

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. E104 OF 2021

HELLEN

ACHIENG

OMBECH.....CLAIMANT

-VERSUS-

**PUBLIC FINANCIAL MANAGEMENT REFORM.....1ST
RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT**

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

JUDGMENT

Introduction

1. For determination is the Claimant's Amended Memorandum of Claim initially dated 10th February, 2021, and amended on 11th November, 2024. Under the Amended Claim, the Claimant seeks the following reliefs:-

- i. A declaration that her termination from employment was wrongful and unlawful.
- ii. Her retirement benefits due
- iii. Unpaid salary for the month of December 2019 amounting to Kenya Shillings 23,000/=.
- iv. Untaken leave of 30 days
- v. Gratuity for 10 years @15 days for every completed year

of service.

vi. Certificate of service

vii. Damages for wrongful and unfair termination of employment amounting to Kshs.293,000/-

viii. Costs and interests of this suit.

2. The Respondent filed a Response to the Memorandum of claim dated 2nd June, 2021, and later amended on 30th April, 2025, denying the claim and further asserting that the Claimant was dismissed for gross misconduct.
3. The Claimant's case was heard on 23rd October, 2025, when she testified in support of her case, adopted her witness statement, and produced her list and bundle of documents as exhibits in the case. The Respondent's case was also heard on even date, and Julius Mutua testified in support of the Respondent's case, adopted his witness statement and produced the Respondent's documents as exhibits in the case.
4. Submissions were filed for both parties and have been duly considered.

The Claimant's Case

5. The Claimant's case is that she was employed by the 1st Respondent in May 2010 and that she carried out her duties diligently and effectively. She states that in December 2019, she was summarily dismissed over allegations of involvement in procurement irregularities, including the use of a counter requisition and issue voucher from the Legal

Unit to obtain items from the main store valued at KSh.1,240,155.00.

6. It is her case that on 17th December 2019, she received a memo requiring her to appear before the disciplinary Committee on 19th December 2019. She states that prior to this, she had not received any warning, complaint, or caution regarding her duties.
7. The Claimant avers that on the scheduled date, she reported to work at 9:00 a.m, but found no one present at the meeting venue, and was later informed that the committee lacked a quorum and would not sit. She states that she was advised to return home and resume her duties.
8. The Claimant states that on 20th December 2019, when she reported to work, she was issued with a letter of summary dismissal by the Program Coordinator, who informed her that the Disciplinary Committee had convened and decided to terminate her employment. The Claimant maintains that she did not attend any other disciplinary session and that if such a meeting occurred, it was held in her absence. She further states that her advocates wrote to the 1st Respondent on 2nd November 2020 expressing her intention to sue, but no response was received.
9. The Claimant states that she did not apply for leave in June 2019 and that the last leave she applied for was in April 2019. It is her position that the leave form for June 2019 is not in her handwriting.

10. The Claimant confirmed in her oral testimony that she was paid her salary for December 2019.
11. On cross-examination, the Claimant told the Court that she was employed as a customer assistant on a one-year renewable contract, which was renewed for ten (10) years. She told the court that her work description did not include procurement.
12. The Claimant further testified on cross-examination that her dismissal was for reason of procuring items without authorization. She denied taking vouchers worth One Million and Two Hundred Thousand.
13. It is her case that a Mr. Njoroge told her to go back home on the date slated for the disciplinary hearing, yet he is the same person who wrote her a dismissal letter, and further that the minutes of the disciplinary hearing indicate it was chaired by him.
14. The Claimant told the Court that she wrote a letter admitting liability, but that she did so under duress.
15. It is her position that upon dismissal, she appealed to the 2nd Respondent, who upheld her dismissal. She further confirmed that her contract does not provide for payment of gratuity.
16. The Claimant prays that her claim be allowed.

The Respondent's Case

17. The Respondent states that the Claimant was employed as a Customer Care Assistant at the National Treasury's Public Finance Management Reforms (PFMR) Secretariat. It avers further that she was summarily dismissed for alleged gross misconduct after being found to have irregularly used counter requisition and issue vouchers to obtain items from the main store valued at KSh. 1,240,155.00.
18. It further states that on 3rd September 2019, the Claimant admitted to using the counter requisition vouchers to obtain items from the main stores.
19. It is the Respondent's case that on 21st November 2019, the Director of Human Resources Management and Development concluded that the Claimant's actions amounted to gross misconduct and recommended disciplinary action. It avers that a disciplinary committee was constituted on 16th December 2019 to address the matter, and on 17th December 2019, the Claimant was formally summoned to appear before it.
20. The Respondent further states that on 20th December 2019, the Disciplinary Committee convened and deliberated on the issue but determined that it was not competent to call the Claimant to make representations, as the matter had already been handled by the Directorate of Human Resources Management and Development. The Respondent maintains that the committee did in fact sit, contrary to the Claimant's allegations.

