

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC NO. E938 OF 2022

(Before Hon. Justice Dr. Jacob Gakeri)

MUKKASA GIRIDHAR RAO..... CLAIMANT

VERSUS

SHREEJI CHEMICALS LIMITED..... RESPONDENT

JUDGMENT

The claimant filed the instant suit on 15th December, 2020 alleging that the Respondent terminated his employment unfairly on 12th April, 2021.

The claimant's case was that the Respondents chairman of the Board of Directors, Mr. Haresh made the decision unilaterally.

The claimant prayed for;

- (i) A declaration that termination of employment was unfair.
- (ii) 12 months compensation.
- (iii) 4 months unpaid cash salary for January to April 2021.
- (iv) Car and fuel allowance for April 2021.
- (v) Telephone Allowance for April 2021
- (vi) Unclaimed Bonus for 8 years
- (vii) Annual leave days
- (viii) Punitive damages

- (ix) Costs of the suit
- (x) Interest on (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x).

The Respondent admitted that the claimant was his employee and drew a salary from the company and had a clear mandate and sabotaged the Respondent Company by writing to the bank to withdraw his personal guarantee yet the issue had been agreed upon.

The Respondent's case was that the Claimants summary dismissal was fair and conducted fairly as he was accorded all his rights.

Claimant's evidence

On cross-examination, the claimant confirmed that he had two sets of employment with the Respondent and was appointed a Director Operations in 2010 and became a shareholder of the Respondent company in 2018. He denied having served as director of the company adding that he was claiming his dues as an employee of the company and had filed a letter of termination of employment dated 12th April 2021. He admitted having filed High Court Petition No. E005 of 2021 seeking an injunction and obtained interim orders and further admitted having filed Miscellaneous Application No. E078 of 2024 and vide affidavit confirmed that he resigned as a director of the company on 24th January 2022 a fact he did not disclose in court without reason. He admitted having been a director of the company as per Form CR12.

On re-examination, the claimant testified that he was in charge of all company operations as Operations Director and the dismissal related to the position.

He reiterated having resigned as a director in January 2022 and Petition No. E005 of 2021 related to the directorship.

Respondent's evidence

RWI Mr. Umang H. Soni confirmed, on cross-examination that he became a director of the Respondent Company in 2009 or 2010 at its inception and neither interacted with employees nor managed them.

The witness confirmed that the claimant was serving the Respondent Company as an employee (Operations Director) and was issued with a notice to show cause in his capacity as such.

That the claimant signed the guarantee as director and shareholder not as Operations Director. The witness admitted that only direction signed loan approvals.

RWI further confirmed that he had no evidence to show that the Respondent issued a copy of the investigation report to the claimant and that he was accorded 24 hours to submit his evidence and prepare for the hearing and the allegation of insubordination was not part of the notice to

show course. The witness could not confirm whether minutes of the disciplinary hearing were shared. That the claimant was informed that he could appeal by 13th April 2021 to Mr. Haresh who had chaired the disciplinary hearing but the claimant requested for a different panel which was not constituted and the summary dismissed was confirmed.

Claimant's Submissions

As to whether the claimant was a director, and shareholder of the Respondent as well as an employee, counsel submitted that he was an employee earning a salary and subject to a disciplinary process and Mr. Umang admitted as much. That his directorship did not extinguish his employment.

Reliance was placed on the decision in **Rift Valley Water Service Board & 3 others V Asanyo & 2 others (2021) KECA 778 (KLR)** and **Kuria V Tigoni Water Supply Co. Ltd (2023) KEELRC 1473 (KLR)** to urge that the claimant had discharged the evidential burden to show that he was an employee of the Respondent and the Respondent relied on the provisions of the Employment Act to terminate his employment.

As to whether the Respondent had justifiable grounds to terminate the claimant's employment reliance was placed on the decisions in **Rupra Construction Co. Ltd versus Makomere (2025) KEELRC 1376 KLR**

and **Dungani versus West Kenya Sugar Ltd (2024) KEELRC 172 (KLR)** on the burden of proof under section 47(5) of the Employment Act.

Counsel submitted that the Respondent had not demonstrated how the claimant misconducted himself as a director or prove that the withdrawal of the guarantee occasioned economic sabotage and no investigation was conducted. That the allegation of insubordination lacked supportive evidence.

Counsel submitted that the claimant had shown that neither the charge of economic sabotage nor insubordination related to his employment duties or had evidential support.

On the procedure of termination of the claimant's employment, counsel submitted that it was flamed on account of short notice to respond to the notice to show cause, prepare for the disciplinary hearing, was granted one additional day upon request for 5 days and no investigation report was provided.

