



**Maigacho v Coast Development Authority (Civil Appeal E046 of 2021)
[2023] KECA 1316 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1316 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E046 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 10, 2023**

BETWEEN

GILBERT MICHAEL MAIGACHO APPELLANT

AND

COAST DEVELOPMENT AUTHORITY RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Mombasa (L. Ndolo J.) dated 22nd April, 2021 in Mombasa ELRC no 507 of 2017)

Court of Appeal awards person whose dismissal was substantially valid two months' salary and costs for procedural lapses in dismissal process.

The appeal concerned the dismissal of the appellant by the Coast Development Authority, which he claimed was procedurally and substantively unfair. The Court of Appeal upheld the trial court's finding that the dismissal was substantively valid but identified procedural lapses, particularly delays in the disciplinary process. The procedural defects led to the award of two months' salary as compensation. The appellant's claim for reinstatement and other damages was dismissed. The court emphasized that termination must adhere to contractual procedures, balancing employer prerogatives with employee rights.

Reported by John Ribia

Employment Law – dismissal – procedures – where the grounds for dismissal was valid – where there were procedural lapses in the dismissal process - whether a person that was substantially validly dismissed could be awarded damages for failure procedural lapses by the employer during the dismissal process - Employment Act (cap 226) sections 41, 43, 44(4)(c); 45, and 47(5)

Brief facts

The appellant was employed by the Coast Development Authority (the respondent) as an Environment Officer and later concurrently nominated as Programme Manager for a Climate Change Adaptation Programme. He alleged that his employment was unfairly terminated following an unlawful interdiction for misconduct. He claimed the interdiction lasted longer than allowed under the respondent's Human Resource Manual and that



the termination process was flawed and retaliatory, as it coincided with his serving the respondent with court summons.

The appellant sought reinstatement or damages, citing unpaid allowances, underpayment due to incorrect job grouping, and compensation for psychological harm and career loss. The trial court dismissed his claims, finding the termination substantively and procedurally fair. Aggrieved, the appellant filed this appeal, challenging the fairness of the termination process and the refusal to award damages.

Issues

Whether a person that was substantially validly dismissed could be awarded damages for failure procedural lapses by the employer during the dismissal process.

Held

1. The first appellate court would only depart from the finding by the trial court if they were not based on evidence on record; where the said court was shown to have acted on the wrong principles of law.
2. The appellant's conduct justified him being termed as difficult. He took the untenable position that he was entitled to remuneration for two positions, that of as an Environment Officer and Programme Manager for the Kenya Climate Change Adaptation Programme-Coast Region. It was however clear in the letter which nominated him in the latter position that the responsibilities attaching to that nomination were in addition to the duties he already performed, his of service remained the same.
3. There was no evidence to justify the appellant's insistence that he was entitled to remuneration regarding the new responsibilities. However, despite being warned against doing so, the appellant persisted in his claims and not only addressed the same to respondents but also addressed his complaints to other third parties. The appellant's termination was justified.
4. Termination of employment must be both substantively and procedurally fair and must be based on valid reason. The termination was substantively fair and was based on valid reasons. The appellant was subjected to a period of interdiction that was more than the prescribed period.
5. In determining whether or not the delay in finalizing the disciplinary proceedings was justified, one must consider all the circumstances of the case. There was no evidence that the appellant's conduct impeded the expeditious determination of his disciplinary proceedings. That the termination took place on the same day as the day the appellant served the respondent with his claim and summons was telling. There was no justification for subjecting the appellant to such anxiety. Interdiction placed an employee in a precarious position. He could not get his full salary yet he was unable during that period to look for alternative employment. It must be finalized with the prescribed period unless there existed justifiable grounds for not doing so. There was no justifiable grounds.
6. The Human Resources (HR) Manual provided that the attendance of an employee may be dispensed with. In the instant case, it was rightly dispensed with since the committee met to consider the statements of the appellant's witnesses. However, the letter of interdiction was dated February 15, 2017. The disciplinary proceedings against the appellant were not concluded within 3 months as required by HR Manual.
7. The termination was substantively proper. However, the procedure for the termination did not strictly adhere to the Manual. There were minor infirmities in the manner the process was conducted particularly as regards the timelines. The failure to adhere to the timelines may have occasioned the appellant injustice since for more than one month he was kept in interdiction when he ought to have known his fate and moved on.

