



**Ndichu v Kenya Breweries Limited (Cause E472 of 2023)
[2024] KEELRC 2397 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2397 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E472 OF 2023
JK GAKERI & JK GAKERI, JJ
SEPTEMBER 30, 2024**

BETWEEN

DAVID CHEGE NDICHU CLAIMANT

AND

KENYA BREWERIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide a Statement of Claim dated 9th June, 2023 alleging that termination of his employment by the Respondent was unfair, malicious, discriminatory and wrongful.
2. The Claimant's case against the Respondent is that on 11th December, 2020, he was suspended temporarily on account of 6,635 KRA Tax Stamps missing from the keg line safe office pending investigations after which the suspension was lifted vide letter dated 11th January, 2021, though police investigation was still on-going on the matter and a notice to show cause was issued on 8th March, 2021 and he responded, was invited for a virtual hearing, attended and was exonerated from wrong doing vide letter dated 31st April, 2021.
3. The Claimant avers that after the police investigation was concluded, the Respondent suspended him from employment to review the report which found that the Claimant was involved in the loss of Tax Stamps and a notice to show cause followed on 9th March, 2022 on allegations made by the Directorate of Criminal Investigations (D.C.I) and the Director of Public Prosecutions (ODPP) and denies the charges, was invited and attended a disciplinary hearing on 12th April, 2021 and his employment was terminated on 22nd April, 2022, appealed and the decision was affirmed vide letter dated 23rd May, 2022.
4. The Claimant prays for;
 - i. A declaration that termination of the Claimant's employment by the Respondent was unfair and wrongful.



- ii. Damages for constitutional violations and breaches.
- iii. Reinstatement.
- iv. 12 months compensation.
- v. Exemplary damages.
- vi. Damages in respect of discrimination.
- vii. Costs of this suit with interest thereon.

Respondent's case

5. The Respondent admits that the Claimant was its employee.
6. The Respondent's case is that on 5th December, 2020 during the morning shift, a report was received that 6,635 tax stamps worth Kshs.9,952.50 were missing from the Keg Line Safe and the same was confirmed on email and the Claimant and his colleague were suspended on 11th December, 2020 to pave way for investigations which was followed by a notice to show cause, response, invitation to a virtual hearing on 31st March, 2021 and notice was issued to the Claimant that he had been exonerated though a police investigation was on-going which found him liable and recommended arrest and prosecution of the Claimant and one Michael Lipesa, the Team Leader in charge of the previous shift, suspension of the Claimant followed and the case was re-opened on the premise that the Claimant was suspected of having committed a criminal offence.
7. It is the Respondent's case that all procedures were complied with and the Claimant was summarily dismissed from employment but the Respondent commuted it to a termination in view of the years of service.
8. That the Claimant appealed the termination, was notified of the outcome and terminal dues paid in September 2022 and prays for dismissal of the Claimant's case with costs.

Claimant's evidence

9. On cross-examination, the Claimant confirmed that Tax Stamps were missing from the keg office safe to which he had access and was charged in Court on account of the loss.
10. The witness confirmed that he was suspended, invited for a hearing, heard and exonerated.
11. That he was charged in Court with one Michael Lipesa, his case was re-opened and the disciplinary process was repeated under the charge grounded on the charges preferred by the Office of the Director of Public Prosecutions.
12. The charge was that the Claimant was suspected to have committed a criminal offence and breached the Respondent's Disciplinary Policy.
13. That the Respondent found the Claimant culpable and terminated his employment on 22nd April, 2022.
14. The Claimant admitted that he and Michael Lipesa were charged and the Tax Stamps could be used to promote illicit trade and attract liability on the Respondent and there were two parallel investigations.
15. The Claimant admitted that he was paid his terminal dues and had no further claim on them



16. On re-examination, the Claimant testified that termination of his employment was unfair as he had been exonerated by the disciplinary committee and the Respondent did not give him a copy of the report it relied on and he was still innocent.
17. The Claimant cited a case where an employee named Mr. Conell Mwambili was charged but given time for the process to be concluded and was still in employment after he was cleared by the Court.
18. That despite request, the police report was not availed by the disciplinary committee.
19. That he first appeared in Court on 12th April, 2022.