Counsel submitted that the timelines were unreasonable and the claimant was denied a fair and meaningful opportunity to prepare his defence.

Further, counsel submitted that Mr. Umang and Mr. Dhaval Soni, the disciplinary panel were both related to the chairman Mr. Haresh Soni, the

claimant's accuser, who heard the claimant's appeal hence the procedure employed by the Respondent was biased.

As to whether the claimant resigned as an employee, counsel submitted that High Court Petition No. E005 of 2021 **Mukkasa Giridhar Rao versus Shreeji Chemicals Ltd** was based on directorship of the claimant as opposed to his employment and the High Court had no jurisdiction on matters employment.

That by the time the claimant resigned from the position of director on 24th January 2022, he had already been dismissed from employment on 15th April, 2021 and Mr. Umang admitted that was the date of termination of employment.

Counsel submitted that the Respondent viewed the claimant's employment and directorship separately and the claimant resigned from directorship.

On reliefs, counsel submitted that the claimant was entitled to all the reliefs prayed for an account of unfair termination of employment. Reliance was placed on **Dishon Kamau Muiruri versus Kenya Revenue Authority (2015) KEELRC** and **Wamukoya versus G4S Security (K) Ltd (2015) KEELRC (2803) KLR** on the 12 months salary and **PN Mashru Ltd versus Ojenge (2023) KECA 473 (KLR)** on punitive damages.

Respondent's submissions

As to whether the claimant served in different capacities, reliance was placed on the decisions in **Kavisa versus Jaramogi Oginga Odinga University of Science and Technology (2026) KEELRC and Sukari Industries Ltd & 3 others versus Ongoro & 3 others (2025 KEELRC 96 (KLR)** to urge that the claimant bore the burden of proof to demonstrate that he served in different capacities. Also cited was the decision in **Nyambane & 28 other versus Kenya Air Ports Authority (2026) KLR (28) KLR** to urge that the claimant adduced no evidence to prove that his role as Operations Director was distinct from his role as a corporate director. That the MOU relied upon was unsigned and thus held one directorship only.

On termination of the claimant's employment, reliance was placed on the affidavit sworn in support of Civil Application No. E078 of 2024 for the submission that the claimant failed to discharge the burden of proof on his entitlement to corporate directorship distinct from his employment as Operations Director. According to the Respondent's Counsel, the claimant was less than candid and the decision on **Rift Valley Water Services Board & 3 others versus Asanyo & 2 others (supra)** was distinguishable because the claimant was not appointed to the Respondent's Board. That notice of the E&G issued to shareholders to ratify the claimant's dismissal and as Operations Director was not separate from his removal as a corporate director.

That the claimant having approbated in an earlier matter could not reprobate in the instant suit by alleging that his employment was terminated.

On reliefs, counsel submitted that none of them was available for want of proof to the required standard and the claimant adduced no evidence of entitlement to car, fuel, telephone allowance, bonus or leave days, claims filed after 3 years were statute barred and punitive damages were unmerited. Counsel prayed for dismissal of the suit with costs.

Analysis and determination

It is common ground that the claimant was an employee of the Respondent serving as its Operations Director since 2010 and served in that capacity for many years and subsequently became a director of the company as well as a shareholder. These are facts the Respondent admitted through its witness and as confirmed by copies of the claimant's payslip and Form CR 12 on record. The letter dated 29th April, 2021 showed that the claimant was a director/shareholder with 562500 ordinary shares and the only other shareholder was Haresh Vrajlal Damodardas Soni.

A copy of the Certificate of Incorporation CPR2009/13639 of the Respondent Company showed that it was registered on 13th November 2009.

The claimant's employment status was further fortified by copies of the provisional NSSF statement 2000 to 2021, KRA P9 Form for 2012, notice to show cause dated 30th March 2021, claimant's response dated 1st April 2021, invitation to attend the disciplinary hearing dated 6th April 2021, claimant's response dated 7th April 2021 and the letter of summary dismissal dated 12th April, 2021.

These letters and documents establish beyond peradventure that the claimant was an employee of the Respondent, was summarily dismissed and paid his dues in accord with the letter of dismissal and issued with certificate of service.

To dispose of the issue of company directorship the claimant admitted that he resigned on 24th January 2022. It is unclear when he was appointed a director of the company. However, he had no claim in on his capacity as a director of the company and even if he had, it would have been unenforceable in the absence of a contract of service as none was provided. Nothing turns on the issue of directorship.