Appeal partly allowed.

Orders

- i. *Order dismissing claim in its entirety by the trial court was set aside.*
- ii. *The appellant was awarded the salary that he was earning as the respondent's Environment Officer for two months.*



iii. *Appellant awarded costs of the appeal and costs of the trial court.*

Citations

Cases

Kenya

1. *Ikatwa, Reuben & 17 Others v Commanding Officer British Army Training Unit Kenya & British Army Training Unit Kenya* Civil Appeal 97 of 2016; [2017] KECA 274 (KLR) - (Explained)
2. *Jabane, Mohamed Mahmoud v Highstone Butty Tongoi Olenja* Civil Appeal 2 of 1985; [1986] KECA 21 (KLR) - (Explained)
3. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Explained)
4. *Kenya Ports Authority v Fadhil Juma Kisuwa* Civil Appeal 76 of 2016; [2017] KECA 652 (KLR) - (Followed)
5. *Kiruga v Kiruga & Another* Civil Appeal 52 of 1985; [1988] KECA 122 (KLR); [1988] KLR 348 - (Explained)
6. *Muriuki, Nebert Bernard v Multimedia University of Kenya* Civil Appeal 303 of 2015; [2020] KECA 37 (KLR) - (Explained)

Regional Court

1. *Mbogo & another v Shah* [1968] EA 93 - (Applied)
2. *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 - (Explained)

Texts

Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995), Halsbury's Laws England (London: Butterworth 4th Edn Vol 44 (1) para 1240

Statutes

Kenya

Employment Act (cap 226) sections 41, 43, 44(4)(c); 45 ; 47(5) — (Interpreted)

Advocates

Ms Abdi for the respondent

JUDGMENT

1. Gilbert Michael Maigacho, the appellant herein, is aggrieved by the judgment delivered on April 22, 2021 by the Employment and Labour Relations Court (ELRC) at Mombasa (L Ndolo J) in Mombasa ELRC No 507 of 2017, that dismissed his claim for reinstatement to the position of Environment Officer and the concurrent position of Programme Manager in the respondent's employment, with full pay and benefits for each position or in the alternative damages in lieu of reinstatement.
2. The appellant's case was that he was initially employed by the respondent as a Management Trainee on November 16, 2012; that in 2013 he was appointed to the position of Environment Officer; that on January 19, 2015, he was appointed as a Programme Manager for the respondent's Climate Change Adaptation Programme; that he held the two positions simultaneously for a period of seven (7) months, running from May 2016 to November 2016 and for which he was entitled to a monthly salary of Kshs 66,882.00 for the position of Environment Officer and a monthly allowance of USD 1,382 plus a per diem allowance of Kshs 11,200.00 for the position of Programme Manager; that the respondent failed to pay him his allowances over the said period; that on February 15, 2017, he was interdicted on half pay for alleged misconduct, which interdiction was to last until May 14, 2017 but the respondent failed to reinstate him back to work; and that he remained on interdiction until June



28, 2017, when his employment was terminated immediately after he served the respondent with court summons and claim.

