

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E112 OF 2023

NATIONAL CEREALS AND PRODUCE BOARD APPELLANT

VERSUS

ERASMUS JOSHUA WANGIO1ST

RESPONDENT

THE ATTORNEY GENERAL2ND

RESPONDENT

(Being an Appeal from the judgment of Honourable S. P. M.

Maureen L. Nabibya delivered on 21 September 2023 in Mombasa

C MELRC 276 of 2018)

JUDGMENT

Background

1. By a Statement of Claim dated 14th September 2018, the 1st Respondent commenced legal proceedings against the Appellant and the 2nd Respondent in the suit mentioned above, seeking the following reliefs against them jointly and severally.

a) A Declaration that the termination of the Claimant's employment by the 1st Respondent was wrongful/unfair, and unlawful.

b) Award the Claimant 12 months' pay as damages for the unfair/unlawful/wrongful termination at KShs. 461,400/-

c) One (1) Month's salary in lieu of Notice-Kshs.38,450/-

d) Outstanding allowances and Overtime of 3668.10 hours worked-KShs. 940,256/-.

e) Unpaid leave days-Kshs.75,421/-.

f) Unpaid Salaries accruing as arrears from December 2011 -March 2018 (78 Months)-Kshs.2,999,100/-.

g) Gratuity.

h) Damages for employment-related defamation of the Claimant by the 1st Respondent.

i) Damages for diminished employability of the Claimant against the 1st Respondent and the 2nd Respondent.

j) Damages for malicious prosecution of the Claimant by the 1st Respondent and 2nd Respondent jointly and severally.

k) Costs of this Claim and interest thereon at Court Rates.

1) Any other relief that the Honourable Court may deem fit to grant.

2. The Appellant opposed the 1st Respondent's claim through a Memorandum of Response dated 7th March 2019, admitting that the 1st Respondent was their employee but claiming that he had neglected his duties, which justified his lawful termination.

3. This Court directed that the appeal be canvassed by way of written submissions. The parties obliged. Their submissions are on record for the Court's consideration.

The 1st Respondent's case before the trial court

4. The 1st Respondent, Erasmus Joshua Wangio, was first employed by the Appellant in 1982 and later worked as a Clerical Assistant from 20th June 1991 until 1st August 1998, when he was promoted to the position of Stores Clerk. His duties involved receiving and dispatching goods to and from the Appellant's stores at Changamwe, Mombasa, and conducting general inspections of the stores and the goods stored therein.
5. On 2 October 2011, during his routine inspection of Store No. 005, the 1st Respondent observed an anomaly. Specifically, stacks of imported fertiliser had been tampered with, and 512 bags of CAN fertiliser were missing. Acting responsibly, he immediately reported the matter to the Assistant Depot Manager, Mr. Omutsan.

Subsequently, Mr. Omutsan and he verified the situation, and the former later reported the matter to the Depot Manager.

6. He further stated that on 3rd October 2011, they recounted the maize stacks only to discover that 26 bags of imported white maize weighing 90 kilograms were also missing. Additionally, it was found that there had been an overpayment of approximately KShs. 4,281.30 to heavy-duty casuals during the same period of the loss.
7. Despite being the officer who discovered and reported the discrepancies, he was arrested on 5th October 2011 in connection with the loss and subsequently charged in Mombasa Chief Magistrate's Criminal Case No. 3187 of 2011 with the offence of breaking into the Appellant's go-down and committing a felony of stealing 512 bags of CAN fertiliser and 26 bags of Maize valued at KShs. 889,400.

8. By a letter dated 20th March 2012, the Appellant accused him of misappropriation and neglect of duty for the loss of 26 bags of imported white maize valued at KShs. 78,000 and 176 bags of CAN fertiliser, valued at KShs. 422,000, as well as an overpayment of KShs. 4,281.30 made to heavy-duty casuals. They demanded that he show cause why disciplinary action should not be taken against him on these charges. Under the same letter, placed him under suspension with effect 19th December 2011, when his salary was stopped pending completion of investigations.
9. By his letter dated 26th March 2012, he provided a detailed response to the show cause letter. By his letter dated 30th March 2012, he appealed against the Appellant's decision to suspend him. His appeal did not attract any action by the Appellant.

10. The 1st Respondent contended that the Appellant defamed him by accusing him of misappropriation and stealing of the fertiliser and maize.
11. He further contended that the Respondents wrongfully and maliciously accused, arrested, charged and prosecuted him in court for the offence of breaking into the building and committing a felony contrary to section 306[a] of the Penal Code, with an alternative charge of failing to prevent a felony contrary to section 392 of the Penal Code.
12. The criminal trial, which lasted several years, ended with his acquittal on 27th October 2017, when the court found no evidence linking him to the alleged theft. The trial court also noted that the 1st Respondent had acted in good faith as the reporting officer and that the prosecution had failed to prove any criminal culpability on his part.

13. Following his acquittal, the 1st Respondent, through a letter dated 26th March 2018, requested reinstatement to his employment and the payment of his withheld dues. However, he was advised that he had been dismissed from his position effective December 2011, by a letter dated 27th April 2012, which he maintains was never served upon him during or after his suspension. He only became aware of his dismissal after making the above enquiry.
14. The alleged termination was unfair, irregular, and carried out in violation of the principles of natural justice and the provisions of Sections 41, 43, and 45 of the Employment Act, 2007. He was condemned without being heard.
15. The 1st Respondent further alleges that the criminal prosecution was malicious, instigated by the Appellant without reasonable cause, and caused him immense psychological distress, reputational harm, and financial hardship. He asserts that the Appellant's actions amounted to defamation and victimization, tarnishing his

career and rendering him unemployable within the public sector.

16. At the time of his suspension, the 1st Respondent earned a monthly salary of KShs 38,450, exclusive of allowances.

Appellant's case before the trial court

17. The Appellant called a witness, Evans Wasike, its Human Resources Manager, to testify on their behalf. The witness admitted that, at all relevant times, the 1st Respondent was employed by the Appellant. However, he stated that the 1st Respondent's duties were extensive and not limited to those outlined in the Claim. He was expected to exercise diligence, honesty, and caution in performing his duties and to avoid any actions that could result in losses to the employer.

18. The witness stated that the termination of the 1st Respondent's employment conformed with due procedure and was for justifiable reasons.

19. There was overwhelming evidence that the 1st Respondent was negligent in his duties, which caused the Appellant to lose 26 bags of imported white maize valued at KShs. 78,000, 176 bags of CAN fertiliser worth KShs. 422,000, and an overpayment of KShs. 4,281.30 to heavy-duty casuals.
20. The witness asserted that this misconduct constituted negligence and dishonesty, providing a valid reason for termination under 44 of the Employment Act, 2007.
21. The Appellant asserted that due process was observed prior to termination. The 1st Respondent was issued with a show cause letter dated 16th December 2011 and was invited to respond in writing. He replied with a letter dated 30th December 2011, which was duly considered. The Appellant considered the response and made certain recommendations.
22. He further stated that the Appellant's Disciplinary Committee met on 12th January 2012 and made further

recommendations. The Staff Advisory Committee further reviewed his case on 14th March 2012.

23. Through a letter dated 20th March 2012, the Appellant issued the 1st Respondent with a suspension letter dated 20th March 2012, giving him a week to show cause why disciplinary action should not be taken against him.
24. The 1st Respondent responded to the suspension through letters dated 26th and 30th March 2012, but his explanations were found unsatisfactory. After further deliberations by the Staff Advisory Committee on 12th April 2012, the Appellant terminated the 1st Respondent's employment through a letter dated 27th April 2012.
25. The Appellant added that the 1st Respondent received all his terminal dues, which he duly collected, confirming that the employment relationship had legally ended.
26. The Appellant contended that the termination met the requirements of both substantive and procedural fairness

as outlined in Sections 43, 44, and 45 of the Employment Act. It argued that negligence is a legitimate reason for termination and that the 1st Respondent's conduct violated both the law and the Respondent's internal human resource policies.

27. The Appellant argued that the claim was legally untenable because the termination was fair and lawful. It further states that the 1st Respondent's suit is statute-barred under Section 90 of the Employment Act, as it was filed six years after his termination in 2012.

28. The Appellant denied the allegations of defamation and malicious prosecution, arguing that it simply reported the matter to the authorities, who independently decided to prosecute based on probable cause. The Appellant pointed out that the trial court did not find the prosecution to be malicious.

2nd Respondent's Case in the trial Court

29. The 2nd Respondent, despite entering appearance and filing the Response to Claim dated 27th February 2019, did not call any witness to testify before the trial court in support of their defence.

Judgment of the Lower Court

30. Upon considering the pleadings, evidence, and submissions by the parties, the Court found that the 1st Respondent had been employed by the Appellant since 1982, advancing through the ranks to become Stores Clerk. The Court noted that on 5th October 2011, a loss of fertiliser and maize was reported at the Mombasa depot, which led to the 1st Respondent's suspension and subsequent arrest on theft allegations.

31. Although the 1st Respondent was later acquitted in Mombasa Criminal Case No. 3187 of 2011, the Appellant proceeded to terminate his employment through a letter dated 27 April 2012, which the 1st Respondent said he only received in 2018.

32. The Court held that the Respondent had not demonstrated that it followed due process in terminating the 1st Respondent's employment. While a show cause letter had been issued and a disciplinary process purportedly undertaken, the Court found that the 1st Respondent was never invited to or present at any disciplinary hearing. The meetings that led to his dismissal were conducted in his absence, in breach of Section 41 of the Employment Act, which guarantees an employee's right to be heard. Consequently, the termination was declared procedurally unfair.
33. On the issue of limitation, the Court held that the claim was not time-barred under Section 90 of the Employment Act. It reasoned that the 1st Respondent was not aware of his termination until 2018, and therefore, time started to run from that date.
34. Regarding remedies, the Court granted the 1st Respondent one month's salary in lieu of notice, totalling

- KShs. 38,450/=. The Court also allowed claims for overtime amounting to KShs. 940,256/= and unpaid leave of KShs. 80,766/=. It was noted that the Respondent did not successfully contest these claims.
35. The Court additionally determined that the 1st Respondent was owed unpaid salaries from December 2011 to March 2018, totaling Kshs. 2,999,100/=:, since there was no proof of payment during that time.
36. Claims for gratuity were rejected because the 1st Respondent had already obtained Kshs.731,000/= from the provident fund. Likewise, the Court dismissed the claims for damages, defamation, reduced employability, and malicious prosecution for insufficient evidence.
37. Thus, the Court found in favour of the 1st Respondent, granting him notice pay, overtime, unpaid leave, salary arrears, plus suit costs and interest from the judgment date.

The Appeal

38. Dissatisfied with the Judgment of the lower Court, the Appellant filed this appeal, setting forth the following grounds: THAT the Learned Magistrate:

1. Erred in Law and in fact in finding that the 1st Respondent was unlawfully and unfairly terminated from employment.

2. Erred in Law and in fact by failing to take into consideration the fact that the Appellant followed due process before reaching a decision to terminate the 1st Respondent from employment.

3. Erred in both law and fact by not considering that the Appellant had valid reasons for terminating the 1st Respondent's employment.

4. Erred in Law and in fact by awarding the 1st Respondent one month's pay in lieu of notice despite the Appellant having clearly demonstrated the 1st Respondent was subjected to a fair procedure before termination.

5. Erred in law and fact by awarding the 1st Respondent a sum of Kenya Shillings Nine Hundred and Forty Thousand Two Hundred and Fifty-Six (Kshs. 940,256.00) as outstanding allowances and overtime despite the claim being statute-barred and clearly not proved.

6. Erred in Law and in fact by awarding the 1st Respondent unpaid leave days for three years preceding termination when, in essence, there was no employment relationship between the Appellant and the 1st Respondent during that period.

7. Erred in Law and in fact by awarding the 1st Respondent unpaid salaries allegedly accruing from December 2011 to March 2018, when in essence, there was no employment relationship between the Appellant and the 1st Respondent during that period.

8. Erred in law and fact when it failed to consider that the Service Commission Act, Cap 185, Laws of Kenya (repealed), prohibited the payment of salaries to the 1st Respondent during the suspension period.

9. Erred in Law and in fact in failing to consider the nature of the evidence placed before her by the Appellant in opposition to the 1st Respondent's Claim.

10. The Learned Magistrate's Judgment was contrary to the weight of evidence and law, thereby rendering it proper to be set aside.

Appellant's submissions

39. The Appellant contends that the 1st Respondent's employment was lawfully and procedurally terminated after investigations into a theft at the Mombasa depot, where the Respondent served as a stores clerk. It was alleged that the Respondent's negligence and failure to follow procedure led to the loss of fertiliser and maize valued at approximately Kshs. 504,281.30.

40. The Appellant states that the Respondent was served with a show cause letter dated 20th March 2012, to which he replied on 26th March 2012. Subsequently, he was suspended from duty to facilitate investigations. The

disciplinary committee convened on 12th January 2012, 14th March, and 12th April 2012 to review the matter. Minutes of the disciplinary meetings were presented as evidence, and the committee ultimately recommended the termination of the Respondent's employment, officially communicated through a letter dated 27th April 2012.

41. The Appellant further argues that the Respondent's claim was filed outside the statutory limitation period under Section 90 of the Employment Act, which restricts the filing of employment-related claims to within three years from the date of termination. It submits that the dismissal occurred in April 2012, yet the claim was not filed until 2018, more than five years later. The trial court, therefore, erred in holding that the claim was not time-barred, relying instead on the Respondent's assertion that he became aware of his termination significantly later.

42. It is also submitted that the lower court erred in finding the termination unfair, despite clear evidence of due

process. The Appellant complied with Sections 41, 43, and 45 of the Employment Act, having issued a show cause letter, conducted investigations, and allowed the Respondent to respond before making a determination. It relies on the decisions in **Pius Machafu Isindu v Lavington Security Guards Ltd [2017] eKLR** and **National Council of Churches of Kenya v Gachoki [2024] KEELRC 1794 (KLR)**, which affirm that termination is fair where an employer establishes valid reasons and follows due process.

43. Regarding the reliefs granted, the Appellant argues that the award of one month's salary in lieu of notice was inappropriate since the Respondent was dismissed for gross misconduct under Section 44(4)(c) of the Employment Act. It also contests the award of Kshs. 940,256 for overtime, claiming that the evidence was unsubstantiated as the Respondent failed to produce any authentic attendance or overtime records to support the amount claimed. The Appellant cites the cases of **James**

Kyama v Muthaiga Golf Club [2022] eKLR and Charles Ogola & 2 Others v Mansion Hart Kenya Ltd [2019] eKLR to support the principle that the 1st Respondent bore the burden of proof concerning alleged overtime work.

44. Similarly, the Appellant asserts that the award for unpaid leave was erroneous because no evidence was tendered to show accrued or unutilized leave days. The court further exceeded the pleaded amount, thereby granting reliefs beyond the scope of the pleadings.
45. On the claim for unpaid salaries between December 2011 and March 2018, the Appellant argues that it was untenable since the Respondent had been suspended without pay pending investigations and was later terminated in April 2012. It maintains that the Employment Act and the former Service Commission Act (Cap 185) permitted suspension without pay in such circumstances.

1st Respondent's submissions

46. The 1st Respondent states that after being acquitted on 27 October 2017 of the criminal charges against him, he sought reinstatement. In response, the Appellant issued him a dismissal letter dated 27 April 2012, which he received only on 27 March 2018.
47. He argues that, since the letter was served on him for the very first time on 27th March 2018, this date should be regarded as the termination date of his employment, and for the purposes of this suit, as the date when the cause of action arose.
48. To support his assertion that the termination letter was not delivered to him on or around the date the Appellant purportedly issued it, the 1st Respondent urges the Court to observe that the letter is indicated to have been sent via ordinary post to "P.O. Box Msau via Voi," rather than to his known postal address, P.O. Box 84696, Mombasa, which obtained in his employment records.

49. The 1st Respondent relied on the case of **Shah v Padamshi [1982] eKLR**, where the court held that there is no presumption of delivery for letters sent by ordinary post, and such presumption only applies to registered post under section 3(5) of the Interpretation and General Provisions Act.
50. He also cited **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR**, where the court emphasised that an employer must prove the employee received the termination letter; otherwise, it is assumed the employee only learnt of the termination upon formal notification.
51. As such, the trial court did not err in holding that the time for purposes of the cause of action herein began running from 27th March 2018, when he first received the dismissal letter.
52. It is further submitted that the termination was both substantively unjustified and procedurally unfair. Reliance

has been placed on **Sections 43, 45 and 47(5) of the Employment Act, 2007**, and the Court of Appeal decision in **Pius Machafu Isindu v Lavington Security Guards LTD [2017] eKLR**. Additionally, it was Appellant [the employer] who bore the burden of proving that termination was based on valid, fair, and justifiable reasons and that due process was followed.

53. The purported grounds for dismissal, namely negligence, loss of fertiliser and maize, and excess payment to casual workers, were unsubstantiated. The 1st Respondent highlighted discrepancies within the internal investigation reports and disciplinary committee minutes, which assigned different losses to various officers, including his supervisor, Mr. Omutsani, who was also implicated in the alleged theft. No evidence linked him directly to the alleged infractions.

54. The 1st Respondent also contends that the Appellant failed to comply with the principles of procedural fairness as outlined in Section 41 of the Employment Act and

Articles 25(c), 47(1), and 50(1) of the Constitution, which safeguard the right to a fair hearing. To buttress this point, he relies on the case of **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, wherein the Court of Appeal emphasised that a fair hearing requires the satisfaction of four critical elements: Explanation of the grounds for termination; opportunity to respond; the right to be accompanied by a representative; and consideration of the employee's submissions.

55. He urges the Court to note and conclude that none of these requirements were met, as no valid show-cause letter or minutes of a disciplinary hearing were produced.
56. He argued that the alleged internal memo dated 16th December 2011 cannot be validly regarded as a show-cause letter. It was simply a request for an explanation of stock variance. He doubts that any disciplinary meeting took place on 19 December 2011, as the Appellant did not produce any record to demonstrate its occurrence.

57. The 1st Respondent added that as a member of the Kenya Union of Commercial Food and Allied Workers (KUCFAW), evidenced by a pay slip showing deduction of union dues, his union should have been informed and allowed to participate in the process. This did not happen. Consequently, the alleged disciplinary process was fundamentally flawed. To support this submission, he has cited the case of **Sammy Bett & 4 Others v National Cereals and Produce Board [2014] eKLR,**

58. The 1st Respondent argues that, having established wrongful dismissal, he was entitled to compensation under Section 49(1)(c) of the Employment Act, which allows for up to twelve months' salary as damages. He was further entitled to notice pay under section 36 of the Employment Act. As such, the trial Court did not err in awarding the two reliefs under these heads.

59. The 1st Respondent submits further that he placed before the trial Court sufficient evidence demonstrating 3,668.10

hours of overtime, and earned but untaken leave days, that justify the Court's award of Kshs. 940,256 and Kshs. 75,421, under the two heads respectively. He urges this Court to note that the Appellant did not rebut his evidence.

60. Lastly, he argues that the learned trial Magistrate was correct in awarding him unpaid salaries and allowances from December 2011 to March 2018 (Kshs. 2,999,100), as he was unlawfully denied payment of the same while on suspension, contrary to Section 18(4) of the Employment Act and Articles 10, 28, and 41 of the Constitution.

Analysis and determination

61. As this is a first appeal, the Court's duty is to re-examine the record evidence, review it comprehensively, and form its own independent conclusions, keeping in mind that it neither observed nor heard the witnesses testify. This

principle was firmly established in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123.**

62. I have carefully considered the pleadings and evidence that were placed forth before the trial court, and submissions by both parties, before this Court, as well as the authorities cited. In my considered view, three main issues arise for determination in this appeal: first, whether the suit before the trial court was time-barred; second, whether the termination of the 1st Respondent's employment was lawful and fair; and third, whether the remedies granted by the trial court were justified.

Was the suit time-barred?

63. To answer this question, one needs to interrogate and render oneself on when the cause of action arose for initiation of the lower court suit. The Appellant asserts that the 1st Respondent's claim before the trial court was time-barred by dint of the provisions of section 90 of the

Employment Act, and the trial Court erred in law when it didn't see it as such.

64. From the record of the lower court, it is clear that the Appellant argued that the cause of action arose on 27th April 2012, when the 1st Respondent was dismissed from employment via a letter of the same date. The 1st Respondent held a different view, asserting that the cause of action arose on 27th March 2018, when the Appellant first informed him that he was no longer its employee, having been dismissed on 27th April 2012.
65. In my view, a cause of action is a bundle of circumstances that constitute grounds for initiating a civil action for redress in a court of law. In other words, a series of circumstances that gives the person initiating the action the right to sue under the applicable law. In a dispute arising under the Employment Act, or out of a contract of employment, one of such circumstances in the bundle, and more particularly in a dispute regarding the fairness

of termination of an employee's employment, would be the manner in which the affected employee was notified of the termination and the date it occurred.

66. Whether the termination letter was served on or around the date appearing on it was a contentious issue. In paragraphs 18 -20 of his Memorandum of Claim, the 1st Respondent averred;

"18. Subsequent to the acquittal, by way of a letter dated 26.03.2018, which the Claimant delivered to the 1st Respondent on 27.03.2018, seeking to be reinstated into his position, of Stores Clerk, together with the payment of my outstanding salaries and allowances.

19. It was on 27.03.2018, that the 1st Respondent served the Claimant with a letter dated 27.04.2012, bespeaking the dismissal of the Claimant from employment effective 19th December,2011.

20. All along, the Claimant had been on suspension since December 2011. When the criminal case ended, it is only upon inquiry as to his case for suspension that

the Claimant was informed of his dismissal on 27.03.2018.”

67. Notwithstanding these clearly and elaborately presented material facts by the 1st Respondent, the Appellant denied the same in a generalised manner, under paragraph 13 of their Memorandum of Response, thus;

“13. The 1st Respondent denies all the contents of paragraphs 7-36 of the Memorandum of Claim and puts the Claimant to strict proof thereof.”

In my view, this wasn't a sufficient traverse of the facts brought out hereinabove.

68. This Court holds that the facts regarding when and how the alleged dismissal letter was served were material facts that the Appellant needed to plead and prove to discount the 1st Respondent's assertion that he was not notified of the termination until after his acquittal in the criminal case, and when he sought reinstatement.

69. Additionally, this Court has carefully considered the Respondent's witness's statement dated 23rd May 2019, which was adopted as his evidence in chief before the trial Court, and observes that it did not address the crucial issue of service of the dismissal letter at all. In my view, this signifies one thing: the non-service of the letter, as explained by the 1st Respondent.

70. This Court has not lost sight of the fact that the Appellant's witness, in his evidence under cross-examination, in a belated but unconvincing attempt to explain the service stated;

".....The decisions were communicated through his official address, given P.O. BOX MUSAU VIA VOI. We used the normal address."

Unconvincing because, upon carefully examining all the correspondence from the Appellant to the 1st Respondent before the letter, none of them bear this address. Therefore, it cannot be claimed to be his last known

address. Furthermore, the Appellant did not provide any evidence to show that this was the address in his employment records or that it had been used previously.

71. In employment disputes where the delivery of a termination or dismissal letter is challenged, it is the employer's responsibility to prove that the letter was served. In cases where the employer claims that the letter was sent by regular mail, they cannot expect a presumption of service without bringing forth cogent evidence. Presumptions of service of documents are safely made only when there is a certificate of postage. See also **Shah v Padamshi [1982]**, **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR**, cited by Counsel for the 1st Respondent.

72. The Appellant's evidence before the trial Court was, and submissions before this Court on this crucial issue of

service are, too scanty. For instance, they do not say when the postage was done, if at all, and by whom.

73. In conclusion, I arrive at the inevitable conclusion that the latter, dated 27th April 2012, was only served on the 1st Respondent on 26th March 2018. In my view, termination of an employee's employment by written communication becomes effective upon receipt of the notification. The 1st Respondent was notified of the termination on 27th March 2018. For purposes of section 90 of the Employment Act, the time for the claim of unfair termination started running on this date. His claim before the trial court was not time-barred. The learned trial Magistrate cannot be faulted for not holding otherwise.

Whether the 1st Respondent was wrongfully or unfairly dismissed

74. In my view, the learned trial Magistrate's conclusion to the effect that dismissal of the 1st Respondent was unfair cannot be faulted.

75. Clearly, section 45 of the Employment Act 2007 outlines what constitutes fairness in matters of termination of employment or summary dismissal of an employee. A fair termination or summary dismissal must be based on fair procedures and valid, fair reasons [substantive fairness]. When either or both of these elements are absent in the termination or summary dismissal, the termination or summary dismissal shall be deemed unfair.
76. Section 41 of the Employment Act provides for procedural fairness in the Kenyan context. The section provides a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. The procedure comprises three principal ingredients: notification, hearing, and consideration. See also **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**
77. The absence of any or all of the specified ingredients renders the termination or summary dismissal unfair. This

Court notes that a show cause letter was issued to the 1st Respondent, to which he responded. In my view, this fulfils the first requirement. However, from the material before the trial Magistrate, she correctly observed that no disciplinary hearing was held, denying the 1st Respondent the chance to cross-examine his accusers or the employer's witnesses, to examine relevant documents, or to be heard in his defence. As a result, the second requirement was not established. An opportunity for an accused employee to be heard is a constitutional requirement. Even the most serious offender is entitled to a hearing. See Court of **Appeal in Bank of Kenya Ltd v Yator (Civil Appeal No. 87 of 2018) [2021] KECA 95 (KLR)**

78. The Appellant's submissions suggest that, since the 1st Respondent was issued a show cause letter and subsequently responded to it, this constituted an opportunity granted to defend himself, and the response served as a defence. With the utmost respect, such

reasoning demonstrates a disregard for the explicit provisions of section 41 of the Act, as well as a series of judicial decisions from this court, the Court of Appeal, and the Supreme Court.

79. Consequently, I agree with the trial Court that the dismissal of the 1st Respondent was procedurally unfair.

Whether the 1st Respondent was entitled to the reliefs granted

80. The Appellant challenges the award of unpaid salaries from December 2011 to March 2018. They submitted, first, that the 1st Respondent was not entitled to any remuneration for that period between 19th December 2011 and 27th April 2012, as he was on suspension. To support this point, they rely on what they term section 18[3] of the repealed Service Act. I have carefully read that repealed Act; it did not have section 18— one wonders where the Appellant obtained it.

81. I take a clear view that the 1st Respondent was entitled to his salary for the period December 2011 to March 2012. There is no doubt that the decision to exclude the 1st Respondent from

service was expressed to take effect retrospectively. The retrospective application also affected his salary payments. Further, the suspension was indefinite. The purpose for which it was being handed down to the 1st Respondent was not expressed in the latter.

82. In a legal framework where the right to fair labour practices [Article 41 of the Constitution of Kenya] and fair administrative action [Article 47] are fundamental and applicable, an employer cannot arbitrarily and whimsically deprive an employee of their entitled salary. This is especially true in cases like the 1st Respondent's, where the deprivation was based on a decision with retrospective effect. Additionally, the Employment Act 2007 prohibits depriving an employee of his salary except in the specific circumstances outlined in section 18 of the Act.

83. In my view, the word "suspension" in the world of work means a temporary privation or deprivation, cessation or stoppage of or from the privileges and duties of a person. The word conveys a temporary or transient period during which the employee is

kept away from his or her regular occupation or calling. It can be either disciplinary or administrative. A suspension is neither a termination nor a dismissal of an employee from employment, therefore. Temporality is the key character of the aspect of suspension.

84. The Supreme Court of Nigeria in the case of **Longe v. First Bank of Nigeria PLC [2010] 6NWLR** held that;

“Suspension by its legal colouration in statutory flavoured employment [and by implication, master-servant] is not a demotion and does not entail a diminution of rank, office, or position. It cannot import a diminution of the rights of the employee given to him under the law. An employer suspending an employee from work only means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office. Hence, it is trite that the contemplation of the law is that suspension would not extinguish the employee status as an employee nor jettison the employment contract.”

85. In the Nigerian case of **Duru v. Skye Bank Plc [2015]**

NLLR neatly elaborated it, thus;

“During the period of suspension of an employee, the employment is neither terminated nor dismissed. Rather, it is merely put on hold to enable the employer to properly carry out its investigations into its allegations against the employee. For the period of the employee’s indefinite suspension without pay, he is still in the employment of the employer and so is entitled to his salaries and allowances.”

86. Additionally, in the case of Chief Justice and President of the Supreme Court of Kenya & and **Judicial Service Commission vs Bryan Mandila Khaemba Civil Application No. 299 of 2019 [Ur. 267/2019]** The Supreme Court of Kenya Stated;

*“The Court further follows the holding by Rika J in **Peterson Ndung’u & 5 Others -Versus- Kenya Power and Lighting** that the withholding of an employee’s pay during the period of suspension has no*

basis and validity under the Employment Act, 2007. That principle applies as the minimum term and condition of service under the Employment Act, 2007. Needless to state, it is a principle within the purview of Article 41 of the Constitution on fair labour practices. Further, the Court considers that the minimum terms and conditions of service under the Employment Act, 2007 constitute such rights that are incorporated in the Bill of Rights when Constitution provides in Article 19 (3) (b) that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Chapter 4 of Constitution on the Bill of Rights.

Thus, the Court returns that it is unconstitutional for an employer, by policy or regulation, to impose suspension with nil pay as an administrative or executive interlocutory disciplinary measure pending the finalisation of the disciplinary process. The Court

considers that it amounts to unfair labour practices in contravention of Article 41 of the Constitution for an employer to impose suspension, more so an indefinite suspension, with nil pay. ...”

87. In the High Court of Allahabad, India, case of **Naresh Chandra Gupta vs. U.P. State Road 2003[3] AWC 1931**, the court stated and I am persuaded:

“34. Reference may be made to the decision of the Apex Court in R.P. Kapur’s case [supra], relied upon by the learned counsel for the petitioner. In R.P. Kapur’s case [supra], their Lordships of the Supreme Court laid down as follows [paragraph 11 of the said AIR]:

“11. The general principle, therefore, is that an employer can suspend an employee pending an inquiry into his conduct, and the only question that can arise on such suspension will relate to the payment during the period of suspension. If there is no express term in the contract relating to the

suspension and payment during such suspension or if there is no statutory provision in any law or rule, the employee is entitled to his full remuneration for the period of his suspension; and on the other hand, if there is a term in this respect in the contract or there is a provision in the statute or the rules framed under providing for the scale of payment during the suspension, the payment would be in accordance therewith. These general principles, in our opinion, apply with equal force where the Government is the employer and the public servant is the employee...But what amount should be paid to the public servant during such suspension will depend upon the provisions of the statute or rule in that connection. If there is such a provision, the payment during the suspension will be in accordance therewith. But if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension. This suspension must be distinguished from

suspension as a punishment, which is a different matter altogether.”

88. The Appellant, having failed to demonstrate that the 1st Respondent's employment contract provided for suspension without pay, the reason why, in the case of an indefinite suspension, the 1st Respondent was placed on nil pay, the law upon which they relied, and the 1st Respondent having been acquitted of the criminal charges, did not establish a justification for depriving the 1st Respondent of his salary during the suspension period. The learned trial Magistrate did not err in awarding the unpaid remuneration for the period the Respondent was on suspension.

89. The 1st Respondent sought before the trial Court, and the Court awarded him overtime compensation worked but not compensated for. He presented overtime sheets that clearly showed the number of overtime hours he had accumulated. Despite this documentary evidence, the Appellant did not present any evidence to discount the

authenticity of the documents, the hours shown thereon, or to demonstrate that the 1st Respondent was paid for overtime. The learned trial Magistrate wouldn't have any basis to decline an award under the head.

90. Having taken the position as I have hereinabove on the effect of an indefinite suspension on the affected employee's rights and benefits, I find no difficulty in concluding that the 1st Respondent was entitled to leave pay during.

91. In the upshot, I find that the appeal lacks merit. It is hereby dismissed with costs.

Read Signed and Delivered this 27th day of November 2025.

OCHARO KEBIRA

JUDGE

ORIGINAL