Concerning termination of the claimant's employment while the claimant averred that it was unfair for want of reason and a flawed procedure, the Respondent maintained that it was fair as he was guilty of gross misconduct and the process was fair.

It is trite law that for a termination of employment to pass muster it must be demonstrated that there was a substantive justification for the termination and the process followed was fair as held in **Naima Khamis versus Oxford University Press EA Ltd (2017) eKLR** and as aptly captured by Ndolo J (as she then was) in **Walter Ogal Anaro versus Teachers Service Commission (2013) eKLR**.

Under section 45(2) of the Employment Act, for a termination of employment to pass the fairness test, the employer must have had a valid and fair reason relating to the employer's conduct, capacity or compatibility or operational requirements of the employer and the process must have been with fair.

As regards the reason(s) for termination of employment, the summary dismissal letter accused the claimant of having authored a letter dated 30th October 2020 to Stanbic Bank which contradicted the position of the board and which sabotaged the Company. That he wrote to the Bank as an employee, shareholder and director of the Respondent. Although the Respondent availed a copy of the letter in question, it did not explain the context in which the claimant signed the guarantee in light of the letter of withdrawal of the signature. The Respondent was additionally cagey on whether the company missed the facility on account of the alleged letter. By a copy of the letter, the Respondent evidentiary demonstrated that the claimant wrote the letter but did not prove that he contradicted a decision of the Respondent's Board of directors. This position's exacerbated by the

fact that Respondents did not file the alleged decision of the board of directors, which is typically a resolution made at a board meeting.

Relatedly, there was no evidence of any investigation having been conducted. The foregoing implicates the validity of the ground of termination of the claimant's employment. The Respondent did not file a copy of the investigation report to show how the claimant sabotaged the Respondent company. The suspension was allegedly to enable it complete the internal investigation. Notably, the claimant signed the loan guarantee as a shareholder and director of the Respondent company as opposed to its employee, a distinction the Respondent laboured to diminish during the hearing but RWI confirmed on cross-examination that the claimant signed the letter as a Director and shareholder of the company as opposed to Operations Director. He further confirmed that employees do not sign such documents.

Significantly, the claimant explained the reasons why he wanted to withdraw his signature and had accorded the Respondent time to address his concerns internally as he was not opposed to the borrowing in totality.

Clearly, the alleged misconduct by the claimant related to an action he allegedly took as a director/shareholder of the Respondent as opposed to his capacity as Operations Director and the sanction, if any, want to have been imposed on him as a director of company, possibly by removal from

the board of directors. The Standard Human Resource Manual dated 1st October, 2016 did not apply to him as a director of the company.

The court also notes that the claimant's letter notwithstanding, the loan was disbursed to the Respondent. Nothing turns on this reason.

The second reason for the claimant's dismissal from employment was not identified by the notice to show cause. The invitation to attend the disciplinary hearing identified it and it related to the claimants alleged attempt to access the Respondents offices after the suspension on 30th March, 2021. The claimant was not accorded time to Respond to this charge prior to the disciplinary hearing or evidence of the alleged act, an issue he raised in his appeal against the summary dismissal. The Respondent filed minutes of the disciplinary hearing which revealed what transpired, and more specifically, that the charges against the claimant were read out by the chairman. Strangely, the claimant's case was not recorded. No question was asked or clarification sought. It was a monologue. It is unclear whether the allegations made against the claimant were indeed proved. The claimant denied the charges and demonstrated why he was not culpable on either of them.

RWI admitted on cross-examination that he had no evidence to prove that minutes of the disciplinary hearing were shared with the claimant.

From the foregoing, it is the finding of this court that the Respondent had failed to demonstrate that it had a valid and fair reason to terminate the claimant's employment in the manner it did.

As regards the procedure employed by the Respondent parties adopted contrasting positions with the Respondent maintaining that it was fair on the premises that he was informed of his rights, received a notice to show cause, invited for a disciplinary hearing, attended and was heard and appealed the summary dismissal.

As adverted to elsewhere in this judgment, under section 45(2)(c) of the Employment Act the procedure the employer uses to terminate the employment of an employee must be fair.

While the provisions of section 45(2) (c) are silent on the tenets of procedural fairness, the provisions of section 41 of the Employment Act provide in elaborate and mandatory procedure which the employer is required to abide by. (see **Pius Machafu Isindu verses Lavington Security Guards Ltd (2017) eKLR**).