3. The appellant's case was that his interdiction was unlawful and that his removal from the position of Programme Manager was unjustifiable and unfair; that his removal was effected by the respondent's Management rather than by the Board; that the termination of his employment was without valid reason and that his termination was connected with the filing of his case in court.
4. According to the appellant, his woes started after May 2016, upon the appointment of Mohammed Keinnan as the respondent's Managing Director; that Keinnan attempted to involve him in office malpractices; that the Managing Director systematically prevented him from performing designated activities in the course of his employment, hence frustrating his performance and causing the appellant emotional distress at work. It was his case that the respondent kept him in Job Group 'CDA7' while the Human Resource Manual provided that his Job Group ought to have been 'CDA6'; that he was underpaid as the salary for Job Group 'CDA6' was not disclosed to him by the respondent; that the respondent had guaranteed his loan with Standard Chartered Bank, based on the appellant's good conduct and that arising from the respondent's illegal administrative action of interdiction and termination, the respondent was liable to clear the outstanding loan balance of Kshs 563,936.00 plus interest of Kshs 6,463.00, which continued to accrue.
5. The appellant, accordingly sought for reinstatement to the position of Environment Officer and the concurrent position of Programme Manager, with full pay and benefits for each position or in the alternative unpaid half salary during the interdiction period in the sum of Kshs. 162,840.00; unpaid extraneous/responsibility allowances in the sum of Kshs 3,283,480.00; damages for psychological harm and injury; airtime/communication allowance for Programme Manager in the sum of Kshs 48,000.00; unremitted PAYE, penalties and interest (December 2012-2014); unremitted PAYE, penalties and interest (2014-2017) in the sum of Kshs 464,156.00; annual salary increments (June 2014-28.6.2017); unpaid salary, allowances and benefits for Job Group 'CDA6'; unpaid medical allowances (August 2013-July 2014 & May 2015- 28.6.2017); outstanding bank loan balance, interest & penalties in the sum of Kshs 579,031.79; loss of future employment (28 years to retirement) in the sum of Kshs 22,472,352.00; outstanding pension benefits (3.12.2012-28.6.2017) in the sum of Kshs 320,649.00; outstanding rent for June, July, August & September 2017 in the sum of Kshs 59,150.00; 12 months' salary in compensation for unlawful termination from position of Environment Officer in the sum of Kshs 802,584.00; 12 months' salary in compensation for unlawful termination from position of Programme Manager in the sum of Kshs 1,713,120.00; costs plus interest.
6. On the part of the respondent, the appellant was accused of unprofessional conduct and blatant refusal to follow laid down procedures, which led to disciplinary action being taken against him; that all this was done in accordance with the *Employment Act* and the Human Resource Manual; that the appellant was employed as a Management Trainee on November 6, 2012 and was later employed as an Environment Officer on December 5, 2013 and was placed in the right job group and paid the applicable remuneration; that on January 19, 2015, the appellant was nominated by the respondent's Management as Programme Manager for the respondent's project implementing team for the Kenya Climate Change Adaptation Programme; that the nomination letter CDA/1-9.2017 clearly stated that the nomination was in addition to the appellant's obtaining duties, was not a change in job group and his terms of service would remain the same, which arrangement the appellant did not object to; that the appellant was only entitled to half salary during the interdiction period and he would be entitled to full salary only upon reinstatement, a decision that lay with the Board; that there were warning letters issued to the appellant and the proper process for interdiction was followed; and that the appellant's removal was fair and procedural that there was no wrongdoing on the part of the Managing Director,



as alleged by the appellant; that there was no policy on guaranteeing loans for employees; and that the appellant was not entitled to any of the remedies sought.

7. In the learned Judge's view, three (3) issues arose for determination in the case and these were whether the appellant's interdiction was lawful and fair; whether the termination of the appellant's employment was lawful and fair; and whether the appellant was entitled to the remedies sought.
8. As regards the interdiction, the learned Judge referred to the letter dated February 15, 2017, from the respondent to the appellant and clause 5.7 of its Human Resource Manual and found that from the evidence on record, the appellant stayed on interdiction for a cumulative period of four (4) months and eleven (11) days, running from February 15, 2017 to June 28, 2017, when his employment was terminated; that in adjudicating disputes emanating from employment, each case ought to be considered on the basis of its own unique facts; that from the letter assigning the appellant the responsibility as Programme Manager for Kenya Climate Change Adaptation Programme, Coast Region dated January 19, 2015 it was clear that the appellant was not given any additional remuneration, on account of his nomination as Programme Manager for the appellant Change Adaptation Programme; that since the appellant had a written employment contract, it was the intention of the parties that any agreement on remuneration, whether by way of salary or allowances, would be in writing; that from his numerous letters to the respondent's Board, the Parent Ministry, other state agencies and non-governmental entities, the appellant was dissatisfied with the fact that he would not earn any additional remuneration, from the Climate Change Adaptation Programme, right from commencement; that the respondent's caution to the appellant to desist from communicating to third parties, in breach of institutional protocol, appears to have done nothing to deter the appellant, who persisted on this path; that the appellant's said communication painted a picture of a disgruntled employee who, rather than concentrating on the work assigned to him, spent all his time and effort agitating for remuneration that was not part of his written contract; that based on the said finding, the respondent's action in interdicting the appellant was justifiable; and that in view of the appellant's conduct, with particular focus on his continuous defiance of his employer's caution to cease communicating with third parties, the one-month lapse in time of interdiction was excusable.
9. As regards termination, the learned judgemade reference to the letter of termination dated June 28, 2017 and found that according to section 47(5) of the *Employment Act*, an employee alleging unfair termination of employment bears the burden of proving the ingredients of unfairness, while the employer has the burden of justifying the grounds of termination. She also referred to section 43 of the *Act* which places the burden on an employer to demonstrate a valid reason that would cause a reasonable employer to terminate employment otherwise commonly referred to as the 'band of reasonable responses test' where the court does not ask what action it would have taken had it been in the shoes of the employer but rather, whether in the circumstances of the case, the employer acted reasonably. In this regard the learned Judge relied on the decision of this court in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR where the following excerpt, from the *Halsburys Laws of England*, 4th Edition was cited with approval:

“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 responses within which one employer might 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.”

10. Applying the ‘reasonable responses test’ to the present case, the learned Judge found that the respondent had a valid reason for terminating the appellant’s employment.
11. Regarding procedural fairness, under section 41 of the *Employment Act*, the learned judge found that the appellant was issued with a show cause letter to which he responded and was further invited to a disciplinary hearing, which he duly attended without any formal objection. She therefore found that in bringing the appellant’s employment to an end, the respondent observed due procedure. The learned judge concluded that the appellant’s claim for compensation was without basis and dismissed it. She found that having held that the appellant’s interdiction as lawful and fair, the claim for half salary withheld during the interdiction period collapsed; that having disagreed with the appellant’s assertion that he was entitled to additional remuneration on account of his nomination as Programme Manager for the Climate Change Adaptation Programme, the claims for extraneous/responsibility allowance and airtime/communication allowance also failed; that the claim for damages for psychological harm and injury was not proved; that no basis was laid for the claims for outstanding bank loan balance, outstanding rent and loss of future employment; that the claim for unpaid salary, allowances and benefits was not proved; that the claims for unremitted PAYE, penalties and interest, medical allowances and pension benefits were abandoned in the course of trial; and that the claim for annual salary increments was settled in the course of trial.
12. In the end, the appellant’s entire claim failed and was dismissed. This is the decision that aggrieved the appellant and provoked the instant appeal in which the appellant raises the following grounds of appeal:
13. We heard this appeal on July 6, 2023 on the court’s virtual platform during which there was no appearance for the appellant, though served, while learned counsel, Ms Abdi, appeared for the respondent. However, both parties had filed their submissions and Ms Abdi adopted her submission in their entirety.
14. In this appeal the appellant relied partly on the submissions made before the learned trial and added that the entire process of interdiction and subsequent termination from employment was legally flawed; that contrary to section 5.5.1 of the respondent’s Human Resource Manual (hereinafter referred to as the manual), there was no report of indiscipline against the appellant made by his head of department to CM/HRS to warrant the managing director issuing the notice to show cause letter of October 13, 2016; that the period between October 16, 2016 when the appellant responded to the show cause letter and May 16, 2017 when the disciplinary hearing was scheduled was seven months and not four weeks as stipulated in the said manual; that the said period was also in breach of clause 5.5.1. (i) which stipulated that the disciplinary cases be dealt with promptly and finalised within a period of three months since the process which was commenced on October 13, 2016 but was not finalised till June 28, 2017 a total of eight months; that section 5.5.1(d) provided that the disciplinary committee’s recommendation to the Managing Director of the respondent (hereafter the MD) would be final; that the MD can only dismiss employees on Job Group CDA 5 and below and inform the next Board meeting; that in this case the chairman of the disciplinary committee recommended that since some witnesses had not responded to the letters given by the management and as not all the witnesses had given evidence, there was need to call for another meeting to look at the evidence; that therefore there was no recommendation for termination of the appellant; that the appellant was not invited to the meeting of the Human Resource Advisory Committee of May 16, 2017, which was the basis of the decision by the MD to terminate the appellant contrary to the said manual; that the minutes of the said meeting were signed on October 23, 2017 yet the termination letter was issued on June 28, 2017; that



the Human Resource Advisory Committee has no disciplinary powers; and that it was not coincidental that the letter of termination of the appellant was issued on June 28, 2017, the same day the summons to enter appearance on the respondent was effected.

15. On behalf of the respondent, it was submitted that though the Manual provided that interdiction should not last for three months, in this case it lasted for 4 months due to the difficult nature of the appellant; that the respondent was also dealing with the appellant's report and complaint to other bodies; that the appellant was served with a show cause letter to which he responded; that disciplinary meeting took place on May 16, 2017 which was attended by the appellant and at which he was given a fair hearing; that following the said meeting, the committee gave the witnesses mentioned by the appellant an opportunity to furnish their statements to enable the committee quickly dispose of the proceedings; that after considering the evidence given by the appellant on May 16, 2017 and the statements received from the said witnesses, the committee on June 8, 2017 being not satisfied with the appellant's response, recommended his termination to the respondent's Human Resources Advisory Committee which recommendation was tabled before the said Human Resource Advisory Committee and adopted on June 16, 2017; that on June 28, 2017 a management letter on the appellant's disciplinary case was forwarded to the respondent's Board of Directors and a termination letter was issued dated June 28, 2017 to the appellant; that based on the foregoing, the respondent took the appellant through the disciplinary process. In support of the submissions, the respondent relied on *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR for the proposition that a disciplinary hearing does not necessarily have to be an oral one in all the cases.
16. It was the respondent's submissions that the respondent in summarily dismissing the appellant established valid and fair reasons as required by section 43 and 45 of the *Employment Act* and that a fair procedure was followed in arriving at the decision. Reliance was placed on *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR on the principle of band of reasonableness and it was submitted that in all the circumstances of the case, the respondent acted in accordance with justice and equity in terminating the employment of the appellant as required under the *Employment Act*. Based on *Reeuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR, the trial Judge was correct in applying the reasonable test.
17. We were accordingly, urged to find no merit in the appeal and to dismiss the same with costs.

Analysis and Determination

18. This being a first appeal, the duty of this court was set out in the decision of *Selle & another vs Associated Motor Boat Co. Ltd & others* [1968] EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and Law. We will only depart from the finding by the trial court if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* [1986] KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & Another v Shah* [1968] EA 93.
19. It is not in dispute that the appellant was summarily dismissed, and the respondent urges that the dismissal was justified. Section 44(4)(c) of the *Employment Act*, provides as follows:

“ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—



- a. ...
- b. ...
- c)
- d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;”

20. It is also notable that under section 43 of the *Employment Act*, the burden of proof is on an employer to demonstrate the reasons for termination as follows:

- 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. The trial Judge in this respect found as follows:

“39. 39. It would appear that the claimant was dissatisfied with the fact that he would not earn any additional remuneration, from the Climate Change Adaptation Programme, right from commencement. This is evidenced by his numerous letters to the Respondent’s Board, the Parent Ministry, other state agencies and non-governmental entities. The Respondent’s caution to the claimant to desist from communicating to third parties, in breach of institutional protocol, appears to have done nothing to deter the Claimant, who persisted on this path.”

22. This was a finding of fact by the learned trial judge. This court (Apaloo, JA, as he then was) in *Kiruga vs Kiruga & another* [1988] KLR 348, while dealing with what amounts to proof, cited *Watt vs Thomas* [1947] AC 484; *Peters v Sunday Post Ltd* [1958] EA 424 and expressed itself as hereunder:

“The word “proof”, as a legal concept, is not pre-ordained and has no objective existence, discoverable either by logic or analysis. It is merely the conclusion that the tribunal draws on any given set of facts or evidence. If the evidence is available and accepted, unless the law directs that a certain fact should be “proved” in a certain way, it cannot be the proper province of an appellate court merely to read that evidence and hold “it is not proved”. That really is another way of saying it is not persuaded by evidence. But the tribunal that needs to be persuaded, is the tribunal of fact to which the evidence is given not one which merely reads it in print. The only suggestion of the trial Judge having misdirected himself was on the onus of proof; but the trial Judge, quite rightly, makes no reference to the onus of proof, for, as often pointed out, no question of the burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The trial Judge came to a definite conclusion on the evidence and no question of onus did or could arise. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or



unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

23. This court(per Hancox, JA, as he then was), in *Mohammed Mahmoud Jabane vs Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, held that:

“The appellate court only interferes with the trial court’s findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

24. In this case, it is clear that the appellant’s conduct justified him being termed as “difficult”. He took the untenable position that he was entitled to remuneration for two positions, that of as an Environment Officer and Programme Manager for the Kenya Climate Change Adaptation Programme-Coast Region. It was however clear in the latter dated January 19, 2015 which nominated him in the latter position that the responsibilities attaching to that nomination were:

“in addition to your current duties and your terms of service remain the same.”

