

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. E952 OF 2022

(Before Hon. Justice Abuodha Jorum Nelson)

JOHN WESISA NAMASWA.....
CLAIMANT

-VERSUS-

THE INSPECTOR GENERAL OF POLICE.....1ST
RESPONDENT

THE NATIONAL POLICE SERVICE
COMMISSION.....2ND
RESPONDENT

THE HONOURABLE ATTORNEY
GENERAL.....3RD
RESPONDENT

JUDGMENT

1. The Claimant through a Statement of Claim dated 19th
December, 2022 pleaded inter alia as follows: -

- a. *The Claimant averred that he was a bona fide employee of the Kenya Police Service duly employed on the 26th of April, 2015 as a police constable and served in this capacity up to the time of his impugned dismissal.*
- b. *The Claimant averred that he served the Respondents diligently and faithfully with little to no concerns from his immediate supervisors on either his discipline, performance of his duties or his dedication to the service.*
- c. *The Claimant averred that on or about the month of April 2020 while stationed at GSU-Headquarters-Ruaraka serving his country as No.103505 Police Constable John Wesisa Namaswa, he became greatly*

ill, lost his mental faculties and found himself undergoing treatment at Eden Therapy Centre in BuruBuru where he had been put on therapy sessions for traumatic treatment arising from other traumatic experiences, the untimely loss of his father.

- d. The Claimant averred that as a result of the said therapeutic treatment, he became self-conscious sometime in December 2020 and went back to camp. That upon returning to camp, he learnt that he had been declared a deserter by the Kenya Police Service and was informed that he would be charged with the offence of absenting himself from the service without leave.
- e. The Claimant averred that on or about the 28th December, 2020 he was charged with the said offence and pursuant to Chapter 30 of the Service Standing Orders, he expected to be accorded a fair hearing that complied with the provisions of Article 47 on the right to fair Administrative Action and Article 50 on the right to fair hearing as espoused under the Constitution of Kenya, 2010.
- f. The Claimant averred that he was made to sign against some pieces of paper which he later learnt were charge sheets for his disciplinary action but he was never formally charged before any disciplinary committee or called upon to tender his representations or defence on the charges levelled against him.
- g. The Claimant averred that on the 11th of January 2021, he was served with a suspension letter and was effectively suspended from duty without any pay and ordered to report to Kimilili Police Station regularly for accountability.
- h. The Claimant averred that he complied with the conditions of his suspension as directed and reported regularly at Kimilili Police Station from the 27th of January 2021 up to the 3rd August, 2021.
- i. The Claimant averred that he was on suspension for over 7 months when sometime in August 2021, he was informed by the Officer Commanding Station, Kimilili Police Station that he had been dismissed from the Kenya Police Service with effect from 23rd April, 2020.
- j. The Claimant averred that he learnt the communication of his dismissal was made to the Officer Commanding Kimilili Police Station vide a signal dated 12th August, 2021 under ref PF/103505/2015034267.
- k. The Claimant averred that he was perturbed by the manner in which he was dismissed as the same seems to have been effected retrospectively, the aforementioned signal indicates he was dismissed from the service with effect from 23rd April, 2020 but the same was only communicated to him on 12th August, 2021.
- l. The Claimant averred that the foregoing indicates that the Respondents had already dismissed him from the service summarily and the purported suspension and disciplinary proceedings were only meant to sanitize their irregular, unprocedural and illegal actions.
- m. The Claimant averred that during his suspension, he was never paid any salary by the Respondents despite being still legally in their service and before his termination, he was earning a gross salary of Kshs. 49,290/=.

- n. *The Claimant averred that his dismissal was irregular and illegal as he was never subjected to any disciplinary proceedings in violation to his rights to fair hearing, fair labour practices and fair administrative action.*
2. The Claimant in the upshot prayed for the following against the Respondent;
- i. A declaration that the Claimant's dismissal from Kenya Police Service was done in gross violation of his rights to fair administrative action, fair hearing and fair labour practices hence the same is illegal null and void *ab initio*.
 - ii. An order directing the Respondents to reinstate the Claimant back to work without any loss as to rank or status and with full salary and benefits.
 - iii. An order directing the Respondents to pay the Claimant all his withheld salaries and benefits.
 - iv. 12 months' salary as compensation for unfair termination of Employment.
 - v. General damages for unfair termination.
 - vi. Costs and interest of the suit.
3. The 2nd Respondent filed their Statement of Defence dated 9th February, 2022 and averred inter alia:
- a. *The 2nd Respondent averred that the Claimant had been a truant employee having been disciplined on three different occasions for absenting himself without leave contrary to section 88(2) and subsection 1(h) of Eight Schedule of the National Police Service Act. That on or about 19th November, 2018 and 24th November, 2018, the Claimant while on duty in GSU Aremiet Camp within Isiolo County absented himself without leave for a period of 5 days. He was subjected to disciplinary hearing to which he admitted the same and was fined Kshs.1500 and to pay Kshs. 3483 being salary for the 5 days he was AWAL.*