Respondent's evidence

20. RWI, Purity Kariuki confirmed on cross-examination that Tax Stamps were applied for manually and the Claimant's criminal case was on-going.
21. The witness admitted being aware of the Claimant's case but did not know what happened and confirmed that Mr. Mwambili was still in employment after he was found not guilty.
22. That a guilty charge would bring the Respondent's name into disrepute and the Respondent had not received any notice from the KRA or incurred any loss by reason of the missing tax stamps.
23. That Mr. Michael Lipesa's employment was terminated in April 2020 and the Claimant two years later.
24. That the recognition certificate given to the Claimant was issued for the period served.
25. That the police report was not filed and the witness could not tell whether the Claimant was given a copy or it was given to the disciplinary committee.
26. That investigation was necessary and was conducted but RWI did not have the report.
27. That the police were not represented at the hearing.
28. On re-examination, RWI testified that termination of the Claimant's employment was on account of the outcome of the DCI investigation and being charged in Court for stealing by servant and conspiracy to commit a felony.
29. That the Claimant engaged in criminal activities under paragraph 7.13 of the Disciplinary Policy.
30. That although the Respondent had no police report, the Claimant was charged in Court by the Office of the Director of Public Prosecutions.

Claimant's submissions

31. On substantive fairness, counsel submits that since the Respondent had exonerated the Claimant vide letters dated 11th January, 2021 and 21st April, 2021, it could not rely on the criminal charge as a basis for terminating the Claimant's employment and the Disciplinary Manual was clear on what could bring the Respondent's name into disrepute.
32. Counsel urges that since the Respondent had exonerated the Claimant, it ought to have allowed the Criminal Case No. 1649 of 2021 to be determined before taking further reaction as the Claimant was still innocent at the time under paragraph 7.13 of the Disciplinary Policy.
33. That the minutes of the disciplinary hearing captured the fact that if the Court found the Claimant culpable, the Respondent could re-open the internal disciplinary process to urge that the Respondent disregarded the presumption of innocence contrary to the requirements of Section 45(5) of the



Employment Act on justice and equity in light of the fact that it had exonerated him from wrong-doing, awarded the Claimant a Long Service Award, 500 shares and a cash gift of Kshs.20,000/=.

34. Counsel invited the Court to find that the termination of employment was substantively unfair
35. On procedural fairness, counsel invited the Court to rely on paragraph 3.5.8 of the Disciplinary Policy in the context of the letter dated 5th February, 2022 which stated the Respondent was reviewing the Report of the Investigation Officer yet the same was not availed to the Claimant before or during the hearing contrary to Section 4 of the Fair Administrative Action Act.
36. Counsel urges that the Respondent failed to apply paragraph 7.13 of the Disciplinary Policy on termination of employment.
37. On discrimination, counsel urges that by failing to apply paragraph 7.13 of the policy, the Respondent treated the Claimant different from Mr. Conell Mwambili mentioned during the hearing and thus discriminated the Claimant citing *Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro (2017) eKLR*.
38. Reliance was made on the decisions in Naomi Wambui *Makokha V National Police Service Commission & 3 others Pet No. E032 of 2023*, Peter Kilonzo *Kitheka V National Police Service Commission & another Petition 17 of 2023* among others.

Respondent's submissions

39. By 9th September, 2024 when the Court retired to prepare this judgement, the Respondent had not filed submissions.
40. The Claimant filed his submissions on 22nd August, 2024.