25. There was no evidence to justify the appellant’s insistence that he was entitled to remuneration regarding the new responsibilities. However, despite being warned against doing so, the appellant persisted in his claims and not only addressed the same to respondents but also addressed his complaints to other third parties. In those circumstances we have no reason to depart from the findings of the respondent that the appellant’s termination was justified.

26. This court, however, held in *Nebert Bernard Muriuki vs Multimedia University of Kenya* [2020] eKLR, that termination of employment must be both substantially and procedurally fair and must be based on valid reason. In this case we reiterate the termination was substantially fair and was based on valid reasons. As regards the procedure, the appellant’s case was that the same was not followed. It is not in disputed that the appellant was subjected to a period of interdiction that was more than the prescribed period. This was justified on the ground that the appellant was difficult and that the respondent was kept busy dealing with the appellant’s complaint made to third parties. In our view, in determining whether or not the delay in finalizing the disciplinary proceedings was justified, one must consider all the circumstances of the case. In this case, there was no evidence that the appellant’s conduct impeded the expeditious determination of his disciplinary proceedings. That the termination took place on the same day as the day the appellant served the respondent with his claim and summons was clearly telling. We find that there was no justification for subjecting the appellant to such anxiety. It must be appreciated that interdiction places an employee in a precarious position. He cannot get his full salary yet he is unable during that period to look for alternative employment. It must therefore be finalized with the prescribed period unless there exist justifiable grounds for not doing so. In this case there was none.



27. Apart from that, in this case, the minutes of the Disciplinary Committee meeting held on May 16, 2017 concluded that:

“since some of the witnesses had been given letters by Management but they are yet to respond he (the Chairman) guided that there (sic) should be given time to respond and those that had not been given letters i.e. Fauziya Mohamed and Dullu Amuma would be issued with letters and all the witnesses to provide their evidence as soon as possible and thereafter we would call for another meeting to look at the evidence.”

28. According to the appellant, he was not called for a further meeting before he received the letter of termination. That notwithstanding in a meeting of the respondent’s Human Resources Advisory Committee Meeting held on June 16, 2017, reference was made to the Disciplinary Committee meeting held on June 8, 2017 which recommended that the appellant be dismissed. The respondent’s Human Resources Advisory Committee adopted the report by the Disciplinary Committee and proposed to forward the same to the Managing Director. The appellant’s dismissal took place by a letter of the same, June 28, 2017.

29. We have considered Clause 5 of the respondent’s Human Resource Management Policies and Procedures Manual. In substance, a complaint against an employee is reported to the Chief Manager, Human Resource Services, (hereafter, CM/HRS) through the Head of Department and a show cause letter is then issued giving the employee 5 days to respond. In this case the appellant contends that no complaint was reported to the CM/HRS through the Head of Department. There is however no dispute that the appellant was served with a show cause notice. In those circumstances, we attach no importance to the manner in which the complaint was transmitted.

30. The manual also requires that a Disciplinary Committee be constituted by the MD in consultation with CM/HRS. Again it is not disputed that such a committee was duly constituted. That the committee heard the appellant on May 16, 2017 is also not disputed. However, at the adjourned meeting on June 8, 2017 when the Committee was to consider the statements of the appellant’s witnesses, the appellant was not present. The said Manual in clause 5.1.(c) provides that:

“The employee shall be required to appear before the committee if need be. This shall be done within 4 weeks.”

31. It is clear that the attendance of an employee may be dispensed with and in this case, we find that it was rightly dispensed with since the Committee met to consider the statements of the appellant’s witnesses. It is however clear that the letter of interdiction was dated February 15, 2017. It is true that the disciplinary proceedings against the appellant were not concluded within 3 months as required by clause 5 of the Manual.’

32. Having considered the evidence presented by the appellant, we find that the termination was substantively proper. However, the procedure for the termination did not strictly adhere to the Manual. There were minor infirmities in the manner the process was conducted particularly as regards the timelines. We find that the failure to adhere to the timelines may have occasioned the appellant injustice since for more than one month he was kept in interdiction when he ought to have known his fate and moved on.

33. In the premises, we allow the appeal as regards the remedies, set aside the order dismissing his claim in its entirety and award him his salary that he was earning as the respondent’s Environment Officer for two months. He will have the costs of this appeal and before the trial court.



34. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