21. It avers that on the same day, 20th December 2019, the Claimant was issued with a letter of summary dismissal on grounds of gross misconduct. The Respondent asserts that the dismissal was lawful and in accordance with Section 44(4)(g) of the Employment Act, 2007, which defines gross misconduct to include committing or being reasonably suspected of committing a criminal offence against or to the substantial detriment of an employer.

22. The Respondent further states that the Claimant was employed on a one year renewable fixed term contract, subject to the Secretariat's needs, and contends further that she is not entitled to retirement benefits, as the National Treasury is guided by the Pensions Act, which defines a "pensionable officer" in a manner that does not include persons engaged under fixed-term contracts such as the Claimant.

23. The Respondent states that the Claimant had utilized all her leave days except for a balance of two days. It avers that she appealed her summary dismissal to the Public Service Commission through a letter dated 24th January 2020, and by a letter dated 3rd March 2021, the Public Service Commission communicated that the appeal had been disallowed on grounds of gross misconduct, noting that the Claimant had not raised any new grounds to justify overturning the decision. The 1st Respondent states that it

subsequently informed the Claimant of this outcome through a letter dated 24th March 2021.

24. The Respondents further contend that gratuity is not a statutory entitlement under the Employment Act, 2007, but is governed by contractual terms, collective bargaining agreements, or internal employer policies. They state that the Claimant's contract expressly excluded entitlement to gratuity upon separation. Accordingly, they maintain that, having been summarily dismissed for gross misconduct, the Claimant is not entitled to the reliefs sought.

25. On cross-examination, the Respondents' witness (RW1) told the court that the issue against the Claimant revolved around a requisition against the policy of the Respondent. He further testified that the Claimant requisitioned items from the National Treasury while the 1st Respondent had its own procurement entity.

26. RW1 confirmed that he did not deny receipt of the items, but by implication, he denied that the items reached the Respondent.

27. It is his testimony that the Claimant was invited for a hearing by letter dated 17th December, 2019, but that no itemized charges were given prior to the hearing.

28. It is his position that the minutes of the disciplinary hearing list the persons who attended, and that the Claimant was not one of the attendees. He stated that the committee felt

that there was no need for the hearing. RW1 further avers that the invitation did not notify the Claimant of her right to attend the hearing with a representative.

29. The witness further stated that the memo dated 16th December, 2019, premeditated the outcome of the disciplinary hearing.

30. The Respondent prays that the suit be dismissed with costs.

Analysis and Determination

31. I have considered the pleadings, the witnesses' testimonies, and the rival submissions. The issues that fall for determination are: -

- i. Whether the Claimant was wrongfully and unlawfully dismissed.
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was wrongfully and unlawfully dismissed

32. A dismissal is deemed wrongful where an employer fails to adhere to the twin tenets of procedural fairness and the substantive justification for the dismissal provided under Sections 41, 43, 45, and 47(5) of the Employment Act, 2007.

33. ***In Walter Ogal Anuro v Teachers Service Commission [2013] eKLR***, the Court had this to say on this twin requirement: -

"For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

34. In dismissing the Claimant, the Respondent relied on Section 44(4)(g) of the Employment Act, 2007, which permits summary dismissal where an employee commits or is reasonably suspected of committing a criminal offence against the employer.

35. Section 41 demands that before terminating the services of an employee on grounds of misconduct, an employer must explain to the employee the reasons for which termination is being considered in a language the employee understands, accompanied by a fellow employee or shop floor representative, and hear and consider the employee's representations on the charges levelled against them.

36. This provision is couched in mandatory terms, and failure to adhere renders the dismissal/termination wrongful and unfair. In **Mary Mutanu Mwendwa v Ayuda [2013] eKLR**, the Court held that the Employment Act has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to

make whenever termination is contemplated by the employer, and is entitled to have a representative present.

37. Similarly, the Court of Appeal in ***Postal Corporation of Kenya v Andrew K. Tanu (2019) KECA 489 (KLR)***, outlined what has come to be recognized as the minimum standards of a fair trial under Section 41, emphasizing that an employee must be informed of the specific charges and be given an opportunity to respond in the presence of a representative of their choice.

38. The Claimant was invited to appear before the Respondent's Disciplinary Committee on 19th December 2019 vide a letter dated 17th December, 2019. Her case is that she reported to work to attend the hearing, but was told that the committee lacked a quorum and would not be sitting.

39. The Respondent's witness confirmed to the court that the committee later sat on 20th December 2019 and expressly resolved that it was not competent to call the Claimant, and that hearing her was not necessary. It then proceeded to summarily dismiss her from service.

40. RW1 admitted that no itemized charges were issued to the Claimant, and the invitation did not inform her of her right to be accompanied by a representative of her choice.

41. It is undisputed that the Claimant was not present when the committee deliberated and reached the resolution to terminate her services. In ***Loice Otieno v Kenya***

Commercial Bank Limited (2013] KEELRC 271 (KLR), the Court held that an employer cannot sidestep the mandatory requirements of Section 41 on the basis that it had already conducted internal investigations.

42. Further, the Respondent's position that the committee was not competent to hear the Claimant because the matter had already been handled by the Human Resources Director is legally untenable. Section 41 does not permit a paper based condemnation without a hearing.

43. Further, the Respondent's assertion that the Claimant appealed against her dismissal to the Public Service Commission, which upheld the dismissal, does not, in my view, sanitize an otherwise unlawful process. In **Judicial Service Commission v Gladys Boss Shollei**, the Court of Appeal emphasized that procedural fairness must be observed at the disciplinary stage, and failure cannot be cured retrospectively by subsequent processes.

44. It therefore follows that the upholding of the dismissal on appeal does not cure the initial procedural defects.

45. In the premise, I find the Claimant's dismissal grossly unprocedural and unlawful.

46. On whether the Respondent had valid, fair, and justified grounds to dismiss the Claimant, Section 43(1) of the Employment Act places the burden on the employer to prove the reasons for termination, and where the employer

fails to do so, the termination is deemed unfair. Further, Section 45(2) demands that the reason (s) must be valid, fair, and justified. In **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR** it was held that the Court looks into the validity and justifiability of the reasons for termination.

47. The allegation is that the Claimant irregularly used counter requisition and issue vouchers to procure items valued at KShs. 1,240,155/=, and hence irregular procurement.

48. The Claimant confirmed writing a letter admitting liability, but claims having done so under duress. RW1 also confirmed that no itemized charges were issued to the Claimant prior to the hearing, and further conceded that the committee felt there was no need to call the Claimant to make representations.

49. The allegation against the Claimant is no doubt serious and is capable of amounting to gross misconduct. However, mere suspicion, without affording the employee a fair opportunity to respond to the charges, is insufficient. In **Charles Musungu Odana v Kenya Ports Authority [2019] eKLR** the Court stated;

“It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment. The Court of Appeal affirmed

this position in its decision in Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR by citing with approval the following excerpt from the Halsbury's Laws of England, 4th Edition, Vol.16(1B) para 642:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair. In assessing

an employer's action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer's decision".

50. The Court finds and holds that while the allegations against the Claimant were weighty and potentially valid, the Respondent did not sufficiently demonstrate that the Claimant was culpable of the charges against her. It therefore failed to prove fair, reasonable, valid, and justified grounds to summarily dismiss the Claimant.

51. In the upshot, I find and hold that the Claimant's dismissal was wrongful, unlawful, and unfair.

Whether the Claimant deserves the reliefs sought **Retirement Benefits**

52. It is not disputed that the Claimant was on a fixed term renewable contract, which was evidently variously renewed. She was therefore not a pensionable officer under the Pensions Act framework applicable to public officers.

53. There is thus no legal or contractual basis for payment of retirement benefits under the Pension Act. This prayer fails on this account.

December 2019 Salary

54. The Claimant admitted on cross-examination that she was paid her December 2019 salary. This claim lacks merit and is dismissed.

Untaken Leave

55. The Respondent told the court that the Claimant had only two leave days that were outstanding. The Claimant alleged 30 days, but did not sufficiently rebut the leave records produced.

56. The Court, in the circumstances, hereby awards payment in lieu of two (2) accrued leave days only.

Gratuity

57. Gratuity is not a statutory entitlement under the Employment Act unless provided by contract, CBA, or Policy. The Claimant confirmed that her contract did not provide for gratuity.

58. This prayer thus fails on this account.

Certificate of Service

59. Under Section 51 of the Employment Act, issuance of a certificate of service is mandatory irrespective of the manner of separation.

60. The Respondent shall forthwith issue the Claimant with a Certificate of Service.

Damages for Unfair Termination

61. Under Section 49(1)(c), the Court is empowered to award up to 12 months' gross salary as compensation for wrongful dismissal.

62. The Claimant served the Respondent for about 10 years. Balancing both the long service and the gravity of the accusations, I award the Claimant compensation equivalent to seven (7) months' salary as compensation for the wrongful dismissal.

63. In the end, the claim succeeds, and I grant orders as follows:-

- a) A declaration that the Claimant's dismissal was wrongful and unlawful.
- b) Payment of seven (7) months' salary as compensation for the wrongful dismissal
- c) Payment in lieu of 2 accrued leave days.
- d) Issuance of a Certificate of Service within 14 days of this judgment
- e) Costs of the suit.

64. Judgment accordingly.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2026.**

**C. N. BAARI
JUDGE**

Appearance:

Mr. Odundo present for the Claimant

Ms. Karbolo present for the Respondent

Ms. Esther s- C/A