Analysis and determination

41. It is common ground that the Claimant was an employee of the Respondent effective 5th September, 2005 serving as a Technical Operator and did so until 22nd April, 2022 when his employment was terminated by the Respondent.
42. It is equally not in dispute that on 5th December, 2020, some 6,635 tax stamps were reported missing from the keg line office safe at the instance of the Claimant after the same was brought to his attention by one Albine Omulando who confirmed as much during the hearing, a fact the Claimant confirmed.
43. The Claimant testified that he called Mr. Michael Lipesa and one Teresia and informed her of the missing reel.
44. Equally not in doubt is the fact that vide letter dated 11th December, 2020, the Respondent suspended the Claimant on full benefits to pave way for investigations into the loss of the 6,635 Tax Stamps and the suspension was lifted vide letter dated 11th January, 2021.
45. The letter was emphatic that;

“We have concluded the internal investigations and the investigation team has exonerated you of any wrong doing on this matter. This letter therefore serves to inform you that your suspension has been lifted with immediate effect.

The letter, however, had a caveat that police investigations were on-going and the Claimant was obligated to co-operate with them and that the internal case would be re-opened if



the police indicated that the Claimant was liable for the loss of Stamps and apply the Respondent's Disciplinary Policy".

46. It is unclear as to when the Respondent reported the matter to the D.C.I.
47. Notably, no investigation report was filed in Court or availed to the Claimant.
48. In a strange turn of events, by letter dated 8th March, 2021, the Respondent alleged that after conduct of the hearing, it had reasonable grounds to believe that the Claimant breached company policy.
49. The letter accused the Claimant of being involved in and or taking part in the events that occasioned the loss of 6,635 KRA Tax Stamps on 4th December, 2020 as he was the last person to access the safe room on 5th December, 2020 at 8.52 hours and was negligent in handling company property by failing to account for the 6,635 Tax Stamps as they went missing during his shift.
50. A response was needed by 11th March, 2021 and he be prepared for a meeting at the office to review the responses.
51. Evidence on record reveal that the Claimant presented a response dated 11th March, 2021 indicating that he reported at work on the morning of December 5th 2020 and explained what he found in the safe at 9.00 am and only picked a full reel of 1001 pieces, evidence Albine Omulando corroborated.
52. The Claimant was invited for a disciplinary hearing vide letter dated 25th March, 2021 and attended the zoom meeting on 31st March, 2021 at 2.30 pm and had been informed of his rights.
53. By letter dated 21st April, 2021, the Respondent informed the Claimant that the disciplinary committee had after due consideration of the totality of the evidence adduced at the hearing exonerated the Claimant of any wrong doing on the matter.
54. The letter informed the Claimant that the Respondent would not take any further action against him.
55. On police investigation, the letter produced the earlier caveat of re-opening the case if police found the Claimant liable for the loss.
56. All was well until about 10 months later when by letter dated 5th February, 2022 the Respondent placed the Claimant on an Investigative Suspension for 30 days "to review and look into the report of the Investigation Officer following the police investigations into the issue of the missing 6,635 Tax Stamps. According to the report, the Investigation Officer, found based on his assessment of the evidence, that you were involved in the loss of the Tax Stamps and he recommended your prosecution."
57. The letter makes reference to the Caveat contained in the letter dated 21st April, 2021 on re-opening of the case.
58. The Respondent indicated that its "inquiry will be done in a way to ensure fairness of all the parties involved."
59. Strangely, the letter required the Claimant to co-operate in the on-going investigations and attend the workplace or relevant place for investigative interview at short notice and answer work related queries.
60. The Chief Shop Steward, Mr. Reuben Amuromo filed a response to the suspension but it is neither signed nor dated.
61. The suspension was lifted vide letter dated 4th March, 2022 after a review of the police investigation report and the Claimant was directed to report to the line manager for allocation of duties.



62. However, in an unexplained turn of events, the Respondent issued a notice to show cause dated 9th March, 2021.
63. The charges centred on the findings and recommendations of the Police Investigation Report and the ODPP decision to charge the Claimant although the Claimant had not been presented to Court to take a plea, which took place on 12th April, 2022.
64. That the Claimant was suspected of having committed a criminal offence against the Company under the charges of stealing by servant and conspiracy to commit a felony.
65. That the suspected criminal actions had cost the Respondent loss of its property Kshs.9,952/= and exposure of Kshs.770,180.80.
66. A response was needed by 14th March, 2022 and the Claimant vide letter dated 14th March, 2022 explained what he found in the safe on the morning of 5th December, 2020 at around 9.52 am and was notified of the missing stamps by Albine Omulando and called Michael Lipesa and also notified the Line Manager, Teresia Wangechi.
67. The Claimant denied having seen or handled the missing Tax Stamps.
68. It is evident that the Claimant was invited to a hearing scheduled for 12th April, 2022 vide letter dated 5th April, 2022, notified of his rights and attended a zoom meeting on 14th April, 2022 and signed the minutes on 22nd April, 2022.
69. He attended in the company of one Mr. Isaac Kapuru and the chief shop steward who was also present had to leave.
70. The Respondent availed three (3) witnesses namely; Norman Kimathi, Albine Omulando and Stephen Njagi who testified.
71. Mr. Norman Kimathi testified that he accompanied the Claimant to the safe to secure Tax Stamps and could only access 1000 stamps at a time and picked 1001 stamps from a new reel, recorded the same and closed the safe.
72. Mr. Albine Omulando found that the previous shift (night) had used stamps but did not deplete the balance from a previous reel but the Claimant had no records of the night shift stamps balance and had picked 1000 stamps from a new reel and the same had been recorded. That he did not find the previous balance of 6,000 stamps.
73. That it is him who noted the missing stamps when he activated usage from the KRA system.
74. That there was handover in the line processing area not in the safe by the previous shift.
75. Mr. Stephen Njagi testified that handover takes place at the shop floor after a shift is concluded and actual balances reflect at the line not the safe and there was no physical handover of balances at the safe and there was no gap in the system.
76. That the loss could only be picked up in the system because of the sequence of numbers on the tax stamps.
77. The Claimant's representative made representations to the meeting.
78. According to him, the Respondent ought to have given the Criminal Court processes time for determination of the case against the Claimant as was the situation in Conell Mwambili's case in UDV.



79. Shockingly, the minutes state that the Claimant had a police investigation report during the hearing yet the Panel did not and could thus not confirm the details he referred to from the document he had.
80. Notably, the disciplinary committee did not make any findings or recommendations at the hearing as the minutes on record reveal.
81. It is unclear to the Court why the disciplinary committee took it upon itself to proceed with a hearing on charges based on a report it neither had nor availed a copy to the Claimant which implicated the Claimant's right to be furnished with a copy of the report and witness statements before the hearing.
82. In the Court's view, it is unclear as to why the Respondent decided to conduct a hearing on the charges grounded on the police investigation report yet it neither availed it nor summon the Investigation Officer, as it was his report. This view is fortified by the fact that the Respondent had already heard the Claimant on the issues relating to the missing tax stamps twice previously and the only difference was the Police Investigation Report which it had reviewed.
83. The termination letter dated 22nd April, 2022 reproduces the charges as per the notice to show cause and articulates the basis of the termination of employment.

Reason for termination of employment

84. The termination letter dated 22nd April, 2022 states that termination of the Claimant's employment was occasioned by the fact that;
 - i. The Claimant had been charged with two counts.
 - ii. Only him and Mr. Michael Lipesa had biometric access to the safe.
 - iii. The Respondent had reasonable and sufficient grounds to believe that the Claimant committed a criminal offence against it to its detriment and thus committed gross misconduct under Section 44(4)(g) of the *Employment Act* and Clause 7.13 of the Disciplinary Policy.
85. Section 44(4)(g) of the *Employment Act* provides inter alia;

An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.
86. As the Claimant has not been shown to have committed a criminal offence, only the second limb of the provision is relevant, namely suspicion based on "reasonable and sufficient grounds of having committed."
87. Intriguingly, the letter of termination makes no reference to the findings or recommendations of the disciplinary committee or anything about the hearing.
88. Other than mentioning that a hearing took place on 14th April, 2022 and the Claimant's attendance and meeting ID on zoom, the letter is silent on the relationship between the hearing and the letter of termination.
89. In the Court's view, this may be because the evidence availed by the three witness did not implicate the Claimant in any wrong doing and the committee found itself in unpalatable circumstances in making a decision on the Claimant's conduct based on the evidence before it and the criminal charges in court, as it had no report or evidence of the Investigation Officer too.
90. The easier option was to find the Claimant culpable based on a report the Committee did not have for purposes of the hearing.



91. Paragraph 7.13 of the Respondent’s Disciplinary Policy states that;
- “Committing an act (whether or not connected with employment) likely to bring the company into serious disrepute inter alia engaging in criminal activities, prostitution, being found guilty of a serious criminal offence and dealing in unlawful drugs” amounted to gross misconduct.
92. Had the Claimant violated this provision?
93. The Court is not persuaded that he had as he is only suspected to have stolen or involved in the stealing of the 6,635 tax stamps valued at Kshs.9,952.50.
94. Significantly, paragraph 8 of the Policy provides that;
- “If, on completion of the investigation and full disciplinary, underperformance and dismissal procedure in Section A, the company is satisfied that gross misconduct has occurred, the result will normally be dismissed without notice or payment in lieu of notice (summary dismissal).”
95. Section 43 of the *Employment Act* provides that;
1. In any claim arising out of termination of a contract, the employer shall be required 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.
 2. 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.
96. Similarly, Section 45(2)(a) and (b) of the Act characterises a termination of employment unfair unless it is shown that the employer had a valid and fair reason to do so.
97. Courts have interpreted Section 43(2) of the *Employment Act* to mean that all that the employer is required to show is that it had a reasonable basis for the belief that it had a reason to terminate the employee’s employment.
98. See *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR.
99. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal stated inter alia;
- “ . . . 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.”
100. In the Court’s view, the foregoing construction of Section 43(2) of the *Employment Act* comports with the so called range or band of reasonable responses test explained by Lord Denning MR in *British Leyland (UK) Ltd V Swift* (1981) I.R.L.R 91.
101. The Claimant’s case is interesting and sounds analogous to a circus with a tragic ending.
102. As adverted to elsewhere in this judgment, the Claimant’s initial suspension in January 2020 was lifted because the investigation team exonerated him from “any wrong doing” as did the letter dated 21st April, 2021 following a full disciplinary hearing on the same charge of missing Tax Stamps.



103. It is notable that although the Respondent suspended the Claimant initially in December 2020 to investigate the loss of tax stamps and conducted a full-fledged disciplinary process pursuant to a notice to show cause dated 8th March, 2021, no internal investigation report or findings were produced or availed to the Claimant.
104. It is therefore not surprising that he was exonerated of any wrong doing.
105. In fact, the Respondent did not file or avail to the Claimant a copy of the police investigation report by an unnamed investigation officer on which it exclusively relied to convict and terminate the Claimant's employment and even then only after the recommendation to charge the Claimant and the colleague was made by the Office of the Director of Public Prosecutions.
106. The absence of an internal investigation report on the alleged loss after investigations and vindication of the Claimant gives a clear impression that the Respondent had nothing on which to justify the Claimant's culpability.
107. Although the letter of termination dated 22nd April, 2020 states that the Respondent had reasonable and sufficient grounds that the Claimant committed a criminal offence, it did not avail any evidence it relied upon in arriving at that this far reaching decision or who and when it was recommended or decision made that the grounds were reasonable and sufficient.
108. This is pertinent because the Respondent did not avail the evidence it relied upon or the elusive police investigation report other than the charge sheet on record filed by the Claimant's counsel.
109. From the foregoing, it is decipherable that the Respondent terminated the Claimant's employment not because it believed that he was involved in the loss of the 6,635 tax stamps or stole them but because he was actually charged in Makadara Criminal Case No. 1649 of 2021 Republic V Michael Nabibya Lipesa and david Chege Ndichu and the case is still on-going.
110. This is also gleaned from the fact that while the Claimant's co-accused's employment was terminated in 2020 for undisclosed reasons, the Claimant's only materialised after the two were charged and it had the Investigation Report from as early as February 2022.
111. Coupled with the fact that the Claimant was given a long service Award, cash award and shares as police action was awaited.
112. In the end, to the question whether the Respondent has proved that it had a valid and fair reason to terminate the Claimant's employment and had reasonable grounds to genuinely believe that it had a reason to do so, the Court returns that the same has not been evidentiary demonstrated.

Procedure

113. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal held inter alia that the elaborate procedure provided by Section 41 of the *Employment Act* was mandatory.
114. The essentials of procedural fairness as articulated in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR are explanation of the grounds of termination in a language understood by the employee, reasons for which termination is being considered, entitlement of the employee to the presence of another employee of his choice when the explanation is made and hearing and considering any representations made by the employee and the person chosen by the employee.
115. In the instance case, it is evident that the Claimant was by a notice to show cause informed the grounds on which termination of his employment was being considered and he responded, he was invited to a



- hearing based on the same allegations and attended and the same were explained to him in the presence of Mr. Isaac Kapuru who as the minutes (unsigned by the committee) reveal made representations.
116. It is however, unclear as to whether the representations were considered as there is no evidence of findings or recommendations of the disciplinary committee.
 117. No doubt the Claimant participated in the proceedings and admitted on cross-examination that the Chairperson of the meeting explained the charges.
 118. Minutes also show that he responded to the charges very briefly perhaps because charges 2, 3 and 4 were purely legal and the Respondent had not availed evidence on which the charges were based.
 119. In fact, the three (3) witnesses who testified at the hearing did not accuse the Claimant of wrong doing and none made reference to the charges the Claimant was facing before the Court or the Respondent's Disciplinary Manual and all of them played a role on that day.
 120. It is thus unclear to the Court what the Respondent took into consideration in determining that it had a reason to terminate the Claimant's employment as the minutes are silent on the findings and recommendation, yet all charges were established.
 121. There is no evidence that the Respondent considered the representations made by the Claimant and Mr. Isaac Kapuru.
 122. More significantly, and closely related to the foregoing is the admission by the Respondent's witness on cross-examination that the Investigation Report, the basis on which the charges were articulated was not shared with the Claimant either before or during the hearing.
 123. On its part, the Committee admitted, as the minutes on record reveal, that it did not have a copy of the Investigation Report and the allegation that the Claimant had a copy of the report at the hearing was not proved as the committee could not confirm whether the document the Claimant had was the Investigation Report.
 124. In sum, the Respondent did not avail the evidence it relied upon to charge the Claimant and find him liable nor were the witness statements of the three witnesses availed prior to or during the hearing.
 125. Could the non-availment of the Investigation Report impeded the Claimant's right to fair hearing?
 126. It is trite law that the right to be heard is a constitutional imperative and availment of the evidence the prosecutor intended to rely on is a major plank of the right to be heard.
 127. The provisions of Section 4(3)(g) of the *Fair Administrative Action Act* cannot be overemphasized.
 128. The sentiments of the Court in *Mereru V Tata Chemicals Magadi Ltd (2023) eKLR* are apt.
 129. In *Postal Corporation of Kenya V Andrew K. Tanui (Supra)*, the Court stated as follows;

“The board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even criminal trials, which are more serious in nature, the accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictments which could torpedo his entire career and destroy his future . . .”
 130. See also *Regent Management Ltd V Wilberforce Ojiambo Oundo (2018) eKLR* and *BATUK Unit Kenya V Mutahi (2023) KECA 1417 (KLR)* among others.



131. In the instant case, since the Investigator's Report was not provided to the Claimant, it is unclear as to how the Respondent expected him to respond to the charges it had formulated against him.
132. Charges against an employee must be grounded on cogent and verifiable evidence comprising documentary evidence or recorded oral testimony which ought to be availed to the employee within reasonable time before the trial to allow sufficient time for preparation of a defence.
133. Non-availment of evidence derogates the employee's right to mount an effective defence and ultimately the right to be heard as was the case here.
134. On the 1st charge, the Claimant had nothing to say but register his disagreement with the charge and the same applies to all charges. In effect, no evidence was placed before the Claimant to rebut or test its veracity.
135. The circumstances of this case are exacerbated by the fact that the disciplinary committee did not have a copy of the report either.
136. It is not in contest that the Respondent made significant effort to comply with the provisions of Section 41 of the *Employment Act*, handled the Claimant's appeal, paid terminal dues and issued the certificate of service, facts the Claimant admitted on cross-examination.
137. That the Claimant co-operated with the investigation teams and acted as directed by the Respondent vide its numerous letters and had no recorded warning.
138. As regards previous practice in dealing with such circumstances, Mr. Isaac Kapuru testified of a case where a Mr. Conell Mwambili was charged in Court but the Respondent accorded him time to have the matter concluded and he is still in employment as RWI confirmed.
139. Although the particulars of the case were not provided by any of the parties, it shows that the Respondent may have differentiated similarly circumscribed persons.
140. From the foregoing, it is the finding of the Court that termination of the Claimant's employment was not conducted in accordance with justice and equity and was thus unfair.

Appropriate Reliefs

i. Declaration

141. Having found that termination of the Claimant's employment by the Respondent was unfair, a declaration to that effect is merited.

ii. Damages for discrimination

142. The particulars of discrimination itemised under paragraph 14 of the Statement of Claim make no reference to any specific form of discrimination, or different treatment of the Claimant in similar circumstances.
143. More significantly, the Claimant's witness statement is silent on the alleged discrimination.
144. The claim lacks supportive evidence and is declined.

iii. Damages for constitutional violation or breaches

145. Neither the Claimant's statement of claim nor witness statement make reference to the constitutional provisions allegedly violated or breached, when and how.



146. The claim lacks not only particulars but also supportive evidence and is declined.

iv. Reinstatement

147. This is one of the remedies provided under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read with Section 49(3)(a) of the *Employment Act*.
148. However, as observed by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union & others* (2014), the remedy is discretionary and is generally available in unique circumstances.
149. The Court is enjoined to exercise its discretion on the basis of the parameters under Section 49(4) of the *Employment Act*.
150. First, although the Claimant appealed the termination of employment, the grounds cited lacked particulars to underline the seriousness of the appeal. The grounds are too generalised.
151. The Claimant contributed to the termination of employment by inter alia failing to notice the short fall until Mr. Aldine Omulando did so.
152. The Respondent paid the Claimant's dues in full and issued a certificate of service.
153. The Claimant had served the Respondent for about 16¹/₂ years which is long as evidenced by Long Service Certificate and awards.
154. The Claimant did not disclose how he mitigated his loss and did not submit on this remedy among others and adduced no evidence on the practicality of reinstatement more than 2 years later and in particular the Respondent's workplace and his readiness to re-join the organization.
155. In the circumstances, the Court is not persuaded that this is an appropriate cause for the remedy of reinstatement and it is accordingly declined.

v. 12 months compensation

156. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation under the provisions of Section 49(1)(c) of the *Employment Act*.
157. In arriving at the quantum of compensation, the Court has taken into consideration the following matters; The Claimant was an employee of the Respondent for about 16¹/₂ years which is reasonably long, though not too long. The Claimant appealed the decision to terminate his employment. The Claimant contributed to the termination of his employment by inter alia failing to notice that some 6,635 tax stamps were missing, a fact he acknowledged. The Respondent paid the Claimant all terminal dues and issued a certificate of service and contrary to the Claimant's allegation of malice on the part of the Respondent, none was established in Court. Lastly, the Claimant neither tendered evidence as to how he mitigated loss nor disclose reasonable expectation of length of service.
158. In the circumstances, the Court is satisfied that the equivalent of four (4) months gross salary is fair.

vi. Exemplary damages

159. The Claimant neither pleaded nor adduced evidence to demonstrate entitlement to exemplary damages.
160. The prayer lacks the necessary supportive evidence and is dismissed.



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

- a. Declaration that termination of employment by the Respondent was unfair.
- b. Equivalent of four (4) months gross salary Kshs.2,161,043.12.
- c. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 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

