly, the Claimant adduced no evidence to demonstrate the alleged defamatory statements or representations, who made them, when they were made and to whom they were made.

115. From the foregoing, the court is not persuaded that the Claimant has placed before the court any material to prove that he was defamed by the Respondent in any manner.

116. To the question whether the Respondent published defamatory statements or representations against the Claimant, the court turns that none has been demonstrated.

Whether the Claimant is entitled to the reliefs sought

Appropriate Relief

117. Having found as above, the court proceeds as follows;

i. Declaration

118. Having found that the Respondent has failed to demonstrate that it terminated the Claimant's employment in accordance with a fair procedure, a declaration that termination of employment was unfair is merited and is granted.

ii. Damages for unlawful termination of employment

119. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*. The court has considered that the Claimant worked for the Respondent for about 14 years, which is long and served diligently. The Claimant appealed the decision and had no previous record of misconduct and expected to serve till retirement. However, the Claimant substantially contributed to the termination of employment.

120. The court is satisfied that equivalent of 2 months' salary is fair.

iii. 3 months' pay for every completed year of service

121. The Claimant adduced no evidence or legal justification for the three (3) months' pay for every completed year of service. The claim lacks particulars and is declined.

iv. ESOP for four (4) years

122. The Claimant did not provide particulars for this claim including how the amount claimed was arrived at. The court is unable to discern the basis of the claim and the amount claimed.

The claim is declined.

v. Bonus for 2021

123. This claim has also not been supported by any evidence as to when it accrued, amount and its approval for payment by the Respondent.

The prayer lacks particulars and is declined.

vi. General damages for defamation

124. Having found that the Claimant has failed to evidentiary prove that he was defamed by the Respondent, the claim for damages is unsustainable and it is accordingly dismissed.

vii. Earnings lost due to defamation

125. This claim lacks supportive evidence and legal justification and it is declined.

viii. Pension, airtime, medical cover, life insurance and NSSF contribution

126. As regards pension contribution for 108 months, airtime for 9 years, medical cover for 9 years, life insurance for 9 years and NSSF employer contributions for 108 months, the Claimant confirmed on cross-examination that he had no claim for pension and NSSF contributions.

127. As regards airtime and insurance, the Claimant admitted that they did not relate to the period he was in employment, but were in futuristic. In other words, the claims are for anticipatory earnings and as they lack particulars and legal basis, they are dismissed.

128. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;

    a. Declaration that termination of employment was unfair.

    b. Equivalent of two (2) months' salary.

129. In the circumstances, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE