



REPUBLIC OF KENYA



**Atak v Judicial Service Commission (Employment and Labour Relations Cause
204 of 2015) [2025] KEELRC 245 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 204 OF 2015**

**MN NDUMA, J
JANUARY 30, 2025**

BETWEEN

THOMAS OLOKO ATAK CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant was the Director of Information Communication and Technology employed by the Respondent on 30th April 2012. The Claimant was summarily dismissed from employment by a letter dated 17th December 2014 and filed this suit on 18th February 2015 seeking the following reliefs: -
 - i. A declaration that the Claimant's dismissal by the Respondent was wrongful, unfair and in breach of the express provisions of the *Employment Act*, 2007.
 - ii. A declaratory order that the interdiction, the subsequent disciplinary proceedings and the summary dismissal was unlawful, unfair and null and therefore of no effect.
 - iii. An order for payment of the Claimant's half salary that was withheld while he was interdicted.
 - iv. An order for payment of the Claimant's itemized terminal dues.
 - v. An amount of Kshs. 8,031,468.00 being 12 months compensation for wrongful dismissal.
 - vi. Payment of salary in lieu of notice (one month) Kshs. 669,289.00
 - vii. Payment in lieu of 90 leave days.
 - viii. An unconditional certificate of service.
 - ix. In the alternative to (v), an order to compel the Respondent to unconditionally reinstate the Claimant without loss as to his salary, benefits, rights, powers and privileges thereof.



- x. In the alternative to (ix), an order to compel the Respondent to re-engage the Claimant in work comparable to the Claimant's previous work prior to his dismissal or other reasonably suitable work at the same wage.
 - xi. Interest on (v), (vi) and (vii) at court rates till payment in full.
 - xii. Costs of the suit.
2. The claimant testified in support of the suit by adopting his witness statement dated 17/2/2015 and filed on 18/2/2015. The Claimant also produced bundle of documents dated the even date and filed also on 18/2/2015 which documents were admitted in evidence as exhibits and marked bundle 'A' except newspaper cuttings marked bundle 'B' whose production was objected to by counsel for the Respondents. The Claimant reserved the right to produce each cutting individually subject to any objections made. The Claimant did not move to produce any of the newspaper cuttings in bundle 'B' and so the court shall not consider same as evidence adduced in this matter.

Summary of evidence by the Claimant**

- 3. The Claimant stated he outlined his broad work plan through memo JUD/ICT/10/Vol. 1/1 dated 27th June, 2012 to the Chief Registrar of the Judiciary (afterwards known as 'CRJ').
- 4. That through the said memo he had sought authority to audit ICT assets, develop Kibera Court ICT infrastructure, redesign Milimani ICT critical infrastructure, acquire new internet and email and recruit critical ICT staff.
- 5. That he worked diligently, professionally, meticulously with dedication as the Director of Information Communication and Technology at the Judiciary until his interdiction on the 31st March, 2014. That he had legitimately expected to be employed by the Respondent until retirement age. That being the Director of ICT of the Judiciary, he was directly answerable to the CRJ.
- 6. That on or about May, 2012 the CRJ requested International Development Law Organization's (IDLO) for assistance in conducting an assessment of Judiciary's Information Communication and Technology (ICT) framework as well as development of an ICT strategic plan. That the Judiciary developed a five (5) year Strategic Plan together with a cost implementation plan which was presented to a plenary session in Milimani Ceremonial Hall on 1st August, 2012. The Claimant stated that the CRJ invited all heads of court divisions, administrative directorates and the ICT Directorate staff. The plenary discussed and suggested amendments to the Strategic Plan. The final document was presented to the CRJ by the IDLO consultants in August, 2012.
- 7. The Strategic Plan identified the following key areas to be addressed by the Judiciary in order to achieve the strategic objectives; culture change; ICT infrastructure; automation of processes; ICT human resources. That the Strategic Plan also anticipated a period of five years to actualize the objectives outlined. The ICT Directorate's 2012-2013 work plan based on the Strategic and cost implementation plans were presented to and approved by CRJ on 7th and 8th of August, 2012 at the Kenyatta International Convention Centre. The CRJ authorized the ICT Directorate to implement the workplan.
- 8. He discharged his duties diligently in accordance with the ICT Strategic Plan.
- 9. That he commenced the phase process of building the ICT infrastructure with input from Kenya ICT Board (now Kenya ICT Authority), based on Government's vision for unified



communication as indicated in tender KICTB/KTCIP/ICB/12/2010-2011 for the supply installation and commissioning system for the Government of Kenya.

10. Claimant said he initiated the process of creating an organization chart for the directorate. That the envisaged directorate had six departments. That he requested from the CRJ, and received approval to recruit departmental managers for the three most critical departments. That these positions were advertised, interviewed for and the recruited managers reported on duty in September 2013.
11. The Claimant stated that he caused the advertisement for middle manager positions in January 2013. That due to budgetary constraints, these positions had not been filled by the time of his interdiction.
12. The Claimant stated further that he duly updated the Finance Committee of the Respondent on the progress of execution of the work plan. That he submitted two (2) board papers to CRJ on 30th April, 2013 and 15th May, 2013 respectively.
13. He forwarded to the Chief Justice of Kenya ICT Directorate Status Report dated 17th August, 2013.
14. On or about September 2013 the Chief Justice of Kenya acting under the authority of the Respondent herein earmarked him for dismissal and subsequently drew up charges that were false, unsubstantiated and malicious.
15. That on 31st March, 2014 he received an interdiction letter from the Chief Justice of Kenya. The letter was clear that he was interdicted from the exercise of the powers and functions of the office of Director of ICT. That additionally, the letter stated that he would be entitled to half salary during the period of interdiction.
16. He wrote a letter to the Chief Justice of Kenya on 7th April, 2014 requesting to be furnished with certain documents so as to adequately respond to the show cause letter (herein after NTSC). He responded to the NTSC of 31st March, 2014 through a letter dated 14th April, 2014 based on his personal notes and recollections as the Respondent had not furnished him with the necessary documents requested by the letter of 7th April, 2014. The Respondent furnished him with most of the requested documents via its letter of 30th April, 2014, where he was directed to respond to the NTSC within 14 days. That upon receipt of the requisite documents, he comprehensively responded to all the allegations of gross misconduct as particularized in the NTSC of 31st March, 2014 through his letter of 12th May, 2014.
17. That one of the grounds of misconduct levelled against him in the NTSC related to the security of the Judiciary ICT system. That the security of the service desk which was in use before he joined the Judiciary was first raised by the Ombudsman through its letter of 24th February, 2014 and further letter of the Chief Justice on 13th March, 2014.
18. That through internal memo of 14th March, 2014 to the Chief Justice, he clearly communicated that they had established a team to transfer all the systems managed by Dew CIS Solutions limited to the Judiciary upon payment of the sum of Kshs. 496,480.00 for migration services. The quotation was passed to the Supply Chain Management for processing. That the Claimant said that it was the Judiciary's long-term strategy to construct both a main data center and a secondary data centre to house all the Judiciary's critical information safely.
19. The Claimant stated that it was alleged that he had neglected his duty by failing to ascertain the particulars and security of Dew CIS Solutions Ltd, that he confirmed that he found that the said company was providing services to the Judiciary on behalf of the National Council for Law Reporting (NCLR) for the following systems: e-mail system, enterprise Judiciary service desk and enterprise case management.



20. That it was correct that Dew CIS Solutions Ltd was engaged at the Judiciary before he joined the Judiciary. That he was unable to obtain any signed agreement between Dew ICS Solutions Ltd and the Judiciary or NCLR. That however, he managed to obtain their tender response to NCLR for the provision of an enterprise case management system for the Judiciary dated 18th July, 2012. That through the tender response documents, he also established that Dew CIS Solutions Ltd was bearing registration number C. 102554.
21. That the Claimant was aware that on 28th May, 2012 the CRJ wrote a letter to the CEO/Editor of the NCLR requesting them to fully design, extend and deploy a premium comprehensive case management system for the Judiciary and to invoice the Judiciary for the same.
22. That the Claimant was also aware that the Dew CIS Solutions Ltd presented an invoice dated 6th June, 2013 to the Judiciary for payment of the sum of Kshs. 800,400.00 arising from the services rendered towards website hosting and mail hosting.
23. That he noticed that there was no requisite documentation to support the claim for payment. That he managed to retrieve from NCLR a justification document and in view of the same he proposed to the Director Supply Chain Management via internal memo dated 6th February 2014 to commence process of either formalizing Dew CIS or put the services to open tender.
24. That it was also alleged that he caused the Judiciary a loss in the sum of Kshs. 19,836,000.00 following outsourcing of the hosting, backups and administration of the system. The Claimant further stated that the Judiciary service desk was not developed in-house but borrowed from the NCLR.
25. The Judiciary had launched a service known as 'faini chap chap', which was part of the enterprise case management system, however, he stopped the same due to lack of capacity in human resource to manage and resolve the queries emanating therefrom.
26. That the Claimant was aware that there was an agreement between NCLR and Dew CIS Ltd for the sum of Kshs. 19,836,000.00 on provision of enterprise case management system and not hosting, backups and administration of a service desk system.
27. He stated that he had communicated through various internal memo on the stalled WAN/LAN project due to financial constraint leading to non-payment of the contractor. The Judiciary was thus unable to have viable, operational and sustainable systems to match the investments therein.
28. The Claimant said that on security of the Judiciary emails, that none was leaked to the public as alleged. That the alleged leaked emails were in the public domain and did not originate from the Judiciary ICT system as the email addresses were not Judiciary's email addresses.
29. On the containerized data center, the Claimant stated that contrary to the assertions of the Respondent, the technical specifications were for 40 feet rather than 20 feet in order to house both the secondary data centre as well as the Supreme Court server.
30. That the Judicial Performance Improvement Project (JPIP) signed an agreement to fully provide equipped container data centres and appropriate back-up systems. The primary data centre had not been activated as at 26th September, 2012.
31. The Claimant stated that in respect to procurement of external services, that during his tenure he didn't procure any external server. The forty (40) IBM servers were delivered within a month after he joined the Judiciary. He was not involved in their procurement and further stated that the said servers were utilized by the Judiciary due to great necessity in service delivery particularly library system, case management, payroll, email, jobs and website.



32. On Lekha Trading Company works in the sum of Kshs. 58,041,487.00, he said the company was awarded a contract to lay LAN in the Supreme Court Building. That this award was made before he joined the Judiciary. That he gave professional advice to the Respondent when he rejected the system as the same did not meet the Government specifications.
33. The Claimant stated that as Lekha had proposed a Panasonic system, he further conducted due diligence and established from Panasonic regional office that Lekha Trading Company were not authorized distributors or installers of Panasonic PABX system in Kenya. The Claimant stated that in light of above he indicated to Lekha Trading Company to either change their equipment to meet the Government's unified communication or have their contract cancelled. That Lekha Trading Company accepted to vary the equipment. That he wrote an internal memo referenced JUD/ICT/4/Vol. 1/1 to the Chief Justice on the structured cabling at Milimani High Court and Milimani Commercial Courts highlighting the need to have proper networks in the courts. He was aware the CRJ approved the proposal he had communicated in the said internal memo.
34. He appeared before the Respondent's panel on 11th July, 2014 for hearing of the disciplinary case. That the Respondent's panel never presented any evidence to back its allegations. That after hearing on 11th July, 2014 the Respondent's panel granted him an opportunity to expound on his letters of 14th April, 2014 and 12th May, 2014. That Claimant confirmed that he expounded on the said letters through another letter dated 16th July 2014.
35. That the Claimant stated that whilst at the Judiciary, he only initiated two (2) projects that is: procurement of a container data centre; and installation of LAN and WAN. That the above projects were undertaken in accordance with the Strategic Plan commissioned and were duly approved by the CRJ. That notwithstanding the cogent and substantive responses to the NTSC dated 31st March, 2014, the Respondent sent a letter dated 17th December 2014 and summarily dismissed him with effect from 17th December, 2014. Claimant further stated that the said letter stated that he would forfeit all the rights and benefits save the contributions made to the Judicial Service Staff Superannuation Scheme.
36. That up to and until 31st March, 2014 the Claimant's performance and conduct was never subject to any appraisal process or disciplinary procedure or proceedings by the Respondent or at all. The Respondent terminated his employment without furnishing valid reasons or at all in respect to the allegations of gross misconduct as indicated in the notice to NTSC dated 31st March 2014. The Claimant further stated that the Respondent herein did not prove any reason(s) or at all leading to his summary dismissal. That during his employment with the Respondent, he enjoyed facilities including loans at favourable rates applicable to the Respondent employees.
37. That as a consequence of the unlawful dismissal the Claimant has been subjected to mental anguish, severe financial distress and loss of future earnings. Due to the tone of the dismissal letter, he hasn't been able to secure alternative employment as the letter casts aspersions on his morals and ethics. The Claimant stated that at the time of his dismissal from the employment of the Respondent, he was earning a monthly salary of Ksh. 669,289.00. He further stated that during the interdiction period, he only received half of his salary.
38. That in view of the foregoing, he believes that the claim is merited and pray that this honourable court grants the prayers sought therein.



Cross-examination:**

39. Under cross-examination by counsel for the Respondent, Mr. Issa, the Claimant largely reiterated his assertions in chief that he received a notice to show cause (NTSC) in April 2015. That he had served the Respondent for about 3 years at the time. The Claimant added that he was simultaneously interdicted from employment upon service of the notice to show cause.
40. The Claimant stated that he faced four (4) broad charges. That he wrote to the Respondent requesting for documents to help him answer the charges. That the documents were availed to him and he filed a response on 14th April 2014 and a further response on 12th May 2014.
41. The Claimant added that he was called to a hearing in June 2014 but the proceeding took place on 11/7/2014. With respect to the charge that he had failed to ensure security of Judiciary ICT System, the Claimant denied the charge. The Claimant stated that he was awaiting provision of land by the Chief Registrar of the Judiciary to build Judiciary data centre. The land to be availed was to be shared with children's court at Kabete.
42. The Claimant stated that he had already put-up secondary data centre at the Supreme Court and the same was functional. The Claimant stated that, as at the date of his interdiction the secondary data centre was functional and the only remaining issue was the transfer of data to Milimani. That the servers were to be moved from the National Council for Law Reporting (NCLR) to the Supreme Court. The Claimant said he had built a container data centre before he was interdicted. The Claimant explained that it was the primary data centre that had not been built but the secondary data centre was in place already. The Claimant explained that the secondary data centre was a 40-foot container which was built as at 11th July 2014. That the container took the place of primary data centre and was to be moved from Milimani to Supreme Court.
43. The Claimant denied as was put to him that as at the time of interdiction the data centre was not in place. That indeed the data centre was due to be moved the following week before the interdiction took place.
44. The Claimant explained that the data was in the cloud and keys to cloud were with NCLR. The Claimant further explained that the Judiciary had to make regular payments for the data centre and that's why it was held with NCLR for convenience purposes. The Claimant insisted that his testimony did not contradict what he told JSC during the disciplinary hearing. The Claimant explained that the strategic plan for the year 2012-2016 had been approved in 2012 when he joined though the same was still a draft. The Claimant stated that he implemented the Zimbra mail system in accordance with the said strategic plan.
45. The Claimant stated that to guarantee safety of Judiciary ICT Systems, the two data centres needed to be moved to the Judiciary. That he was only at work for twenty-two (22) months. That delay in building the two data centres was due to lack of funds. The Claimant reiterated that the lack of failure to secure funds to build the two data centres made him feel that he could not fully guarantee security of Judiciary ICT system while it was hosted out there.
46. The Claimant also reiterated his answers with regard to the second charge of neglect of duty which charge he confirmed had three (3) components. The Claimant stated that he did not procure the company known as Dew CIS since he found it working with the Judiciary at the time he was appointed. The Claimant explained that Dew CIS supplied email system and case management system to the Judiciary. The Claimant said that upon appointment, he visited the company premises and found the company to be competent. The Claimant explained that the said company also supplied similar services



- to NCLR. The Claimant explained that Dew CIS were domiciled at Barclays Plaza and he established their credibility when he visited the company there in the year 2012 though he could not recall the exact date.
47. The Claimant denied the charge that he was negligent for failing to verify the status of this company. The Claimant was emphatic that he had done exactly that upon being employed. The Claimant stated that he was satisfied that the company was able to provide the services the Judiciary had contracted them to do. The Claimant stated that he could not recall if he had seen the contract between Dew CIS and the Judiciary even as at the time of the disciplinary hearing. The Claimant denied that he was negligent in this respect and denied exposing the Judiciary to ICT insecurity.
 48. The Claimant also reiterated his denial that he was guilty of incompetence by not giving the Judiciary value for money, when he purchased the 40 feet container for the secondary data centre at NCLR.
 49. The Claimant explained why he had bought a 40 feet container instead of the earlier specified 20 feet container. The Claimant explained that he procured the container not from the highest bidder but from the 3rd highest bidder. The Claimant said he submitted to JSC, only documents he believed were relevant to this case presented in the NTSC and had requested and obtained same from JSC. That these did not include due diligence report on the said procurement of secondary data centre. The Claimant insisted that JSC was unfair to him and the charge against him had no merit. The Claimant said he was already aware that JSC was going to fire him and that is why he did not waste money hiring a lawyer. The Claimant said one Mr. Mohamed had confided this to him. The Claimant said his dismissal was a foregone conclusion. That the disciplinary hearing was just a ruse. The Claimant said he was very proud of the service he had given the Judiciary in the short time he served and said he was not guilty of any of the charges levelled against him.
 50. The Claimant stated that the letter of summary dismissal provided the reasons for the action but same were not valid and were not the actual reasons they relied on to dismiss the claimant. That the interdiction followed a statement by CRJ at Mavoko that senior officers had been suspended for building a non-existent court. The Claimant said that he was not involved in that court building. The Claimant said he was arrested and charged with others for causing loss of Kshs. 46 million to the Judiciary. The Claimant said that the disciplinary charges at JSC did not cite this matter and the Claimant said he did not raise the issue of Mavoko Court in his pleadings.
 51. Under re-examination the Claimant clarified that the primary data centre was complete as at the time he left the Judiciary. That they were only waiting to move the servers from Milimani to the Supreme Court. That the data centre was technically functional. That movement was to be done between April and May. That even though he had initially requested for a 20 feet container, JPIP had requisitioned a 40 feet container for a data centre. That the Claimant discussed the matter with Mr. Mbui, a representative of the World Bank at the Judiciary and they agreed to tender for 40 feet container and JPIP would pay for it. The initial 20 feet container was in the Judiciary budget but JPIP had 40 feet container in their budget. That there was no issue raised regarding the size of the container. That the 40 feet was suitable for the data centre. The Claimant explained that no one had complained about any breach of ICT security system at the Judiciary. The Claimant stated that emails were leaked between the Chief Justice and his advisors and this is what led to the complaint. The Claimant explained that the email addresses used were not Judiciary addresses. They were gmail or yahoo personal accounts. The Claimant said that the Judiciary ICT system could not guarantee security of such personal accounts. That these emails were outside of the Judiciary domain. The Claimant explained that it was not part of his docket to safeguard personal data for Judicial Officers and other persons. The Claimant further explained that the Judiciary was to install firewall and network management system to secure Judiciary



network from intruders and management of viruses. That this action was in the Judiciary's strategic phase for implementation in year two of the plan to end of the 5-year plan.

52. The Claimant further clarified that Dew CIS were on the ground when the Claimant was hired by the Judiciary and were responsible for maintenance of the Judiciary ICT system and official emails. That data was stored in cloud in USA. That Judiciary was in the process of moving data from Dew CIS to Judiciary to ensure better control from Judiciary data Centre. Dew CIS had requested to be paid before moving their services to the Judiciary data centre. The Claimant explained further that the intended movement was to guarantee 24-hour access to the system.
53. The Claimant explained further that 'Faini chap chap' was a project conceptualized by Dew CIS and they had obtained a pay bill number by the time for that purpose by the time the Claimant was appointed to the Judiciary. The Claimant explained that there were challenges in the implementation of the project since the Judiciary did not have a call center for answering queries in the event of misdirected payments by customers. The Claimant stated that he notified the Judiciary about these challenges. The Claimant explained that he constructed a ten (10) seat call centre at Milimani and was awaiting recruitment of personnel to man the call centre. The Claimant stated that the launch of 'Faini Chap chap' was however done at Kibera Court by the Chief Justice to start the payments prior to the procurement of personnel to man the call centre.
54. The Claimant stated that he was wrongly and unfairly found guilty of gross misconduct. The Claimant stated that gross misconduct was not explained in the letter of dismissal. That he still does not understand what exactly he was found guilty of. The Claimant added that the summary of JSC findings was not sent to him at all and first saw it in court. The Claimant concluded that the disciplinary process was a charade and a foregone conclusion. All the five officers who appeared before JSC were dismissed. That the other four (4) had legal representatives. The Claimant said he was happy he had saved himself some money by not hiring a lawyer since the matter had been prejudged by JSC.

Response**

55. The Respondent called Winfrida Mokaya (RW1) to testify in defence of the Respondent. RW1 was the Registrar of JSC at the time. RW1 adopted her witness statement and also testified at length in chief.
56. The Respondent deposes that the Claimant was the Head of ICT Department in the Judiciary. That he was expected to provide professional, and administrative advice and support on all matters relating to ICT. That his specific duties included: -
 - i. To develop and ensure the implementation of information and communication technology strategies in line with the Judiciary mandate and the Judiciary Transformation Framework.
 - ii. To develop and implement effective policies, procedures, systems and processes for systems administration and security, judicial applications support and network administration.
 - iii. To advise the judiciary on the development, implementation and maintenance of computerized court process, which include but not limited to court management, virtual court systems (teleconferencing), document management systems, data capture and recovery systems.
 - iv. To develop accountability structures, supervise periodic reporting and projects and monitor the performance of the ICT department.
 - v. To ensure all directorates and court stations are adequately resourced by professional and competent personnel.



- vi. To oversee the development of ICT plans in coordination with other directorates and departments.
 - vii. To oversee the contracting and management of ICT and related service providers
 - viii. To coordinate the provision of timely information communication technology services to other directorate and court stations
 - ix. To keep and maintain stock of all ICT inventory of the Judiciary in liaison with procurement department
 - x. To oversee periodical checks of the state of ICT equipment and software and submit report to the Chief Registrar.
57. That he was in management level therefore and in the conduct of his work he was guided by all relevant statutes on ICT, procurement and financial management including all Government circulars and policies such as the Government Unified Communication Strategy.
58. RW1 deposes that during the disciplinary process for the former Chief Registrar of the Judiciary the JSC had observed that there could have been professional misconduct on the part of some of the senior managers in the Judiciary.
59. The JSC held a meeting on 31st March 2014 in which the commission reviewed the performance of the Judiciary's top management and deliberated on the findings of the special audit report no. JUD/IAR NO.0/14 issued on 22/1/2014. The report was placed before court. Pursuant to that review JSC made a decision to take immediate and appropriate action against the officers whose performance had been noted as wanting and those mentioned in the report.
60. Accordingly, by a letter dated 31/3/2014, the Chief Justice informed the Claimant that he had failed to carry out his duties diligently and set out in detail the allegations of gross misconduct that had been levelled against him as follows: -
- a. Failing to ensure security of Judiciary ICT system as the ICT systems used in the Judiciary were hosted at some unknown, insecure and improperly procured place and as a result the Judiciary was not in control of the same.
 - b. Neglect of duty as head of the ICT directorate; the Claimant neglected his duties by:
 - i. Failing to ascertain the particulars and security of a company known as Dew CIS which has allegedly been hosting the backup for the Judiciary service desk, website, case management systems in various registries for nearly two (2) years.
 - ii. Failing to provide any supporting documents for the contract with Dew CIS.
 - iii. Unlawfully outsourcing the hosting, backups and administration of the system despite being aware that the Judiciary service desk system was developed in house. As a result of which the Judiciary incurred losses of Kshs. 19,836,000.00.
 - c. Incompetence: The Claimant exhibited incompetence by initiating and overseeing fraudulent ICT projects with the aim of hoodwinking the public that Judiciary was capable of offering 'Faini chap chap' for quick and expeditious payment of fines and further failing to ensure that the SMS short code 20583 for service desk was active.
 - i. Failing to ensure that the Judiciary has viable operational and sustainable systems despite the heavy financial investment on ICT projects over the past two (2) years.



- d. Failing to ensure value for money contrary to the provisions of Chapter 12 of the *Constitution*, Public Finance Management, the Public Procurement and Disposal Act 2005 and Regulations of 2006 by:
- i. Initiating e-filing of pleadings which cannot be used without ascertaining the legal implications which require mandatory signing of pleadings by litigants or their advocates. The system had no provision for electronic signature and therefore resulted to the judiciary incurring colossal costs on a system that did not serve its utility purpose.
 - ii. Advising and recommending the procurement of the data centre and providing specifications for a 20 feet container, but instead accepting supply of a 40 feet container doubling the initial estimated cost, contrary to provisions of the Public Procurement and Disposal Act, 2005 and Regulations.
 - iii. Failing to ensure that the existing servers were fully utilized before procuring external servers which resulted to unwarranted high expenditure
 - iv. Failing to give professional advice, exercise due diligence and ascertain that one Lekha Trading Company had completed works before payment of Kshs. 58,041,487/=. Further, despite the payments in advance the Claimant failed to ensure that the works had been handed over to the Judiciary.
 - v. Causing colossal amounts of money to be spent by the Judiciary in installing Local Area Network and Wide Area Network especially at Milimani Law Courts yet the judiciary ICT committee had installed the same in 2010.
 - vi. Failing to ensure that soft copies of the records are availed for use by the judiciary three (3) years after the process of digitization of court records was completed.
61. RW1 deposes that the Claimant was asked to show cause why severe punishment should not be meted on him which he proceeded to do in written responses dated 14/4/14 and 12/5/2014 respectively.
62. That the Claimant was placed on interdiction on half pay pending the determination of the disciplinary process. The Claimant was allowed use of his official laptop, tablet and motor vehicle.
63. That by a letter dated 30/4/14, the deponent provided all the documents requested by the Claimant to enable him prepare and furnish his response to the notice to show cause.
64. That JSC upon reviewing the charges and response at a meeting held on 15/6/2014 resolved to proceed with the disciplinary hearing and notice to appear before a disciplinary hearing on 11/7/2014, was issued to the Claimant. The notice was dated 27/6/14.
65. RW1 adds that, at the hearing, the Claimant admitted that he had received all the documents he had requested for to enable him defend himself. That the Claimant admitted that he had initiated two projects that were part of the charges, being the procurement of a container data centre and installation of Local Area Network and Wide Area Network (LAN & WAN) which composed of charges no 4b and 4f respectively. The Claimant further confirmed that other projects the subject of the charges were ongoing and that as head of ICT in the Judiciary he was responsible to ensure the projects ran smoothly and correctly.
66. RW1 stated further that upon conclusion of the hearing, the Claimant filed written submissions dated 16/7/2024.



67. RW1 noted that upon conclusion of the disciplinary hearing JSC reached the following conclusion based on the oral evidence adduced and written submissions: -
- a. On the 1st charge on failing to ensure security of the Judiciary ICT system;
 - i. The committee found that the Claimant as ICT director had failed to ensure security of Judiciary ICT Systems.
 - ii. The Claimant had failed to expedite the process of relocating the systems from NCLR and Dew CIS to the Judiciary and the establishment of requisite infrastructure to facilitate the same.
 - iii. The committee therefore found him liable for incompetence in performance of his duties.
 - b. On the 2nd charge on neglect of duty;
 - i. The committee found that the officer did not provide professional advice to ensure that the judiciary data held by the company was secure.
 - ii. He failed to advice on measures to deal with the company in the face of the anomalies cited in the matter.
 - iii. The committee therefore found him negligent in performance of his duties.
 - c. On the 3rd charge of incompetence;
 - i. The committee found that the officer failed to provide professional advice that the prerequisites for setting up a 'Faini chap chap' system needed to be put in place before its launch and instead admitted to implementing the system based on instructions from the former CRJ even though he was aware that the system would fail.
 - ii. The Claimant failed to clarify to the committee under whose authority and or supervision Mr. Mbugua Kabiru configured and managed the Judiciary ipads and exposing the email system to security risk.
 - iii. The committee therefore found the Claimant incompetent in performance of duties.
 - d. On the 4th charge regarding the failure to ensure value for money;
 - i. The committee found that the Claimant did not justify the need to replace LAN/WAN at Milimani.
 - ii. The Claimant failed to demonstrate that there were relevant approvals on changes in the concept note from 20 feet container to 40 feet container which was eventually procured.
 - iii. The committee therefore found the Claimant culpable of making decisions that did not ensure value for money for the Judiciary.
68. RW1 concluded that the JSC committee had lawfully and fairly found the Claimant guilty on the four (4) charges levelled against him and recommended that the Claimant be summarily dismissed on grounds of gross misconduct which decision was approved by JSC on 17/12/2014. That the Claimant was issued with a letter of dismissal dated 17/12/2014, which letter was placed before court.



69. RW1 concludes that the summary dismissal of the Claimant was lawful, fair and allegations of malice on the part of JSC were not established by the Claimant.
70. That the petition lacks merit and it be dismissed with costs.
71. RW1 was subjected to very close cross-examination by Advocate, Kitche for the Petitioner.
72. RW1 stated that she had joined the Judiciary in 1997 and that she was Registrar JSC at the time the Claimant faced disciplinary charges. That as Registrar she sat in the disciplinary hearing to help process the matter as part of the secretariat. That she played no other role in the proceedings. RW1 stated that Respondent did not provide minutes of the disciplinary hearing in respect of the former CRJ, Gladys Shollei. RW1 admitted that the charges against the former CRJ provided background information that led to the charging of the Claimant and other senior managers of the Judiciary. RW1 further admitted the special audit report also formed the basis of the charges against the Claimant but could not recall if the audit report was availed to the Claimant before the hearing. RW1 added that the Claimant was availed all documents he had requested for as the minutes of the proceedings show.
73. RW1 admitted that the Claimant admitted directly initiating two projects out of the 14 projects canvassed in the charges the Claimant faced. RW1 said the Claimant had supervisory role over all the projects including those not initiated by him. That his duty was inter alia to ensure security of Judiciary ICT but he failed to do so. When requested for such evidence, RW1 only stated that the fact that ICT was still hosted elsewhere two years down the line was sufficient evidence that same was not secure and the Claimant was not aware who held the access rights of the Judiciary ICT system despite being the head of ICT for two years. RW1 said there was no evidence of breach of the Judiciary ICT system. RW1 said she did not know when the company Dew CIS was procured by the Judiciary. RW1 said the Judiciary did not sign any contract with this company. That the company had a contract with the National Council for Law Reporting and not the Judiciary. That there was no privity of contact between DEW CIS and the Judiciary. RW1 said she did not know when DEW CIS was on boarded by the Judiciary. That the Judiciary paid fees to the company based on request for payment made by the Claimant. That the company was paid Kshs. 19,836,000/=. RW1 admitted that the Judiciary collaborated with NCLR on ICT matters. RW1 said there was an invoice from DEW CIS to NCLR for hosting and cloud computing services in the sum of Kshs. 800,400.00 for the period 1/7/2013 to 30/6/2014. That DEW CIS hosted the website and cloud computing. That hosting of email from Treasury was to be transferred to NCLR due to a lot of down turns. RW1 stated that the service to the Judiciary were satisfactory but there was no record of how DEW CIS was contracted by the Judiciary if at all and this matter was flagged in the audit report hence the Claimant had to answer for that.
74. RW1 was not sure if any payment made to DEW CIS was wrongful. RW1 said Claimant was guilty of incompetence with regard to the project 'Faini chap chap'. That the Chief Justice was made to launch the project for quick payment of fines when it was not ready and therefore not operational. That the Claimant was negligent in this regard. That the project was stopped immediately since there was no call centre to back-up the initiative. RW1 could not recall when the initiative was cancelled. RW1 said that the Claimant had sufficient staff to support the initiative. RW1 admitted the Claimant had requested for 3 assistant directors but had 40 staff. RW1 said the three assistant directors were not employed.
75. RW1 said today Judiciary uses Q-pay, a mobile payment system which supports e-filing yet Judiciary has no call centre. RW1 said that 'Faini chap chap' did not require a call centre. RW1 admitted that she was not an ICT professional and the Claimant was better placed to explain the matter. RW1 denied that the Claimant had already started e-filing system before he was charged and interdicted stating that at the time, pleadings were being scanned and uploaded to the system. RW1 said at the time there was no system to support e-filing. That the same could only work with LAN and WAN in place. RW1 said



that JSC did not involve an ICT expert in the probe that led to the dismissal of the Claimant. That no such expert testified before JSC committee. RW1 admitted that no witnesses were called at the hearing except the Claimant in his defence. RW1 said that the Claimant procured a 20 feet container to host the Judiciary server but a 40 feet container was eventually procured. RW1 admitted that there was a variation of the requisition. RW1 admitted that procurement was done by a team but stated that the Claimant was a key officer to oversee the process as head of ICT. RW1 could not confirm if the variation was necessary for purpose of relocating the server stating that whatever the case Judiciary paid more for the 40 feet container as opposed to 20 feet container that had been requisitioned initially. RW1 did not know if the 20 feet container was sufficient for hosting the server. RW1 said that the Claimant should have cancelled the requisition of 20 feet container and commenced the requisition of 40 feet container afresh. RW1 said there was no report from procurement on the matter giving a professional view on the procurement variation.

76. RW1 admitted that nobody was criminally charged in respect of this procurement but Claimant was dismissed for gross misconduct. RW1 admitted that the dismissal letter did not give details of the specific reasons for dismissal. That the reason given was gross misconduct having been found guilty of the four (4) charges levelled against him.
77. RW1 said that the Claimant was paid terminal benefits due to him but she had no details of the same. RW1 said Claimant had served 2 ½ years but she did not have the computation of terminal dues paid to him. RW1 said she did not know if Claimant was paid in lieu of notice but stated that this was a summary dismissal. RW1 stated that criminal charges against the Claimant and others were terminated.
78. In re-examination RW1 said that the Claimant did not request for the special audit report. RW1 said the Claimant failed in his administrative duties and the charges were basically about that and not on procurement matters that provides a disciplinary code must abide by this standard. In this regard, notwithstanding that the employment relationship between JSC and the Claimant was regulated by the Judicial Service Commission, the applicable internal disciplinary code is as stipulated in the Judiciary Human Resource Policy and procedure manual, JSC was obliged to objectively demonstrate that it had a valid reason to summarily dismiss the Claimant from employment.
79. The Respondent proffered four (4) charges against the Claimant.
80. The first charge was that the Claimant failed to ensure security of Judiciary ICT system. The Claimant as in the charge was accused of not enabling the Judiciary ICT to determine:
 - a. How to get all the rights to the system;
 - b. Where the service desk is hosted
 - c. How to access the host in case of a problem
 - d. How the backup is stored and how it can be returned
 - e. Whether the system upgrade should be done and if so, how often
 - f. Whether there is a supervisor who can override the rights of the administrators and hence compromise security measures that have been put in place.
81. RW1 concluded that the explanation by the Claimant on all charges was not satisfactory hence the summary dismissal. RW1 prayed that the suit be dismissed with costs.



Determination

82. The parties filed written submissions which the court has carefully considered together with the authorities furnished by counsel thereof. The court has also considered the evidence adduced by CW1 and RW1 and have delineated the following issues for determination: -
- i. Whether the summary dismissal of the Claimant was for a valid reason(s) proved by the Respondent.
 - ii. Whether the Respondent followed a fair procedure in arriving at the decision to summarily dismiss the Claimant
 - iii. Whether the Claimant is entitled to the reliefs sought.
83. The court will proceed to consider these matters together in a systematic manner.
84. Section 43(1) and (2) of the [Employment Act](#), 2007 provides:
43. Proof of reason for termination
 - (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.
85. This provision of the Act places the burden on an employer to prove on a balance of probability that it had a valid reason to dismiss an employee from employment. This test applies to all employees notwithstanding any other statute which regulates their employment. The Claimant in the response dated 14/4/2014, explained that he had joined the Judiciary on 28/5/2012. That upon joining Judiciary he had first developed a strategic plan document and in that process, he had established the huge deficiencies in Judiciary ICT infrastructure and staff. That most ICT systems in use were still managed by the NCLR. That immediate takeover of the systems managed by NCLR and/or introduction of any new ones with the current staff complement would have overwhelmed the Directorate. The Claimant stated that he had outlined his broad work plan in a memo to the CRJ dated 27/6/2012 titled “request for authority to audit ICT assets, develop Kibera court ICT infrastructure, redesign Milimani ICT infrastructure, acquire new internet and email providers and recruit internal ICT staff.” That the strategic plan was presented to a plenary in Milimani Ceremonial Hall in August 2012.
86. The Claimant explained that he had commenced to implement the plan by recommending the recruitment of qualified staff for critical ICT roles and the proposal was accepted, however, the recruitment of ICT staff was stopped without any explanation despite shortlisting done by that date.
87. The Claimant went ahead to offer detailed explanation to the 1st charge on the specific steps he had taken which explanation was repeated in chief before court.
88. The second charge was negligence of duty whose particulars were that the Claimant as the head of ICT Directorate had failed to ascertain the particulars and security of a company known as Dew CIS which was hosting the back up for the Judiciary service desk, website and case management systems in various registries for nearly two (2) years, failing to provide supporting documents for the contract with Dew CIS and despite being aware that the Judiciary service desk system was developed in house



the Claimant unlawfully outsourced the hosting, backups and administration of the system and as a result the Judiciary had incurred a loss of Kshs. 19,836,000.00.

89. The Claimant had explained to JSC as he explained to the court that by the time of his recruitment, he found DEW CIS already providing services to the Judiciary. That he had established that NCLR had contracted the said company which was also offering services to the Judiciary. That he had learnt of this from a memo by CRJ dated 13/6/2012 titled “upgrade of hosting and cloud services” That according to this memo the company provided systems that included e-mail systems, the enterprise Judiciary service desk and the Enterprise Case Management System. The Claimant had denied any negligence on his part stating that the Dew CIS was contracted before he was employed. That his effort to obtain any contract between Dew CIS and Judiciary or NCLR were not fruitful. That by a letter dated 28/5/2012, CRJ had requested CEO/Editor of NCLR to fully design and deploy a premium comprehensive case management system for the Judiciary and to invoice the Judiciary for the same.
90. That in February 2014, Dew CIS presented an invoice addressed to NCLR seeking payment from the Judiciary. That he had presented the said invoice and supporting documents to the Judicial tender committee. That the tender committee requested for a properly addressed invoice to the committee but that did not happen.
91. The Claimant explained that Kshs. 19,836,000.00 was paid pursuant to an agreement between NCLR and Dew CIS and the amount was for the provision of an Enterprise Case Management System, not hosting backups and administration of a service desk system.
92. The Claimant testified that the Enterprise Case Management System was developed according to that agreement and Judiciary specification and had been successfully used to manage the election petitions. That it was in the process of being deployed at the Supreme Court, the Court of Appeal and the Family Division of the High Court in Milimani and training for the court and registry personnel on this case management system was scheduled to start on 8/4/2014 in Nakuru with funding from World Bank’s JPIP.
93. The third charge facing the Claimant was one of incompetence in that the Claimant had initiated and overseen fraudulent ICT projects with the aim of hoodwinking the Kenyan public. That the Judiciary was capable of offering “Faini chap chap” for quick and expeditious payments of fines and further failing to ensure that the service short code 5834 for service desk was active.
94. That despite the Judiciary investing heavily in ICT projects over the past 2 years, the Claimant had failed to ensure that the Judiciary had viable operational and sustainable systems to march the investment. That such system includes provision of reliable internet, secure Judiciary emails and other services.
95. In response to this charge the Claimant explained that “Faini chap chap” system and SMS short code 5834 was part of the Enterprise Case Management System whose agreement had been entered into between NCLR and Dew CIS.
96. The Claimant explained that after ‘Faini chap chap’ was launched, he had stopped it when it emerged that the Judiciary didn’t have the proper processes and infrastructure to successfully manage it. The Claimant said he had embarked on addressing the identified gaps by first requesting for staff to man a call centre to manage and resolve ‘Faini chap chap’ as seen in the memo dated 10/10/2013 sent by the Claimant to CRJ. The Claimant said he had also liaised with Safaricom to get best practices and procedures as per email dated 20/9/2013 from Safaricom confirming training of Judiciary teams and customer education. The Claimant stated on the solution required once staff were identified, and recruited by building reliable infrastructure including WAN and LAN services and improvement



vide tenders 03-2012-13 WAN and LAN and 08-2012-2013. This process entailed supply, installation and commissioning of a containerized data centre which was going on but incomplete due to non-payment. The Claimant stated that he had updated the Chief Justice of this progress at a meeting held on 6/9/2013 at his office.

97. The Claimant explained that they had huge investment on ICT in the Judiciary under the WAN/LAN project but however were unable to realize the full gains of the investment because the contractor had not been fully paid hence the project remained incomplete and had raised the matter in several memos dated 2/10/2013; 20/11/2013 and 29/1/2014. That Judiciary could not have reliable internet until the WAN/LAN project was complete. That two independent suppliers under the project could provide reliable internet one being to provide back-up on the other in the event of outage, the other ensuring continuity.
98. The Claimant stated that Judiciary emails were secure and he had no report of any breach into it. That with regard to emails purported to have been leaked, the email address used were non-judiciary email addresses being gmail and yahoo. That Judiciary ICT Directorate had no control over emails generated or propagated by other email servers hence the Claimant could not be blamed for such leaks.
99. The fourth (4) charge was failing to ensure value for money contrary to the provision of the Constitution and Public Finance Management, the Public Procurement and Disposal Act 2005 and PP & VA regulation of 2006. The particulars of this include initiating e-filing of pleadings which could not be used, procurement of 40 feet container after advising acquisition of 20 feet container, failing to ensure existing servers were fully utilised and failing to give prior advice before payment of Kshs. 58,041,487 to Lekha Trading Company causing collapse of installation of LAN and WAN and failure to ensure soft copies of records are availed for use by the Judiciary since digitization process began 3 years before.
100. The Claimant gave explanation in detail for the procurement done before he was appointed and after, stating that due diligence was conducted before every procurement and proper evaluation done before payments were approved according to laid down standards. The Claimant concluded that the Judiciary had invested over 1,087 billion in ICT in the past two financial years. That this was the largest investment in ICT ever undertaken by the Judiciary. That a budget of Kshs. 1,622 billion was proposed for financial year 2014-2015 to be funded by Government of Kenya, UND and JPIP. That despite the massive investment there had been no commensurate increase in ICT staff, both technical and management for managing ICT back ground services and users using the systems provided. The Claimant said that the Judiciary needed to reconsider the halted recruitment of ICT officers including Audio Visual Recording Supervisor, Audio Visual Librarian, Audio visual technicians, network and data centre administrators and ICT officers. Claimant outlined many ICT projects ongoing in the out-Judiciary stations and all required ICT officers to manage and protect the investment. The Claimant also recommended upgrade of quality and/or ICT skills of court and registry clerks as these are the backbone of the functions of court registries. The Claimant concluded that he had discharged his duties diligently according to regulation and in the best interest of the Judiciary.
101. The Chief Justice acknowledged receipt of the response by a letter dated 15/4/2014. By a letter dated 30/4/14, CRJ provided the Claimant with all documentation the Claimant had requested and invited the Claimant to submit further responses based on the supplied documents within 14 days. The Claimant wrote a supplementary response to the charges dated 12/5/2014 which is before court embellishing the explanation earlier given.
102. By a letter dated 27/6/2024, JSC wrote to the Claimant informing him that it had considered the charges against the Claimant and his responses at a meeting held on 25/6/2014 and had resolved to



have disciplinary proceedings instituted against the Claimant to continue. The Claimant was given notice to appear before the JSC committee appointed to investigate the matter pursuant to section 54(4) Part IV 3rd Schedule of the *Judicial Service Act* 1, 2011.

103. The Claimant was informed that he will be answering to the charges communicated in the referenced NTSC. The letter did not inform the Claimant of his rights including whether he may be represented by counsel or whether he is entitled to be accompanied by an employee of his choice to assist him in the proceedings. The Claimant was also not informed whether he could call any witness.
104. The court observes at this point that the special audit report or any investigation report by the JSC committee did not constitute the documents availed to the Claimant. Indeed, RW1 stated that the same were not provided to the Claimant since he had not requested for them. The court further notes that the NTSC dated 31/3/2014 written by the Chief Justice to the Claimant titled “Gross misconduct” which contains the four (4) charges levelled against the Claimant did not reference any audit reports or any investigation report that formed the basis of the charges. The letter simply said “The Judicial Service Commission has noted with immense concern that as the Head of the Information Communication Technology (ICT) Directorate you have failed in the discharge of your management and administrative duties diligently, bringing the operation of the Directorate into disarray”
105. This was followed by an outline of the four charges levelled against the Claimant.
106. The Claimant attended the hearing before a committee of JSC chaired by Rev. Samuel Kobia with Prof. Tom Ojienda and Hon. Emily Ominde as Commissioners.
107. The court has considered the minutes of the disciplinary committee and has noted the following: -
 - i. The committee did not read out to the Claimant the charges he faced but informed the Claimant that the charges were per the NTSC the Claimant had already responded to in writing.
 - ii. The committee established that the Claimant had received all the documents he had asked for and did not require any further documents at that time unless need arose from the proceedings to request for further documentation.
 - iii. There was no complainant before the committee to present the case against the Claimant by adducing oral and documentary evidence before placing the Claimant on his defence.
 - iv. Since no response was made by the Chief Justice or the JSC to the explanation the Claimant had made extensively in writing, the committee did not point out to the Claimant why they were not satisfied with the written responses and whether any part of the responses was satisfactory.
 - v. The Claimant was made to repeat what he had explained in detail in the two written responses he had made.
 - vi. The commissioners asked the Claimant various questions throughout the proceedings and in the end asked the Claimant to make written submissions to them.
108. In short, no oral or documentary evidence was presented at the disciplinary hearing despite reference to special audit report and other investigation by the JSC committee prior to the disciplinary hearing. The claimant was simply called upon to prove his innocence.



109. RW1 in court stated that it was the said audit report which the Respondent relied on titled “special audit report on unpaid bills totaling Kshs. 178,314,638.00 dated 22/1/2014” which formed the background to the charges. The said document was not provided to the Claimant at the hearing or at all until the matter came to court.
110. The court has observed that the ICT matters that formed the basis of the charges against the Claimant were technical in nature. The explanation given by the Claimant was also largely technical in nature. The court noted that no ICT expert tabled any report before the JSC committee to counter or confirm the explanation given by the Claimant to the charges levelled against him. The JSC committee did not provide a report to the Claimant or to the court giving reasons why they were not satisfied with the explanation given by the Claimant in his written responses and during the oral hearing.
111. There is not before court any evaluation of the charges laid against the Claimant vis a vis the answers he gave so as to arrive to the conclusion that the Respondent had valid reason(s) to summarily dismiss the Claimant.
112. The court is of the considered view that no person placed any evidence before the disciplinary committee against the Claimant in the presence of the Claimant before giving the Claimant a hearing to enable the committee to even begin to have an opportunity to reasonably evaluate the merit of the case vis a vis the defence proffered to arrive at a finding of fact on each of the charges levelled by the Chief Justice against the Claimant. The Claimant was not made aware of any persons they interacted with during their investigations so as to arrive at the conclusion that the Claimant had a case to answer.
113. This process followed by the committee hindered them from being able to fairly and justly prove as obliged under sections 43(1) and (2), 45(1) and (2) read with 47(5) of the *Employment Act*, 2007 that they had valid reasons and justification to summarily dismiss the Claimant.
114. The Claimant in his cogent evidence before court demonstrated that he had made very elaborate responses to the NTSC explaining that he was not guilty of the charges levelled against him and so was not guilty of misconduct. The Respondents without making any comment on the responses by the Claimant went ahead to summon him to a hearing where no evidence was adduced. Accordingly, it is the conclusion by the court that the Respondent had failed to prove that it had established valid reason(s) following a fair procedure to summarily dismiss the Claimant.
115. In this regard we refer to the case of Pius Machafu Isindu versus Lavington Security Guard Limited [2017] eKLR in which the court of Appeal held: -

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble.”



116. In the case of Rebecca Ann Maina and 2 others versus Jomo Kenyatta University of Agriculture and Technology [2014] eKLR, the court held: -

In order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employee which would assist them in preparing defence.”

117. In her evidence in chief RW1 specifically stated:

During the disciplinary process for the former Chief Registrar of the Judiciary the JSC had observed that there could have been professional misconduct on the part of some senior managers in the Judiciary. These observations were corroborated by the internal and external audit reports.”

118. From the testimony by the Claimant and that by RW1, these internal and external audit reports were never availed to the Claimant to help him prepare the first and second written responses to the NTSC nor were they availed to him before or at the disciplinary hearing. All RW1 told the court is that the Respondent availed the Claimant the documents he had specifically requested for.

119. RW1 did not find it fair and just, to furnish the Claimant with documents which formed the basis of the charges though same were not specifically referred to in the NTSC to inform the Claimant of their existence and relevance to the charges he faced. This existence of, reference to and reliance on by the Respondent on the said special internal audit report dated 22/1/2014 is evident since same was produced before court by RW1 as exhibit 2.

120. RW1 stated at paragraph 8 of her witness statement that “Judicial Service Commission made a resolution that the Hon. Chief Justice in exercise of his authority as stipulated in paragraph 15 and 25 of the Third Schedule of the *Judicial Service Act* to take immediate and appropriate action against the officers whose performance had been noted as wanting and those mentioned in the special internal audit report as being in breach of their duties.”

121. RW1 however under cross-examination stated that the special audit report did not have any adverse recommendations against the Claimant. The court finds that the Respondent was obliged to avail the report to the Claimant.

122. The Respondent did not adduce any evidence that it had conducted a performance appraisal or review of the work done by the Claimant in the two years he had served the Respondent. The court indeed finds that no performance review report for the year 2012/2013 or 2013/2014 was tabled at the disciplinary hearing nor was one presented to the Claimant to enable him respond to the charges of incompetence, neglect of duty, failure to ensure security of Judiciary ICT or failure to ensure value for money in his management of ICT department of the Judiciary. The court finds that these are matters that would have been confronted first in a job evaluation/review exercise as a performance measure, before being escalated in a NTSC by way of allegations of misconduct.

123. The Respondent failed to demonstrate vide tangible and cogent evidence obtained following a fair procedure that the Claimant was negligent, incompetent, extravagant or was a failed manager as alleged or at all.

124. Considering the foregoing the court finds no difficulty in coming to the conclusion that the Respondent did not only fail to prove that it had valid reason(s) to summarily dismiss the Claimant,



but also failed to demonstrate that it followed a fair procedure in arriving at the decision to summarily dismiss the Claimant.

125. The summary dismissal of the Claimant was arrived at following a flawed procedure and was unlawful.

126. The court in arriving at this decision has considered the decision in the case of David Gichana Omanga versus Mombasa Maize Millers Ltd E145 of 2021 in which the court emphasized the essentials of procedural fairness as provided under section 41 of the *Employment Act* as follows: -

24 Compliance with the procedural fairness outlined in section 41 of the *Employment Act*, is not a mechanical rote process where an employer is expected to keep a checklist. The essentials are to notify an employee of the charges or reasons being contemplated to terminate his services in a language the employee understands giving him an opportunity to prepare and respond to the charges either in person or colleague/union representative or considering his representations.”

127. As stated earlier in the present matter, the Claimant was not made aware that he could bring a colleague or representative to the hearing even though the Claimant has not specifically complained about this stating that hiring an advocate could have been a waste of money since the matter was pre-determined. It is incumbent on the employer to notify the Claimant of this right in the NTSC. It has also been emphasized that the employer is under an obligation under the rules of natural justice to avail relevant documents to the employee which contain adverse or favorable information to help the employee prepare his defence. In this matter, the court finds that the Respondent had an obligation to voluntarily furnish the Claimant with the audit reports that had informed the decision to charge the Claimant and other officers of the Judiciary with offences of gross misconduct that could lead to their summary dismissal as happened in the case of the Claimant.

128. Related to the issues of fairness is the lack of a witness to elaborate fairly technical charges leveled against the Claimant. In Judith Nyagol and Judicial Service Commission and Another (Petition E015 of 2024 (2024) KESC 69 (KLR) 22 November 2024(Judgment) the Supreme Court held that

This then brings us to the next limb of the aspect of fair trial, and that is whether it was prejudicial to fail to avail the witnesses. It would appear that the Respondents relied predominantly on the judgment of the Criminal Court which was also the basis of the ‘complaint’. They did not call any witnesses and did not adduce any evidence. While it was upon the Respondents to elect which witnesses to call, if any, it was upon them to prove their case and not leave it to conjecture or even worse, to shift the burden of proof to the Appellant. To that extent, we find that failure to avail witnesses was fatal to the Respondent’s case, trial and ultimate decision.

129. The Respondent has failed to demonstrate that it presented clear evidence at the disciplinary hearing to be countered by the Claimant in his defence. The Respondent also failed to provide specific reasons why the Claimant was found guilty in respect of each specific offence of negligence, incompetence, failure to ensure value for money and compromising the security of the Judiciary in the absence of any relevant technical and other evidence adduced providing the Claimant with opportunity to counter specific aspects of the allegations before the Respondent arriving at a just and fair decision on each of the charges. Indeed, no specific reasons have been given for the adverse findings in respect of each charge to justify the decision arrived at by the disciplinary committee of JSC that the Claimant was guilty of all or any of the charges levelled against him. The process in sum failed in procedural fairness



leading to an unlawful and unfair decision against the Claimant in violation of sections 41, 43 and 45 of the *Employment Act* 2007.

130. In conclusion, the court finds that the summary dismissal of the Claimant was unlawful and unfair and the Claimant is entitled to the reliefs sought in the memorandum of claim as follows: -

(a) One month salary in lieu of notice

131. Upon being summarily dismissed the Claimant was not paid one month salary in lieu of notice in terms of his contract of employment or as mandated under section 36 of the *Employment Act*, 2007. Accordingly, the court awards the Claimant the equivalent of one month salary in lieu of notice in the sum of Kshs. 669,289.00

(b) Withheld half salary during interdiction

132. The Respondent placed the Claimant on interdiction with effect from 31/5/2014 to the date of summary dismissal. As a result, the Respondent paid the Claimant Kshs. 177,144.50 basic salary instead of Kshs. 354,289.00.

133. Upon dismissal, criminal proceedings against the Claimant were commenced by EACC against the Claimant, which criminal charges were withdrawn by the DPP subsequently under section 87(a) of the Criminal Procedure Code and allowed by the court on 23/10/2017. As per the case of Grace Gathoni Murithi versus Kenya Literature Bureau (2012) eKLR, the Respondent is obliged to pay the Claimant all the withheld salary for that entire period. This position was restated in the case of Bryan Mandela Khaemba versus the Supreme Court of Kenya and Judicial Service Commission (2019) eKLR where the court held that a staff of the Judiciary who is placed on suspension would be entitled to full pay since the JSC is obliged to process and conclude the disciplinary process expeditiously.

134. Accordingly, the half salary due to the Claimant between the period 31st March 2014 and 17th December 2014 be refunded to him in the sum of Kshs. 1,514, 299.75

(c) Repayment of mortgage facility at commercial rates from date of dismissal.

135. The Claimant had obtained a house loan under Judiciary cash backed scheme at 3% per annum. Upon summary dismissal, this rate was reverted to commercial rate. The Claimant is entitled to continue payment of the mortgage at 3% interest per annum and a refund of the extra interest paid as a result of the unlawful summary dismissal. The reversal took effect on 21/6/2015. The court relying on the decision in Linda Were versus Sanlam Life Insurance Limited and 2 others (Cause 248 of 2020) (2024) KEIC 3 (KLR) and Nancy Akinyi *Kunga versus Credit Bank Ltd Cause E555 of 2023* KEELRC 2814 (KLR) (9 November 2023) finds that the Claimant is entitled to the refund of the extra interest charged on his mortgage from 21/6/2015 to payment in full, the 3% interest being part of his employment contract and therefore had legitimate expectation that he would repay the entire loan at 3% interest. However, the claimant in the body of the memorandum of claim and prayers did not include this relief and the court is bound by the pleadings by the claimant and cannot grant this relief.

(d) Compensation

136. The Claimant testified that he had not obtained any employment since his dismissal from employment by the Respondent and subsequent aborted criminal prosecution at the behest of the Respondent. The claimant earned a gross salary of ksh 669,289.00 at the time of the unlawful dismissal. The Claimant was not paid substantial terminal benefits due to the summary dismissal. The Claimant lost prospects of earning a good salary in the high position he held at the Judiciary unlawfully. The court finds that



the Claimant suffered immense loss and damage visited on him unlawfully by the Respondent. The Claimant lost means of livelihood for himself and his children. The court finds that the Claimant was a victim of circumstances and did not substantially contribute to the summary dismissal. The criminal prosecution no doubt magnified the trauma and deprivation the claimant suffered.

137. The court has considered the Supreme Court decision in Kenfreight EA Ltd versus Benson K Nguti (Petition 37 of 2018) (2019) KESC 79 (KLR) in respect of the principles of compensation under section 49(1) as read with 49(4) of the Employment Act 2007, and circumstances of this case which resonate with that one. The court has considered the period of two and a half years the Claimant had served and that he expected to serve the Judiciary as Director ICT up to the date of retirement as he stated in his testimony.
138. Considering also the publicity that accompanied this matter which may have contributed to the failure by the Claimant to secure another job, the court awards the Claimant the equivalent of 6 months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Ksh 4,015,734.00

(e) Leave pay:

139. Leave payment in lieu of 90 days was claimed by the claimant and no evidence was adduced by the respondent to demonstrate it had paid the claimant in lieu of days not taken. The court finds that the claimant proved he was owed by the respondent in lieu of 90 leave days not taken in the sum of Ksh. 2,0007,866.70. and is awarded accordingly.

e. Certificate of service

140. The court also finds that the Claimant is entitled to grant of certificate of service and the respondent is directed to provide the same within 30 days of this judgment.
141. For the avoidance of doubt the claims for reinstatement and re-engagement are not tenable due to passage of time and are dismissed
142. In the final analysis judgment is entered in favour of the Claimant against the respondent as follows:
- a. Ksh. 669,289.00 in lieu of one-month notice
 - b. Ksh 1,514, 299.75 for withheld salary for the period 31st March 2014 to 17th December 2014.
 - c. Equivalent of six (6) months' gross salary being compensation for the unlawful and unfair dismissal in the sum of Ksh (669,289 x 6) Kshs. 4,015,734
 - d. Provision of certificate of service within 30 days of judgment
 - e. Payment in lieu of 90 days leave not taken in the sum of Ksh. 2,0007,866.70.
 - f. Interest at court rates from date of judgment till payment in full
 - g. Costs of the suit

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

MATHEWS NDUMA**

JUDGE

Appearance:

Mr. Kitche for the Claimant



Mr. Issa for Respondent

Mr. Kemboi – Court Assistant