- b. The 2nd Respondent averred that subsequently, between 13th February, 2020 and 24th February, 2020 while stationed at GSU Headquarters' in Ruaraka, the Claimant absented himself without leave for a period of 11 days. He was subjected to disciplinary hearing where he stated that he had emotional stress which in turn makes him forget to report to duty and he had sought treatment from an African medicine doctor. The Claimant was fined Kshs. 2000 and to pay Kshs. 8,356 being salary for the 11 days he was AWAL.
- c. The 2nd Respondent further averred that the Claimant between 17th March, 2020 and 25th March, 2020 while stationed at GSU Headquarters' in Ruaka absented himself without leave for a period of 8 days. He was fined 1500 and was to pay Kshs.5,894 being salary for the 8 days he was AWAL.
- d. The 2nd Respondent averred that the Claimant went AWAL from 13th April, 2020 for a period of 253 days without leave only to resurface on 22nd December, 2020 claiming to have lost his mental faculties.
- e. The 2nd Respondent averred that the Claimant was not suffering from any mental illness and in an attempt to verify the same and the various letters from Eden Therapy Centre, Presiding Officer of the impaneled disciplinary committee in the presence of the Claimant went to the alleged Therapy Centre and found that the same was just a single room but not a therapy centre. Furthermore, the owner refused to give them any information relating to the alleged treatment centre.
- f. The 2nd Respondent averred that the disciplinary committee having refuted the issue of his treatment at Eden Therapy Centre, the Claimant did not have an explanation as to his whereabouts for the 253 days he was absent from work without leave.
- g. The 2nd Respondent averred that disciplinary committee conducted a hearing on 28th December 2020 where the accused was heard and in turn pleaded guilty.

- h. The 2nd Respondent averred that due to the grievous nature of the Claimant's offence, the same was transmitted up the chain of command and then to the 2nd Respondent to render an outcome.*
- i. The 2nd Respondent averred that the Claimant was suspended from duty and with the suspension of his powers and benefits in accordance with the National Police Service Commission (Discipline) Regulations.*
- j. The 2nd Respondent deliberated upon the Claimant's case and the various disciplinary cases and concluded that the Claimant did not deserve to continue serving in the Police Service as his disciplinary cases showed his disinterest in the disciplined service.*
- k. The 2nd Respondent averred that the Claimant was dismissed from service with effect from 23rd April, 2020 the date he was declared a deserter this was communicated to him in a letter dated 13th August, 2021.*

4. The 2nd Respondent in the upshot prayed as against the Claimant that the Claimant's suit be dismissed with costs.

5.

The 3rd Respondent filed their Statement of Defence dated 1st February, 2023 and averred inter alia:

- i. The 3rd Respondent averred that the Claimant was subject to provisions of National Police Service Act No. 11 of 2011, the Service Standing Orders and the National Police Service Commission (Discipline) Regulations 2015.*
- ii. The 3rd Respondent averred that the Claimant during his service at the General Service Unit (GSU) he did not earn himself any awards of commendations but had one unheeded warning letter and three convictions of disciplinary offences. That the Claimant*

had a history of absenting without leave as illustrated by the 2nd Respondent above.

iii. The 3rd Respondent averred that on 13th April, 2020 the Claimant was required to attend the morning tamaam parade but he failed to do so and efforts were made to trace his whereabouts but he could not be located. That on 23rd April, 2020 the Claimant was declared a deserter after absenting himself for a period of ten days pursuant to section 94 of the National Police Service Act of 2011.

iv. The 3rd Respondent averred that on 24th April, 2020 a signal was sent to the Police headquarters for stoppage of the Claimant's salary and further administrative action.

v. The 3rd Respondent averred that on 22nd December, 2020, the Claimant was notified of the intended disciplinary proceedings by being served with a notice to show cause why disciplinary action should not be taken against him.

vi. The 3rd Respondent averred that the Claimant upon being required to show cause why disciplinary action should not be taken against him indicated that he was sick and had been taken to a therapist and was recovering. He appended his signature on the notice confirming he was notified of the intended proceedings.

vii. The 3rd Respondent averred that on 28th December, 2020 the Claimant was notified of the intended disciplinary proceedings against him by being served with a waiver notice by Mr. Fredrick Omusugu, ASP. The Claimant appended his signature on the notice.

viii. The 3rd Respondent averred that the Claimant appeared before the disciplinary committee on 28th December, 2020 where he claimed to have fallen sick while at his home and had sought

- medical attention at Eden Medical Centre on 5th September, 2020 which was after 144 days of absencing work without leave.
- ix. The 3rd Respondent averred that the Claimant was not sick as alleged. He did not report the said sickness at the nearest police station or any officer including the 1st Respondent as required and did not produce any medical records at the internal disciplinary proceedings to prove his illness.
- x. The 3rd Respondent averred that guided by the provisions of the National Police Service Commission (Discipline) Regulation 2015 and Service Standing Orders, disciplinary proceedings were conducted whereby the Claimant was charged with the offences of absencing without leave contrary to Section 88(2) 1(h) of the Eight Schedule of the National Police Service Act No.11A 2011.
- xi. The 3rd Respondent averred that the substance of the charge was read to the Claimant in English, a language he understood where he pleaded guilty to the charge and a plea of guilty was entered.
- xii. The 3rd Respondent averred that by pleading guilty, the Claimant opted not to exercise his right to challenge the evidence proffered against him through cross-examination of the prosecution witness who would have been called to give evidence and to call witnesses to testify in his defence. That he appended his signature on the defaulter sheet upon pleading guilty in the disciplinary proceedings.
- xiii. The 3rd Respondent averred that on the weight of the evidence adduced, the Claimant was found culpable for the disciplinary offences and a recommendation for dismissal was made to the 2nd Respondent on 27th May, 2021.
- xiv. The 3rd Respondent averred that the Claimant was accorded an opportunity to offer a statement in mitigation after the conviction was considered before passing of the relevant

sentences. That upon conviction and pending confirmation of the sentence of dismissal by the 2nd Respondent the Claimant was suspended from duty with effect from 11th January, 2021 on an interim basis pending his dismissal from service as stated in paragraph 48 of chapter 30 of the service standing orders.

xv. *The 3rd Respondent averred that the Claimant was not entitled to payment of salary upon being suspended from duty as he was not working. That the 2nd Respondent confirmed the sentence of dismissal through a letter dated 12th August, 2020 and the Claimant was dismissed from service with effect from 23rd April, 2020 being the date he was declared a deserter. This was contrary to the assertions that he was dismissed retrogressively.*

xvi. *The 3rd Respondent averred that the Claimant was informed of the dismissal through a letter dated 13th August, 2021 and his right to appeal against the conviction and sentence within 14 days through the normal police channels. That the Claimant has not lodged an appeal against the dismissal despite being informed of the decision to dismiss him from service.*

xvii. *The 3rd Respondent averred that the Claimant was lawfully and procedurally dismissed from service in compliance with the provisions of Article 47 of the Constitution, the National Police Service Act, the National Police Service (Discipline) Regulations 2015 and Chapter 20 of the Service Standing Orders which are applicable to the Claimant by virtue of his enlistment in Service.*

xviii. *The 3rd Respondent averred that the Claimant did not exhaust all internal remedies as required by law before seeking redress before this court. That the instant suit was premature and an abuse of court process. That the Claimant was not entitled to the prayers sought having being relieved of his duties within the law. That he was not entitled to any salary after dismissal as he*

had not worked for that period and the Claimant could not be reinstated as it would amount to imposing an employee on an unwilling employer.

6. The 3rd Respondent in the upshot prayed as against the Claimant that the Claimant's suit be dismissed with costs.

EVIDENCE

7.

Both the Claimant's and Respondents' case was heard on

25th February, 2025 and the Claimant herein (CW1) adopted his witness statement and bundle of documents as his evidence in chief.

8.

In cross-examination he confirmed that he was employed in 2015 and he understood his terms and conditions of service. He admitted he absented himself from work between 13th April, 2020 to 22nd December, 2020. That he was served with a show cause letter upon resuming work and he responded to the show cause letter. In response to the show cause letter he stated that he was unwell. He admitted that he was away without permission for 253 days as per defaulter sheet. That he understood the procedure for sickness in government. He stated that he had a letter from his doctor and he presented it before the disciplinary committee.

9. CW1 confirmed that he was reported missing on 13th April,2020 but the doctor's letter was dated 10th September,2020 which was about six months after he was reported missing. That the doctor indicated that the Claimant was traumatized after the death of his father and he could not come to work. He further stated that he was not aware that the hospital was untraced by his employer and that he did not appeal the dismissal.
10. In cross-examination by Koech he confirmed that he was absent without permission and he had other previous offences and that his father died in 2019 July after long illness. He confirmed that he did not go the medical center with the respondent to trace it and that he was outpatient and out of his senses. He had someone accompanying him to hospital and they did not report to his employer that he was sick and that he was just a friend.
11. In re-examination CW1 clarified that he signed the defaulter sheet. That he was told to sign in the nature of his duties and he was not given a chance to read it. That he did not communicate about his sickness because of his condition. That he did not know what was happening around him and the doctor maintained he had mental challenges.
12. The Respondents on the other hand called one witness Haron Njoka(RW1) a police officer attached to GSU who interacted with the Claimant in the course of his work. He adopted his witness statement and documents filed with response as his evidence in chief and stated that the Claimant

never raised any issue of coercion during the disciplinary hearing.

13. In cross-examination RW1 confirmed that he was the prosecutor to the Claimant and that he was aware of Police Standing Orders. The Claimant was served with Notice to show cause on 22nd December, 2020 and granted 3 days to respond. That the Force Standing Orders provide for three days.
14. RW1 confirmed that the Claimant was notified of disciplinary hearing on 28th December, 2020 and the hearing was conducted the same date. That he was aware of the requirement of 7 days in the orders but a waiver could be signed. RW1 confirmed that a waiver was given in special circumstances and the reasons had to be recorded. That in this case the reason was to set an example to others for such long absence. He denied that the respondents had any premeditated position.
15. RW1 confirmed that the Claimant alleged having mental challenges and they wrote to the doctor to verify the position and found that the health facility was non-existent. That the letter was taken by the presiding officer who gave them a feedback that the hospital did not exist.
16. RW1 confirmed that an officer going through mental illness was supported if there was evidence. That there was no evidence of mental illness in respect of the Claimant.

CLAIMANT'S SUBMISSIONS

17. The Claimant's Advocates Bryan Khaemba, Kamau & Company Advocates filed written submissions dated 14th April, 2025 and submitted that courts have held that when illegality and procedural impropriety in termination of employment are alleged by an employee the burden shifts to the employer to prove that indeed the employee's termination was legal and procedurally fair based not only on statute and policy but also in accordance with the rules of natural justice. The same was anchored on articles 47 and 50 of the Constitution. Counsel relied on among others the case of **Anthony Chitavi v Malindi Water & Sewerage Company Ltd (2013) eKLR** on this assertion.

18. On the issue of whether the Respondents had a fair reason for terminating the Claimant's employment, counsel submitted that it was the Respondents' case that it terminated the Claimant's employment for absencing himself from work without leave/ absconding duty for a period of 253 days. On the other hand, the Claimant contended that during the period he was away from duty he had been incapacitated and was of ill health.

19. Counsel submitted that an employer has a right to terminate an employee who absconds their duty without permission and without a justifiable cause however, the same has to be carried out with proper procedure and the employer has a legal burden to ascertain the whereabouts and/or reach out to the employee and inform them of the intended termination of their employment due to absencing themselves without leave. That

where such absence has been caused due to illness that had incapacitated an employee, the same cannot constitute fair ground for termination unless their health makes it a hindrance for them to perform their duties.

20. Counsel relied on the case of **Bakhoya v Chane & another (Employment and Labour relations Petition E147 of 2023) [2024] KEELRC 293 (KLR)** to submit that it is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract, the employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer should also issue the employee with a notice to show cause why their employment should not be terminated on grounds of absenteeism.
21. Counsel submitted that the Respondents did not reach out to the Claimant to find out his whereabouts or the reasons why he absconded duty. That the Respondent did not ascertain the Claimant's evidence that he was undergoing mental illness that had incapacitated him for the period he was absent from work. The Respondent's witness evidence in that regard was hearsay which is inadmissible before court as he alleged that he was informed by another officer that the hospital in which the Claimant was being treated was non-existent and he similarly conceded that he never authored the letter to the said hospital.
22. Counsel submitted that there was not sufficient cause to dismiss the Claimant from work as his absentia was due to

illness that incapacitated him and he fell ill whilst discharging his duties to his employer who had a legal burden to ensure his healthy.

23. On the issue of whether the procedure in terminating the Claimant's employment was fair and lawful and whether the Respondents violated the Claimant's rights to fair administrative action and fair hearing, counsel relied on the case of **Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] eKLR** to submit that an employee must always be accorded a fair procedure prior to the termination of their employment even when the reasons contemplated for the said termination entail absconding of duty or absence without leave.
24. Counsel submitted that the right to fair procedure was coded under the Constitution under Article 47 where the Fair Administrative Action Act which was enacted to give effect to the above article section 4(3) on adequate notice to be given to person to be affected by administrative action, an opportunity to be heard and to make representations, notice to cross-examine, evidence and materials to be relied upon in making the decision. That disciplinary hearing must be fair in line with Article 50 of the Constitution.
25. Counsel submitted that procedure for disciplinary hearings of members of the force was provided for under Chapter 30 of the Force standing orders which stipulates that all disciplinary proceedings against the members of the force shall comply with article 47 of the Constitution of Kenya on the right to fair

administrative action. That section 15 of the Standing Orders provided for notification period of at least seven days where the same could be waived in exceptional circumstances and the reasons recorded.

26. Counsel submitted that the Respondent did not follow due procedure in arriving at the decision to terminate the Claimant's employment. All procedures were hurried and flouted which points to an already premeditated decision to terminate his employment regardless of whether the reasons he had presented for absence were valid in the circumstances or not.
27. Counsel submitted that the Respondents' witness conceded that the Claimant was granted three days within which to show cause why disciplinary action should not be taken against him. This was a clear violation of section 15(1) of the force standing orders that provided that such period must not be less than seven calendar days. This was a violation of the Claimant's right to fair administrative action as he was not accorded adequate time to prepare his defence.
28. Counsel submitted that the Claimant was granted three days to show cause which was against the above provision of seven days. That the Claimant was notified of his disciplinary hearing on the same day that it was conducted being the 28th of December, 2020 which again against the seven days' notice.
29. Counsel relied on the case of **Okoth v Jamii Telecommunication Limited (Cause 1556 of 2018) [2023] KEELRC 1643 (KLR)** to submit that failure to accord an

employee sufficient time to respond to the charges or to prepare for the hearing violates their right to a fair hearing and further that the Respondent indicated that it had waived the notice of the hearing that is supposed to be served upon the Claimant as provided for under the force standing orders. The standing orders provide for such notice can only be waived under special circumstances and the reasons for the waiver must be recorded. In this case the reason for the waiver was because, 'they wanted to use him as an example' which cannot constitute exceptional circumstances that would warrant violation of the Claimant's right to a fair hearing and fair administrative action.

30. Counsel submitted that the Claimant was never subjected to any disciplinary hearing but was only called into his superior's offices and ordered to sign against some papers which later indicated were his charge sheets and the same alleged that he had pleaded guilty to the offences which was false.

31. Counsel relied on the case of **Okoth v Jamii Telecommunication Limited (supra)** to submit that the Respondent who are the custodians of all documents pertaining to the said disciplinary hearing, never produced any evidence including minutes of the said disciplinary hearing.

32. Counsel relied on the case of **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR** to submit that where there are contradicting versions of whether a disciplinary hearing took place or whether the same was done in accordance with the law, the employer has the legal burden

to produce minutes of the said disciplinary hearing to put the issue to rest and failure to do so must be construed against the employer who is the custodian of the said records.

33. Counsel submitted that the procedure adopted by the Respondents in dismissing the Claimant was unfair and unlawful and the same not only violated his right to fair administrative action and fair hearing but also violated the disciplinary procedures under chapter 30 of the National Police Force standing Orders. Counsel relied on the case of **Mwende v Interstrat Limited t/a Big Square (Employment and Labour Relations Cause 616 of 2018) [2023] KEELRC 1153 [KLR]** to submit that the termination of the Claimant's employment was unfair and unlawful both in substance and procedure. The same violated the Claimant's right to fair administrative action and fair hearing and denied him an opportunity to adequately render his defence.

1ST & 3RD RESPONDENT'S SUBMISSIONS

34. The 1st and 3rd Respondent's Advocates filed their submissions dated 5th May 2025 and on the issue of whether there was a valid reason for termination, counsel relied and submitted that the Claimant was dismissed from service for absenting himself without leave for 253 days from 13th April, 2020 to 22nd December, 2020. That an employer under section 44(4) (g) of the Employment Act is entitled to

summarily dismiss an employee who absents themselves from work without lawful cause.

35. Counsel submitted that the Claimant was declared a deserter on 23rd April, 2020 having failed to report for duty for 10 consecutive days as per Section 94 of the National Police Act 2011. His salary was stopped, and disciplinary action was initiated.

36. Counsel relied on paragraph 56 (1) of the Chapter 30 of the National Police Service Police Standing Orders to submit that any police officer may be removed from service on the grounds that it is in the public interest or in the interest of the service to do so and relied on among others the case of **Richard Kiplimo Koech v Yuko Supermarket Ltd (2015) eKLR** to submit that absence from work without permission or lawful cause falls under misconduct and is one of the grounds upon which an employer may summarily dismiss an employee.

37. Counsel submitted that the law is that an employer alleging desertion against employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration to which the Respondent did. That the Respondent made all efforts to reach the Claimant in his last address known to them with a show cause letter as to why the Claimant should not be dismissed.

38. Counsel submitted that desertion is a grave administrative offence which if proved would render an employee liable for

summary dismissal. That it is not enough for employer to simply state an employee has deserted duty. That where an employer alleges desertion, it must prove the ingredients of the desertion such as that the employee has no intention of returning to work. It is clear that the Claimant did not have any intentions of returning to work as he never communicated to the employer of his whereabouts.

39. Counsel relied on the case of **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR** to submit that the burden of proving the fact that the employee does not want to work anymore rests on the employer. That the Respondents complied with the obligations set out in the case of **Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR** by issuing the Claimant with a Notice to show Cause on 22nd December 2020, giving him an opportunity to explain his prolonged absence.

40. On the issue of whether the correct procedure was followed, counsel relied on Paragraph 56(2) and 57 of Chapter 30 of the National Police Service Police Standing Orders to submit that the Respondents acted lawfully and in full compliance with the National Police Service Police Standing Orders and section 41 of the Employment Act 2007 in terminating the Claimant's employment. Counsel submitted that the Claimant after absenting himself for 253 days was served with notice to show cause of 22nd December, 2020 giving him three days to respond. That the Claimant upon being asked why disciplinary action should not be taken

against him by Chief Inspector Wilson Sanaka, the Claimant cited that he was sick and had been taken to a therapist and was recovering. The Claimant acknowledged receipt of the notice by appending his signature and was given 3 days to respond thereby fulfilling the procedural requirements under law. The existence of the alleged hospital could not be traced by the Respondents in the presence of the Claimant.

41. Counsel relied on the case of **George Musamall v G4S Security Services Kenya Ltd [2016] eKLR** on requirement for both substantive and procedural fairness. That the employee must also be notified of the charges against them and given an opportunity to respond. He submitted the Claimant pleaded guilty and voluntarily signed the defaulter charge sheet, indicating his full participation in the proceedings.
42. Counsel relied on Sections 45 and 47(5) of the Employment Act and the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** to submit that the Respondents adhered to both substantive justification and procedural fairness. That the actions of the Claimant warranted a summary dismissal under section 44(4)(g) of the Employment Act.
43. On the issue of whether the Claimant is entitled to the Prayers sought, counsel relied on Section 12(3) of the ELRC Act and section 49(3) (a) of the Employment Act which provided for reinstatement if the termination or summary dismissal is found to be unfair and within three years of dismissal. Counsel further

relied on among other cases the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** to submit that reinstatement would be impractical in this case since the 3 years have since lapsed since April 2020 when the Claimant was dismissed and the long absence of the Claimant before dismissal.

44. Counsel submitted that reinstatement was not viable where the employee's conduct is incompatible with the employer's expectations. Reliance was placed on the case of **Joshua Rodney Marimbah v Kenya Revenue Authority(2021) eKLR**. Given the Claimant's history of absenteeism, reinstatement is untenable, as the employment relationship between the Claimant and the Respondent has been irretrievably broken.
45. On the issue of whether the Claimant is entitled to twelve month's salary as compensation for unfair termination, counsel submitted that the Claimant was lawfully dismissed for absenting without leave for 253 days, which is a serious offence under both the Employment Act and the National Service Act
46. Counsel submitted that the Claimant failed to account for 144 days before seeking medical attention and pleaded guilty during disciplinary proceedings. Given the seriousness of the misconduct, termination was both substantively and procedurally fair, eliminating any basis of compensation.
47. Counsel relied on the case of **Vincent Abuya Obunga v Mast Rental Services Limited** to submit that the Respondent

terminated the Claimant for absencing without leave and therefore not entitled to payment.

48. On the issue of whether the Claimant is entitled to General Damages for unfair termination, counsel relied on the case of **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR** to submit that general damages are not payable for wrongful or unfair termination. The award of compensation for unfair termination is discretionary as per the provisions of sections 49 and 50 of the Employment Act which is limited to twelve month's salary.

49. Counsel submitted that the termination was procedurally fair and substantively justified under the Employment Act and the

50. National Police Service Act. Even if the court were to find procedural lapses, the available remedy would be statutory compensation, not general damages. Counsel in conclusion urged the court that employers are Kenyans too and have rights which courts are bound to respect while relying on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (2016) eKLR** that justice is a two-way highway.

2ND RESPONDENT'S SUBMISSIONS

51. The 2nd Respondent's Advocates filed its submissions dated 18th May, 2025 and on the issue of whether there was a valid reason for termination of the Claimant, counsel submitted that

the Claimant's termination was grounded on clear and justifiable reasons in accordance with the law and the disciplinary framework governing members of the National Police Service.

52. Counsel submitted that the Claimant was absent from duty without leave for a period of 253 consecutive days, beginning 13th April, 2020 and ending 22nd December 2020. The Claimant's extended and unexplained absence constituted a serious dereliction of duty, which cannot be trivialized or excused. He further submitted that the Claimant had previously been disciplined on at least three occasions for similar offences. He was a repeat offender who had shown no effort to reform. When the final instance occurred -an absence of over eight months- there could be no doubt that the Claimant had repudiated his obligations under the employment contract

53. Counsel relied on Section 44(4) (g) of the Employment Act and the case of **Rodgers Titus Wasike v General Motors East Africa Ltd [2020] KECA 529 |(KLR)** to submit that the employer is entitled to summarily dismiss an employee who absents themselves from duty without leave and failed to inform the employer of their whereabouts or provide a valid reason.

54. Counsel relied on among other cases, the case of **Thomas Dzombo Kirunga v Krystalline Salt Ltd [2020] eKLR** to submit that an employee must inform the employer of any absence and seek permission to extend it. Failure to do so constitutes a valid reason for dismissal.

55. Counsel submitted that the Claimant made no effort to contact his employer during the 8-month period of absence. That the Claimant's action amounted to a fundamental breach of the employment contract and justified summary dismissal and that the Claimant was accorded due process. He was issued with a notice to show cause, appeared before a disciplinary committee on the 28th December, 2020 and admitted to the offence.
56. Counsel submitted that the Claimant's guilty plea was voluntarily recorded and in line with the established disciplinary procedures and the National Police Service Standing Orders, a recommendation for dismissal was forwarded and confirmed.
57. Counsel submitted that the Claimant was officially dismissed from service effective 23rd April 2020, the date on which he had initially been declared a deserter. He was informed of his right to appeal the decision but failed to exercise it and further that the decision to terminate the Claimant's employment was supported by sufficient and valid reasons and that the disciplinary process adhered to the principles of procedural fairness.
58. On the issue of whether the Respondents followed due procedure, counsel submitted that the Respondents followed due process and complied with the applicable constitutional and regulatory standards under the framework governing members of the National Police Service.
59. Counsel further submitted that on 22nd December 2020, the Claimant was issued with a Notice to Show Cause by Chief

Inspector Wilson Sanaka, in line with paragraph 15(1) of Chapter 30 of the National Police Standing Orders. He was clearly informed of the allegation of absenting himself from duty without leave for 253 days and asked to provide reasons why disciplinary action should not be taken against him.

60. Counsel submitted that the Claimant acknowledged receipt of the notice by appending his signature and was granted three days to respond. This step satisfied the requirement of fair notice and opportunity to be heard which is at the heart of procedural fairness under article 47(1) of the Constitution.

61. Counsel submitted that upon considering his explanation which was found unsatisfactory, the committee proceeded to issue a waiver notice dated 28th December 2020 signed by Mr. Fredrick Omusugu, ASP, pursuant to Paragraph 15(5) of the Standing Orders and that the waiver allowed the disciplinary proceedings to commence with less than seven days' notice due to the exceptional nature of the case, and the reasons for the waiver were properly recorded.

62. Counsel submitted that during the hearing, the Claimant was charged under Section 88 (2) (1)(h) of the Eighth Schedule of the National Police Act. The details of the charge were read to him in a language he understood and he pleaded guilty and that the Claimant voluntarily signed the Defaulter charge sheet, confirming his participation in the process and his admission of guilt. The admission was made during a lawful hearing and formed the basis of the committee's finding of culpability and the recommendation for dismissal.

63. Counsel relied on among other cases, the case of **Wachira v Tusker Mattresses Limited [2023] KEELRC 1976 (KLR)** to submit on the established tests for substantive and procedural fairness in disciplinary processes and further on section 3(2) (b) of the Employment Act to submit that the Act excludes members of the disciplined services from its scope. The appropriate substitute for statutory justice lies in the broader principles of constitutional fairness and reasonableness as embodied in article 47 and 50 of the Constitution, and as operationalized through the National Police Service Standing Orders.
64. Counsel further relied on the case of **Moses v Mini Bakeries (NBI) Limited [2023] KEELRC 572 (KLR)** to submit that a fair hearing does not necessarily demand a physical or drawn-out process, especially where an admission of guilt has been made. The Claimant's admission was unequivocal and formed a sufficient basis for the Respondent's to conclude the proceedings.
65. Counsel submitted that the dismissal of the Claimant was substantively justified and also procedurally fair. The disciplinary measures were grounded on a clear and verifiable record of misconduct, conducted within a proper legal framework and in full compliance with the rights afforded under the Constitution and the internal disciplinary code.
66. On the issue of whether the Claimant was entitled to the prayers sought, counsel submitted that in light of the Claimant's repeated absenteeism, clear admission of

misconduct and the fair and lawful disciplinary procedure, there existed no legal or equitable basis to award any of the remedies sought.

67. Counsel submitted that where dismissal was lawful and justified, the claim for damages, back pay, or compensation for unfair termination could not stand. The dismissal was neither arbitrary nor unjustified.

DETERMINATION

68. The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by counsel.

69. The issues for determination are: -

- a. *Whether the Claimant was dismissed unfairly by the Respondent*
- b. *Whether the Claimant is entitled to the reliefs sought.*

Whether the Claimant was dismissed unfairly by the Respondent

70. In this case, the Claimant stated that the Respondent terminated his service when he absented work from 13th April, 2020 to 22nd December, 2020 when he was unwell while the Respondents alleged that the Claimant was dismissed on grounds of absenteeism from duty for 253 days from 13th April, 2020 to 22nd December, 2020 without justifiable reasons. That the Claimant had a history of absenteeism and had three previous convictions for absenteeism.

71. The Respondents alleged that the Claimant deserted his employment duties which amounted to repudiation of his contract of employment. It was the Respondents' case that the Claimant never bothered to report to work or attempt to make efforts to inform the Respondent of his absence. That the Respondent tried to find the Claimant's whereabouts in vain until he resurfaced on his own volition on 22nd December, 2020 and given a show cause letter on the allegations of absconding duties.

72. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of

employment on this ground is under consideration. This was the position in the case of **Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR**, where the court held that: -

18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.

73. In this case the Respondent indicated that it made efforts to reach the Claimant although no evidence was attached to prove the said efforts by the Respondents. This court takes judicial notice of the nature of the conduct of the Claimant who never communicated to the Respondents and long duration of 253 days he had deserted duties. The Claimant failed to show up on 13th April, 2020 and he was declared a deserter on 23rd April, 2020 after 10 days as per Section 94 of the National Police Act 2011. The court also notes that the Claimant had three other convictions of absconding duties.

74. It was held in the case of **Richard Kiplimo Koech Vs Yuko Supermarket Ltd [2015] eKLR** that absconding duty was an act of misconduct on the part of the employee, in which

case the requirements of Section 41 of the Employment Act obtain.

75. Whereas the Respondents never issued a show cause letter during the period the Claimant was away without leave because he could not be traced and the same was issued upon his resumption of duties this court notes that even though the burden is on the employer to show attempts made to reach the employee the employee had to illustrate that the unfair termination occurred as provided for under section 47(5) of the Employment Act. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the court held as follows on this burden: -

14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
[Emphasis added]

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "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.”

15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43.

76. The Claimant had to prove the reason he absconded duties was because he was sick before the Respondents could be called upon to justify the reasons for termination. In the case of **Peris Nyambura Kimani v Albit Petroleum Limited [2014]**

eKLR states that :-

“...in the circumstances where an employee is unwell for whatever reason, within the employment and labour relations regime, the basic requirement on the part of the employee under the Employment Act is that when one is sick or unwell, this is to be brought to the attention of the employer within a reasonable time.”

77. In this case the Claimant despite stating that a friend used to accompany him to hospital, the friend or himself never notified the Respondents of his sickness. The Claimant admitted that he sought medical attention on 5th September, 2020 almost six months after he was declared as a deserter. He could not explain his whereabouts between when he absconded duties and the time he sought medical attention which was a period of 144 days.

78. In addition, the Eden Medical Centre which issued the letters of 10th September, 2020, 18th October, 2020 and 5th December, 2020, the doctor indicated that the Claimant had

been traumatized after the death of his father which death occurred in July 2019. This was a year after such demise. The letter of 18th October, 2020 and 5th December, 2020 indicated that the Claimant was ready to resume work and he was yearning to work to provide for his young family but he never resumed work or even contact the Respondents.

79. The Medical facility also did not respond to the Respondents' letter dated 30th December, 2020 eliciting details on sickness and treatment of the Claimant and upon the presiding officer visiting the facility it was a one rented room to mean no such facility existed. The owner also refused to give further information about the facility if at all it existed.

80. This therefore meant that the Claimant failed to discharge his burden under section 47(5) of the act of the occurrence of unfair termination before the Respondent could be called upon to justify the grounds of the dismissal.

81. When it comes to the procedure adopted by the Respondents this court notes that the conduct of the Claimant who had other three convictions on absconding duties would warrant a summary dismissal under section 44(4)(a) of the

Employment Act. The Respondents still gave Claimant a chance to be heard by giving him a notice to show cause dated 22nd December, 2020 where he was to respond in three days.

82. The Claimant responded to the show cause letter although he claimed the period was short the required period was waived due to his long period of absenteeism. He was invited for a disciplinary hearing on 28th December, 2020 which took place the same day after a waiver and the Claimant stated no notice was given yet all along the charges of absenteeism were all along known to him. The Claimant admitted the charges and was found guilty and convicted. He admitted having signed the defaulter sheet.

83. The Claimant was placed on suspension on 11th January, 2021 as the Respondents sought approval on sentencing which approval was given on 15th July, 2021 and the Claimant dismissed vide the letter dated 13th August, 2021 with effect to 23rd April, 2020 when he was declared as a deserter.

84. The Respondents therefore had all the reasons to dismiss the Claimant. It is clear section 43 of the Employment Act states that the employer must have genuinely believed the

reasons existed which caused termination of the employee. The Court of Appeal in **Civil Appeal No 66A of 2017, Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR** held as follows on the standard of proof: -

"The trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. 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 employee's services."

85. It is important to that by virtue of section 3(2) of the Employment Act, it does not apply to disciplined forces which the claimant was in. The applicable law and procedure is Force Standing orders. However, the above principles of law enunciated in case law and Employment are referred to in the context of the fact that they propound the principles of natural justice which are engendered in International Law, the Constitution and fair administrative action.

86. The Court is however satisfied that the respondent had lawful and justifiable reasons to dismiss the claimant and that

the dismissal was carried in accordance with Force Standing Orders

87. In conclusion the Court finds and holds that the claim is without merit and hereby dismissed the same with costs

88. **It is so ordered.**

Dated at Nairobi this 28th day of November, 2025

**Delivered virtually this 28th day of November,
2025**

Abuodha Nelson Jorum

Presiding Judge-Appeals Division