In **Postal Corporation of Kenya versus Andrew K. Tanui (2019) eKLR**, the Court of Appeal enumerated the elements of Procedural fairness as reasons for which the employer is considering termination of employment, explanation of the grounds of termination in a language

understood by the employee, entitlement of the employee to a fellow employee of his choice or shop floor representative when the explanation is made and hearing and considering the representations made by the employee and/or that other person. The Respondent's contention that the procedure was fair notwithstanding, it may be faulted in various respects. For instance, the Respondent gave the claimant one (1) day to respond to the notice to show cause dated 30th March, 2021. The time given was too short notwithstanding the fact the claimant responded on 1st April 2021. Equally, the claimant was accorded one (1) day to prepare for the disciplinary hearing vide letter dated 6th April, 2021 and had to forward soft copies of his evidence via email by 7th April 2021 at 5pm and thus had less than 24 hours to provide his evidence, prepare for the hearing and search for a person to accompany him to the hearing.

Needless to belabour, the notices were too short and unreasonable. A fact the claimant complained about it by his letter dated 7th April, 2021, sought extension of time and a copy of the investigation report among other documents.

RWI confirmed on cross-examination that the investigation report was not availed to the claimant. In his response to the claimant's request for documents Mr. Haresh indicated that there was no investigation report and rubbished the request for bank statements stating that it was irrelevant. Puzzlingly, the claimant had been suspended to enable the Respondent complete internal investigation for the alleged gross misconduct.

Similarly, the chairman of the Respondent's board of directors Mr. Haresh was the chairman of the disciplinary committee and the appeal had to be made to him by 5.00pm on 13th April, 2021, which the claimant did and the response was dated 15th April, 2021, upholding the decision he had made after the disciplinary hearing.

In his appeal, the claimant raised the issue of short notice to appear for the disciplinary hearing and non availability of the investigation report or findings. Neither was available yet the Respondent had confirmed in writing that it had completed the internal investigations on the alleged gross misconduct which was the basis of the invitation for the hearing.

It is trite that an employee undergoing disciplinary process ought to be accorded sufficient time to respond to the allegations made against him or her and reasonable time to prepare for the hearing and secure a fellow employee or shop floor representative to accompany him or her.

The one (1) day extension the Respondent company accorded the claimant after the one (1) day given earlier was nothing but tokenism and patently unreasonable and a violation of the claimant's right to fair hearing. The fact that the claimant met the unfair deadlines could not avail the Respondent.

The short durations, the Respondent accorded the claimant to respond to the notice to show cause, attend the disciplinary hearing, appeal the summary dismissal and the chairman of the Respondent's board of directors sitting at the disciplinary committee hearing and determining the appeal coupled with the refusal to avail a copy of the investigation report or findings of the internal investigation, impeded the claimants right to fair hearing.

The foregoing is fortified by the sentiments of the Supreme Court of Kenya decision in **Evans Odhiambo Kidero & 4 others versus Ferdinand Ndung'u Waititu & 4 others (2014) eKLR** as follows;

“fair hearing in principle incorporates the rules of natural justice which includes the concept of audit arteram partem (hear the other side or no one is condemned unheard) and nemo judex in causa sua (no man shall be judge in his own cause) otherwise referred to as the rule against bias. Peter Kaluma Judicial Review: Law Procedure and Practice 2nd Edition Nairobi: 2009 at page 195 notes that the rules of natural justice generally refer to procedural fairness in decision making...

What then are the norms or components of a fair hearing? The Supreme Court of India in **Indru Ramchand Bharvani & others versus Union of India & others 1988 SCR Supi (1) 544, 555** found that a fair hearing has two justifiable elements:

- (i) an opportunity of hearing must be given; and
- (ii) (ii) that opportunity must be reasonable (citing Bal Kissen Kejriwal versus Collector of Customs Calcutta & others AIR 1962(at. 460)...”

The court was unambiguous that the right to fair hearing is a wide concept incorporating the right to fair trial. See **Mohammed Abdi Muhamud versus Ahmed Abdullahi Mohamad & 3 others (2018) KESC6 (KLR)** among others.

On the consequences of non-availability of documents to enable an employee prepare for a disciplinary hearing, the Court of Appeal decisions in **Postal Corporation of Kenya versus Andrew K. Tanui (supra) Ol Pejeta Ranching Co. Ltd vers David Wanjau Muhoro (2017) KECA 329 (KLR)** and **Regent Management Ltd versus Wilberforce Ojiambo Oundo (2018) KECA883 (KLR)** are instructive, that it violates the employee's right to fair hearing.

Under section 45 (4) of the Employment Act, a termination of employment shall be unfair for purposes of this part where;

- (a) the termination is for one of the reasons specified in section 46; or
- (b) it is found out that in all the circumstances of the case, the employee did not act in accordance with justice and equity in terminating the employment of the employee.

In determining whether it was just and equitable for an employer to terminate the employment of an employee, the court must consider the factors enumerated by section 45(5) of the Employment Act, including the

procedure adopted by the employer in reaching the decision, communication of the decision to the employee, handling of appeal, if any, conduct and capability of the employee till termination of employment, compliance with statutory provisions on termination including issuance of certificate of service, requirements of section 41 and previous warning letters, if any.

In this case the claimant had served the Respondent company diligently for 11 years had no warning letter, and was issued with a certificate of service. The Respondent accorded the claimant short periods to respond to the notice to show cause, appear for the hearing and appeal, refused to avail documents and the chairman of the board of direction was conflicted when he solely determined the appeal having chaired the disciplinary hearing.

For the forgoing reasons, it the finding of this court that the summary dismissal of the claimant by the Respondent on 12th April, 2021 was procedurally unfair.

Appropriate relief

Having found that termination of the claimant's employment by the Respondent was unfair, the claimant qualifies for various reliefs including the declaration that termination of employment was unfair and unlawful. The summary dismissal letter dated 12th April 2026, indicated that the

claimant would be paid his salary up to and including the date of termination of employment which was repeated by Mr. Hareh Vrajla Soni's letter dated 15th April 2021.

The claimant adduced no evidence prove that the amount due to him until 15th April 2021 was not paid. The prayer is declined.

As regards fuel and telephone allowances' neither the claimant's written witness statement nor the oral evidence he led in court made reference to his entitlement to any of the allowances prayed for. Relatedly, copies of payslips on record had no entries for any of the allowances. The court has no factual basis on which to award fuel or telephone allowance.

The foregoing applies on all fours to the claim for unclaimed bonus for 8 years. This is because a claim for bonus ought to be grounded on contractual obligation on the employer to pay bonus. The claimant provided no evidence of entitlement to bonus at whatever amount per year.

The claim is declined.

Concerning leave days, the claimant threw figures to the court to award without any factual basis for the claim. He adduced no evidence to prove that he was not allowed to take leave for the entire duration or did not apply for annual leave.

Particulars on why he did not proceed on annual leave were not availed nor were the number of days claimed. The claim lacked supportive evidence and it is declined.

As regards punitive damages, the court is guided by the sentiments of the Court of Appeal in **P N Mashru Ltd versus Ojenge (2023) ECA 473 (KLR)** where the court stated as follows;

*“on the award of punitive damages, in **Bank of Baroda (Kenya) Ltd versus Timwood Products Ltd Civil Appeal No. 132 of 2001**, this court citing **Obongo & another versus Municipal Council of Kisumu (1971) E.A 91 and Rook versus Barnard & others (1964) A.C 1129** held that in Kenya punitive or exemplary damages are awardable only under two circumstances namely:*

- (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government.*
- (ii) where the defendant’s action was calculated to procure him some benefit not necessarily financial at the expense of the plaintiff. The third scenario is of course where such damages are authorised by statute...”*

The claimant neither alleged nor demonstrated that he was treated oppressively or unconstitutionally or the Respondent intended to derive a benefit by his removal from the office of Operation Director of the company.

The prayer is unmented and it is declined.

On compensation for unfair termination of employment, having found that the summary dismissal was unfair, the claimant qualifies for compensation under the provisions of section 49(1) (c) of the Employment Act. Considering that the claimant was an employee of the Respondent for about 11 years which is neither too long nor short, had no previous record or misconduct of warning, appealed the decision and did not contribute nominally to the termination of employment, the equivalent of five (5) months gross salary is fair.

Intriguingly, neither the statement of claim nor the claimant's written witness statement indicated the claimant's salary nor how the figure of Kshs.1,899,800 used to compute awards prayed for was arrived at.

Similarly, the copies of payslips on record and the KRA Form 9A revealed that the claimant had a salary of Kshs.310,500 in 2012 and 2013.

The 5 months gross salary compensation shall be computed on the basis of the claimant's average salary for March 2021, February, 2021 and January 2021.

In conclusion judgment is entered in favour of the claimant against the Respondent as follows;

- (a) Declaration that termination of employment was unfair.
- (b) Equivalent of five (5) months gross salary.

(c) Costs of the suit.

The award is subject to statutory deductions as by law required.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI

ON THIS 18TH DAY OF MARCH, 2026

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the

Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE