



**Runo v Kenya Wildlife Service (Cause 1773 of 2016)
[2025] KEELRC 116 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1773 OF 2016
K OCHARO, J
JANUARY 24, 2025**

BETWEEN

GITONGA RUNO CLAIMANT

AND

KENYA WILDLIFE SERVICE RESPONDENT

JUDGMENT

Introduction

1. Mr. Gitonga Runo [the Claimant] was employed by Kenya Wildlife Service [the Respondent] for approximately 26 years. Four years before his appointed time for retirement, the Respondent terminated his employment on alleged gross misconduct, on his part. Contending, that the termination was unfair, wrongful and irregular, the Claimant initiated the suit herein, seeking various reliefs, reliefs tied to a claim for unfair and wrongful termination, and others that were not. Thus;
 - a. That the disciplinary proceedings, interdiction dated 1st February 2016 and termination of services dated 3rd May 2016 were wrongful and irregular.
 - b. That the Respondent pay the Claimant Gratuity for the period from 11th October 1995 to 1st July 2002 forthwith.
 - c. That the Respondent pay gratuity for the under-deducted pension at the rate of 31% gross pay from 1st July 2002 through 31st December 2006 forthwith.
 - d. That the Respondent does restore the Claimant to his position and with full pay and benefits from the time of interdiction.
 - e. In the alternative and without prejudice to [IV] above, the Respondent does pay the Claimant the equivalent of gross pay he could have earned until his date of retirement in February 2020 and the Respondent does issue to the Claimant a Certificate of Service.



- f. Damages
 - g. Interest
 - h. Costs.
2. The Respondent resisted the Claimant's claim by filing a Response to the Memorandum of Claim. They denied the Claimant's cause of action and his entitlement to the reliefs sought. They Counterclaimed against the Claimant for a sum of KShs. 31, 023,070.80.
 3. At the Hearing, the Claimant testified as a sole witness on his claim, while the Respondent presented three witnesses to testify to support its defence against the Claimant's suit. The Claimant and the Respondent's witnesses adopted their respective witness statements filed herein as their respective evidence in chief.
 4. After hearing the parties on their respective cases, this Court ordered them to file their submissions. They obliged the direction.

The Claimant's Case

5. The Claimant stated that he first came into the employment of the Respondent on 11TH October 1990, as an accountant. Thereafter, he served the Respondent in various capacities at various times. Due to his diligence and hard work, he earned several promotions, the last being to Head, Supply Chain Management, Job Grade 3B.
6. By a contract of employment that was entered into between him and the Respondent on or about 1st July 2002, his terms of employment were changed to permanent and pensionable. At the conversion, the Respondent erroneously failed to consider his actual salary for the computation of pension.
7. On or about 26th April 2007, the Respondent's Board of Trustees adopted and passed a resolution on payment of gratuity to remedy the erroneous non-deduction, for 1st July 2002 – 31st December 2006. The gratuity was to be paid to the affected employees at 31% of their gross pay. Those employees who were not exiting employment immediately, inclusive, of the Claimant were to be paid on reaching the mandatory retirement age.
8. On 1st February 2016, the Respondent interdicted him citing the fact that he was involved in an irregular procurement of Toyota 4x4 Land Cruiser Pick-Ups for the KWS/AFD Northern Kenya Biodiversity Conservation Project during the 2014/2015 financial year. The interdiction letter was signed by Lynette Muganda on behalf of the Director General.
9. Subsequently on or about the 1st April 2016, he was summoned by the Respondent's investigators, Mr. Maurice Omondi and Ignatius Ipapo to record a statement, which he did.
10. He further stated that by a show cause letter dated 18th April 2016, delivered to him on 20th April 2016, setting out three accusations against him, he was asked to respond to the allegations and show cause why disciplinary action couldn't be taken against him. He was required to respond within three days of the date of the letter. On 21st April 2016, he responded to the letter.
11. On 26th April 2016, he was called on the phone to appear before the Respondent's disciplinary panel on 27th April 2016. On 27th April 2016, he was served with a letter dated 22nd April 2016 extending the time for responding to the show cause letter and another dated 25th April 2016 inviting him to appear for the disciplinary hearing.



12. He attended the hearing which lasted for less than one hour. At the hearing, he wasn't given any documents.
13. By a termination letter dated 3rd May 2016, the Respondent terminated his employment stating: -
.....Irregular procurement of five [5] Toyota Land Cruiser Pick-Ups from Toyota Kenya valued at Kshs. 31, 023, 070 .80the panel found you guilty of gross misconduct as indicated below;
 - I. You advertised for the said motor vehicles without the knowledge and approval of the Director General which was irregular.
 - II. You facilitated the said purchase of the five [5] Toyota Land Cruisers without the relevant requisition form and confirmation of the relevant budgetary allocation in accordance with the Public Procurement and Disposal Act.
 - III. You were aware that the procurement was dependent on KWS funds but failed to reject and appropriately advise against processing the purchase requisition using the AFD project vote line.
 - IV. You were aware that the procurement of the vehicles was being undertaken using KWS resources but intentionally failed to give correct information and advice to the Tender Committee during its meeting held on 21st April 2015.
 - V. You intentionally failed to provide relevant documents [approved purchase requisition form and funds availability certificate]to the Tender Committee to guide appropriate decision making.
 - VI. You intentionally and maliciously manipulated the intentions of the Tender Committee, through your memo to the Director General ref; KWS/PRO/22 dated 22nd April 2015.
 - VII. Through your memo ref: KWS/PRO/22 dated 22nd April 2015 you intentionally and maliciously lied to the Director General that the procurement of the five [5] Land Cruisers valued at KShs. 31, 023,070.80 was under the AFD project funds contrary to the Tender Committee approval.
 - VIII. You committed the service to the procuring of the said vehicles without first ensuring that there were sufficient funds set aside for the activity contrary to the Public Procurement and Disposal Act.
14. On 16th May 2016, he appealed against the decision of the Panel. The appeal was never attended to. Despite the pendency of the appeal, the Respondent has been persistently calling him to attend its offices to select pension options.
15. The to the Respondent's accusations against him, the procurement of the vehicles was conducted legally and professionally as;
 - a. There was an approved plan and budget as required by law.
 - b. There was a purchase requisition from the user department [fleet management] as required by the law, which purchase requisition was,
 - i. raised and authorized by the user department,



- ii. approved by the Director General of the Respondent.
 - iii. following confirmation of funds through the finance /vote book.
- c. The three [3] purchase requisitions for the purchase of the motor vehicles were consolidated for procurement purposes as required by the law against splitting.
 - d. Tender/solicitation documents were prepared as required by law.
 - e. Solicitation of tenders Advertisement was done in two dailies of wide circulation [in Standard and Nation newspapers] as required by law.
 - f. The period allowed for tender opening was allowed to lapse as required by law.
 - g. Tenders were opened in the presence of bidders who chose to attend as required by law.
 - h. A Tender Processing Committee [Evaluation, Negotiation, Inspection and Acceptance Committee] was appointed by the Director General as required by law.
 - i. The tender was evaluated and the tender evaluation report was provided with recommendations for award to Toyota Kenya by the Tender Processing Committee.
 - j. The agenda for the Tender Committee was circulated to the members long before the Tender Committee meeting.
 - k. The Tender Committee [duly appointed by the Director General] sat with quorum and deliberated on the tender. Observers were invited and Transparency International attended a sitting in compliance with the law. The Tender Committee approved the award to Toyota Kenya for nine [9] vehicles of equal value for a total sum of KShs. 53, 622,658.
 - l. The Director-General signed the letter of award for Toyota Kenya.
 - m. The Legal Office of the Respondent prepared the contract with Toyota Kenya.
 - n. The Director General signed the contract with Toyota Kenya.
 - o. The vehicles were received at the Respondent's Central Workshops.
 - p. Tender processing Committee inspected and accepted the vehicles and issued an Inspection and Acceptance Certificate.
16. The Claimant contended that he did not at any time participate in the procurement of motor vehicles worth 31, 023, 070.80 in the Financial year 2014/2015. There was no such process.
 17. The Claimant stated that he hasn't received any gratuity and or terminal benefits for the years he worked for the Respondent, thus, 1995 to 2002 [under contract] and 2002 to 2006 and pensionable. For the latter period, 2/3 of his pension was wrongly not subjected to pension deductions.
 18. Further, he worked faithfully for the Respondent for 26 years and had only 4 years to retire at the time of termination. He couldn't get another employment due to his age and the adverse implications of the wrongful dismissal.
 19. The Respondent's Counterclaim is unfounded. He didn't cause any loss to the Respondent. All the nine [9] vehicles that were purchased were received and distributed to its various stations.



20. Cross-examined by Counsel for the Respondent, the Claimant stated that his letter of employment dated 11th October 1990 provided his monthly salary as KShs. 65,000. The letter didn't provide for entitlements like pension and medical allowance. At that time, the letter didn't provide for gratuity.
21. He confirmed that he was appointed into the Tender Committee under the letter dated 18th January, 2007, [see page 28 of the Claimant's Bundle of Documents]. The letter was express, honesty, thoroughness and faithfulness were required of him in the discharge of his task as a member of the Committee.
22. The show cause letter gave him only three days to respond. He didn't have sufficient time and was not given documents to enable him to adequately respond.
23. There was a procurement plan for the purchase of the motor vehicles as demonstrated by the consolidated plan for the financial year 2014/ 2015 which at item 40 thereof provided for a consolidated figure of KShs. 264, 298, 262 for machinery, automobiles, plant, and equipment.
24. In his response to the show cause letter, he stated that the provision for the motor vehicles was approximately Sixty Million. This statement is perfectly in sync with the Respondent's exhibit, [see page,3, Bundle 3], the consolidated plan for the year 2014/ 2015.
25. He further testified that the Respondent's budgets are recorded in vote books. From the KWS Vote Book System, document [page 7 of the Respondent's Bundle 3], the vote line for motor vehicles was KShs. 93, 770, 000.00. In the financial year 2013/ 2014, KShs. 35,000,000 was spent on motor vehicle transactions, leaving a balance of KShs. 58, 770,000.00 [approximately KShs. 60,000,000.00]. This amount spilled over to the Financial year 2014/2015.
26. The eight [8] vehicles that were delivered on 21st January 2015, were purchased under the 2013/2014 budget. Deliveries are only made after payment for the purchased items.
27. The user Department requisitioned the purchase of the five [5] vehicles vide a requisition form dated 8th January 2015, [see Claimant's documents page 74]. Referred to the requisition form dated 25th April 2014, he explained that a requisition being a proposal by the user department, can successfully go through the tendering process or not. It might be accepted or not. The requisition for 25th April 2014, didn't go into the tendering process. The endorsement 'processed' means it had gone through the vote book. It had been seen.
28. There was a requisition on 11th August 2014, for two vehicles worth KShs. 13,000,000. There was no tender process for this requisition. As such there wasn't any financial commitment for their purchase.
29. Contrary to what is reflected on the minutes of the disciplinary proceedings, he admitted that he was only involved in the process leading to the purchase of the four [4] vehicles not the five [5]. A Senior Officer Mr. Ochuodho was involved in the process regarding the five. The requisition form dated 8.01. 2015 is a testament to this. His signature only obtains on the requisition form [see page 73, Claimant's documents] for the four.
30. The Memo dated 22nd April 2015 that he did to the Director General wasn't misleadingly done. It was just a summary of happenings in the Committee meeting of 21st April 2015. He mentioned AFD projects for the issue featured in the day's deliberations, and AFD needed to know whether the four vehicles had been purchased.
31. The tender documents did not refer to AFD. It deliberately indicated AFD/KWS. The finer details were embodied in the Tender Committee minutes. The Memo cannot be read in isolation from the other documents. The Director had all the documents before he made the approvals. The Director



General could not be misled as the process undertaken was so elaborate and there were sufficient documents showing who was taking care of the purchase of the four and five vehicles.

32. He asserted that his claim for gratuity for the period 11th October 1995 to 1st July 2002 was anchored on the Memo on page 130 of his documents that indicated expressly that it applied to past members of staff who had served under the PAWS project. He was put on contract in 1995. Therefore, the last paragraph of the Memo applied to him. The Memo also indicated that his case for gratuity was to be resolved alongside that of four other employees.
33. The Human Resource manual placed him under entitlement to gratuity, as he had worked on contract for the Respondent for seven [7] years.
34. There was a defined pension scheme for which he was paid KShs. 1,827, 357 on 6th October 2016 through his account. Under the second scheme, he was paid, Kshs. 2, 644, 295. He is currently earning KShs. 22,000 pension per month.
35. The pension amounts that he was paid do not include the period 1995 -2002 when he wasn't covered under any scheme but was entitled to gratuity.

The Respondent's Case

36. The Respondent presented three witnesses to testify on its behalf, Valentin Wilson Kanani [RW1], Godwin Muhati[RW2], and Maurice Omondi [RW3] to testify on its behalf.
37. RW1 testified that he is the Respondent's Human Capital Manager and has been so for more than twenty years.
38. The witness stated that the Respondent received sponsorship from the French Development Agency [AFD] to facilitate conservation efforts in Northern Kenya including the Marsabit National Park. To support the efforts, AFD provided funding for the purchase of four motor vehicles and a provision was made in the Respondent's budget for procurement of the same.
39. Instead of procuring four [4] vehicles, the Respondent ended up procuring nine [9] vehicles from Toyota Kenya. The additional five [5] vehicles were not provided for under the AFD funds. The additional procurement was discovered at the point of making payment to Toyota Kenya.
40. The additional purchase of the five [5] vehicles was irregular and it put a financial strain on the Respondent as it was forced to source additional funds from internal sources to pay for the five [5] additional vehicles. This was at a time when the Respondent was experiencing financial difficulties.
41. The witness stated further that the Claimant as Head of Supply Chain Management was instrumental in the procurement together with Mr. Michael Musyoka, the Fleet Manager under whose department the vehicles fell.
42. The Claimant was interdicted on 1st February 2016 to pave way for the investigations into the circumstances under which the five [5] additional vehicles were procured.
43. The investigations revealed that the procurement had been conducted in irregularly and in circumstances that suggested gross misconduct on the part of the Claimant and the Respondent's Fleet Manager.
44. Subsequently, the Respondent issued a notice to show cause dated 18th April 2016 to the Claimant requiring him to offer an explanation to the allegations of irregularity set out in the letter. The Claimant was required to respond within three [3] days of receipt of the letter. Through a letter dated 20th April 2016, he comprehensively responded to the show cause letter. He however suggested that the time he



had been given wasn't adequate. Consequently, the Respondent opted to extend the time given to the Claimant to respond by a further four [4] days from 22nd April 2016 to 25th April 2016.

45. The Claimant's explanation was not satisfactory and the Respondent decided to convene a disciplinary hearing in respect of the Claimant's case. By a letter dated 22nd April 2016, the Claimant was informed that the hearing would take place on 27th April 2016. The Claimant was also informed that he was at liberty to be accompanied by a colleague of his choice at the meeting.
46. He further stated that the Disciplinary Panel considered the representations made by the Claimant against the allegations against him and found that he had facilitated the purchase of the five [5] vehicles without a confirmation of the relevant budgetary allocation for the expenditure thereby committing the respondent to pay KShs. 31, 023,070.80 without a budgetary allocation for the expenditure.
47. The Panel found that the Claimant's actions amounted to gross misconduct warranting summary dismissal but due to his length of service, the Panel recommended the termination of his employment.
48. The Respondent decided to terminate his employment and this was communicated to him through the letter dated 3rd May 2016. He was informed that his terminal dues could be paid upon clearing with the Respondent. He subsequently cleared with the Respondent and was paid his terminal dues.
49. The Claimant appealed against his termination. Before the appeal could be considered by the ADHOC Committee, the Claimant moved to Court on 16th September 2016 seeking various reliefs including reinstatement. At a sitting of the ADHOC committee on 3rd March 2017, the committee noted that the Claimant had moved to court to challenge his dismissal. The Committee therefore asked him to elect whether to pursue the appeal or proceed with the case filed in court.
50. At the meeting, the Claimant indicated that he needed to seek legal advice on the issue first, as a result, the hearing of the appeal was adjourned. The claimant never got back to the committee on whether he wished to pursue the appeal. It appeared he had abandoned the appeal.
51. Cross-examined by Counsel for the Claimant the witness testified that the Respondent's Procurement Procedure Manual does not at all provide for an aspect of funds availability certificate. However, it provides for open tendering under Clause 7. 10. According to the clause, tender documents and advertisements are prepared by the procurement Department in consultation with the user Department.
52. The witness confirmed that he was a member of the Tender Committee appointed by the Director General. The other members were appointed by the Director, too.
53. Clause 7. 70.3 establishes the Evaluation, Negotiation, Inspection, and Acceptance Committee. The Committee must at the end of any procurement process do a report. Per Clause 7.10.6, the Legal Department in consultation with the Procurement Department shall prepare a contract for the procured goods.
54. On delivery, the Evaluation, Negotiation, Inspection and Acceptance Committee, can accept or reject the goods. The Claimant was not a member of the Committee.
55. The Claimant was not involved in the advertisement.
56. According to his witness statement, the Committee members didn't have the opportunity to look at the requisition document because they presumed that that was a procurement function. They didn't ascertain whether or not there were funds available.



57. One of the functions of the Tender Committee was to ascertain the source and availability of funds. It didn't therefore perform its functions properly.
58. Lynette Muganda sat in the Tender Committee on 16th February 2016 and 2nd March 2016. Apart from being a member, she was the Deputy Director of Human Capital.
59. If there was any error, it was by the two clerks mentioned in the investigation report. The Claimant wasn't one of them. He cannot be blamed. Though one Jane Gitari is substantially mentioned in the report, she was not to testify for the Respondent.
60. The witness admitted that per one of the documents tendered in evidence by the Respondent, extracted from an audit report, there were funds at the material time, for the replacement of motor vehicles.
61. Cross-examined on the foundation of the Respondent's Counterclaim, the witness admitted that there wasn't any document from which it can be argued that it provided proof for the amount therein.
62. Purchase requisition isn't a binding document but a process document. The requisition for 30 million was prepared by one Solomon Havi an officer in the Fleet and Mechanical Department under the instructions of his manager, Micheal Musyoka.
63. According to the Respondent's Human Resource Manual, disciplinary cases must be concluded within three [3] months.
64. He testified that those employees who worked under the PAWS project were entitled to gratuity. Those who had left were paid, but those who continued to be in the service of the Respondent were to be paid upon attaining retirement age. However, this had to be included in their contract of employment, as a term thereof.
65. The Claimant wasn't given a certificate of service.
66. Per the Human Resource Manual that applied at the material time, the Claimant ought to have been sanctioned by the Board of Trustees.
67. Rw2 testified that to support conservation efforts, AFD provided funding for the purchase of motor vehicles. The motor vehicles were for patrol and provision of security. AFD provided funding for four motor vehicles and a provision for the same was made in the Respondent's budget. Instead of procuring four vehicles, the Respondent ended up procuring 9 vehicles from Toyota Kenya. The five additional vehicles were not provided for under the AFD Funds.
68. The additional procurement was made at the time the Respondent was making payment to Toyota Kenya.
69. The additional purchase of five vehicles put a financial strain on the Respondent as the Respondent was forced to source for additional funds from other internal sources to pay for the vehicles. This was a time when the Respondent was experiencing financial difficulties and such an additional expenditure was not anticipated.
70. Cross-examined by Counsel for the Claimant, the witness admitted that he wasn't conversant with matters, the Respondent's Vote Book System, as he was largely a field person. However, he appreciates that work plans and budgets provide a blueprint that guides activities for the year in issue.



71. RW3 stated that sometime in February 2016, he was tasked with investigating a case where the Respondent had apparently committed funds in the sum of Kshs. 31,023,070.80 in acquiring 5 additional vehicles, funds which had not been budgeted for.
72. He took witness statements from all the involved parties including the Claimant.
73. The investigation team was also guided by the internal audit report from the Respondent's audit department. The investigations revealed that there were various procurement irregularities. Thus: -
 - a. During the financial year 2014/2015, one of the Respondent's donors Agence Francaise de Development (AFD) had allocated Kshs. 24,874,300/- to the Respondent for the purchase of 4 vehicles. They were to be used to support conservation activities in Northern Kenya, especially in the Marsabit area. The project manager for this project was Mr. Gordon Muhati.
 - b. The vehicles were procured from Toyota Kenya following a procurement process. The purchase requisition for the vehicle was made by the Fleet Manager Michael Musyoka and processed by the Claimant as the head of the supply chain.
 - c. Instead of procuring the intended 4 vehicles which were to be sourced using the AFD funds, the Respondent ended up procuring 5 additional vehicles leading to Toyota Kenya supplying 9 vehicles at an extra cost of Kshs. 31,025,070.80.
 - d. In procuring the 9 vehicles, the Claimant who was the Head of the Supply Chain indicated to the Respondent's Director General in a memo dated 22nd April 2016 that the source of funds for all the vehicles was AFD yet AFD had only provided funds for 4 vehicles.
 - e. For the 4 vehicles procured through AFD funds, PRF No. 344671 dated 13th November 2014 was raised. It was approved by the Deputy Director General on 5th December 2014.
 - f. After raising the approval of the PRF, the Respondent was required to advertise for the submission of tenders in two local dailies and this was done on 13th January 2015.
 - g. On 8th January 2015, another PRF No. 344673 for 5 vehicles was prepared by the fleet manager and approved on 30th January 2015 by the acting Director General. The approval was sought after the advertisement was made and not before which is irregular.
 - h. The requisition was for 5 vehicles and the source of funds were said to be the AFD project yet the funds for this project could only procure the 4 vehicles set out in the PRF No. 344671 dated 13th November 2014.
 - i. At the time in support of the procurement of the 5 additional vehicles set out in PRF No. 344673 were being presented for payment, PRF No. 344673 was altered to indicate that the vehicles were going to be procured using the Respondent's funds. The words "Northern AFD Project" were crossed out and replaced with the words "KWS-Procurement of Vehicles" instead.
 - j. These changes were effected because the finance department would raise queries over the source of funds for the 5 additional vehicles noting that the funds for the AFD project had already been earmarked for the purchase of the 4 vehicles.
 - k. Before funds are committed to the financing of a particular item or project a funds availability certificate ought to be presented to the tender committee to show the availability of funds. The requirement of the funds availability certificate was a brainchild of the Claimant. In this particular case, however, a funds availability certificate was not availed.



- I. At the time the finance department realized that there were no funds to support the purchase of the 5 additional vehicles, Toyota Kenya had already slapped the Respondent with an additional bill of KShs. 31, 025,070.80. The Respondent had to source for additional funds from other sources to foot this bill. This expenditure was unplanned and therefore exerted a lot of pressure on the Respondent's finances.
74. Cross-examined by Counsel for the Claimant, the witness stated that the amount, KShs. 31, 025,070.80 reflected in the investigation report was the total value of the five [5] additional vehicles. However, the Respondent does not have a document which speaks to this figure. He couldn't tell where this figure was derived from.
75. The witness admitted that per the audit report, [see page 22, Respondent's bundle 1 of documents] there was a budget for motor vehicles, namely KShs. 60,000,000. The Auditors recommended that the supplier be paid as the contract between it and the Respondent was binding.
76. The witness further admitted that he couldn't adequately answer some questions about the purchase requisitions as he wasn't an accountant. The purchase requisition form didn't have a place for approval by the Director General.
77. The account code -100500 on the purchase requisition form dated 8th January 2015, approved by the Director General, was from the KWS vote book, not AFD.
78. In his evidence under re-examination, the witness testified that the Director General had to approve every purchase requisition.
79. The advertisement in issue was placed by the Claimant. He was at the material time, Head of Supply Chain Management.

Analysis and Determination

80. I have carefully considered the pleadings by the parties, their respective evidence, and submissions by their Counsels, and the following issues emerge for determination, thus;
 - I. Whether the termination of the Claimant was procedurally and substantively fair.
 - II. Whether the Claimant is entitled to the reliefs sought.
 - III. Whether the Respondent's Counterclaim is merited.
 - IV. Who should bear the Costs of the suit and the Counterclaim

Issue 1

81. No doubt, the legislation on unfair termination/ dismissal represents a major incursion into the common law, limiting the employer's otherwise open-ended power to bring the contract of employment to an end without substantive justification, and imposing general standards of procedural fairness upon the process of termination/ dismissal. Section 45 of the *Employment Act*, expressly prohibits the employer from terminating an employee's employment unfairly. Sub-section 2 thereof provides an insight as to what amounts to an unfair termination- one that isn't founded on fair procedure, and valid and fair reason[s].



82. In *Pius Macha Isundu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal elaborated the position thus;

“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on the employers in matters of summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43]-prove that the reasons are valid and fair[section 45]-prove that the grounds are justified[section 47[5], among other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and hearing before termination.”

83. The procedure contemplated under section 41 is mandatory and embodies three components, notification, hearing and consideration. The employer contemplating terminating their employee’s employment must notify the employee of the intention and the grounds stirring the same. They must then allow the employee adequate time to prepare and defend himself against the accusations. Lastly, the employer must consider the representation[s] made by the employee and or the person accompanying him, before a final decision on the matter is made.

84. Ordinarily, the notification of the accusations against the employee is done through a show cause letter and or an invitation to a disciplinary hearing. No doubt, in this matter, the Respondent notified the Claimant that it intended to take an adverse action against him, through a show cause letter dated 18th April 2016. The letter read in part;

“.....an internal inquiry instituted by the management into the irregular procurement of five [5] Toyota Land Cruiser Pick-ups during the 2014/15 Financial year has revealed as follows;

- i. You were aware that the procurement of the vehicles was being undertaken using KWS resources but intentionally failed to give the correct information and advice to the Tender Committee during its meeting held on 21st April 2015; details are well known to you.
- ii. You were well aware that the procurement was dependent on KWS funds yet you failed to reject and appropriately advise against processing of the purchase requisition using the AFD project vote line.
- iii. You facilitated the said procurement of five [5] Toyota Land Cruisers without asking for production of the relevant procurement plan
In accordance with the Public Procurement and Disposal Act.
- iv. You committed the service in procuring the said vehicles without first ensuring that there were sufficient funds set aside for the activity contrary to the Public Procurement and Disposal Act.”

85. The invitation letter that was subsequently issued to the Claimant did not bring in any new accusations. It only referred to the show cause letter and informed the Claimant of the date that had been slated for the disciplinary hearing. Legitimately and reasonably it could be expected that the foretated charges could be the ones he was to defend himself against and that if his employment was to be terminated, it could be based on the charges or some of them.



86. I have carefully considered the reasons for the termination of the Claimant's employment, and agree with the Claimant that the reasons went beyond the four that were set out in the show cause letter. An act by the employer to terminate an employee's employment on accusations outside of those they set out in a show cause letter for which the employee was invited to make a representation on, renders nonsense the legal insistence that the affected employee should be informed of the charges against him and be allowed adequate opportunity to prepare and make a representation on them. Where such an act is detected as it has been in the instant matter, the Court will be left with no other option other than to declare the termination procedurally unfair.
87. The Claimant asserted, and the Respondent admitted, upon being served with the show cause letter that required him to respond within 3 days, he protested the short notice. The Respondent contends that by a letter dated 22nd April 2016, it extended the time for him to respond. The Claimant on the other hand asserted that the letter that purported to extend time was given to him on the 27th of April 2016. Service of the letter became a contested issue, therefore. The Respondent was asserting the service. It was bound to prove the same. It didn't. This leads to the inevitable conclusion that the Claimant wasn't given an adequate opportunity to prepare and defend himself.
88. I now turn to the substantive justification aspect. Procedural fairness is interwoven with substantive justification, and as such where it is found that the employee's employment was terminated on grounds outside of those that he was called upon to defend himself, no doubt such termination shall be held to be on account of an invalid ground[s], and thus unfair, considering that a valid ground of termination is one that can legitimately form a basis for the termination.
89. The accusations that were introduced post the show cause letter [grounds i, vi and vii of the termination letters], largely placed the Director General at the centre of the controversy. He was a vital person to testify in this matter, and more especially considering the Claimant's insistence throughout that; the process for the procurement of the five vehicles was so elaborate; the memo to the Director General was just but a summary of the happenings at the committee meeting; that the memo under the controversial issue of the purchase of the motor vehicles indicated AFD/KWS; and the Director General was availed all the documents for consideration before he approved the purchase, and as such he couldn't, and was not misled, as alleged.
90. The Respondent with the knowledge of this, inexplicably deemed it necessary not to call the Director General to testify to discount the Claimant's position. I can only make an adverse inference against the Respondents. Had the Director General testified, his evidence could have injured the Respondent's case.
91. I have carefully considered the evidence of the Respondent's witness, none of the testified on these grounds of termination. Further, the minutes of the disciplinary hearing, conclude that the Claimant's firm position that the Director was not misled and could not be, that he approved the transaction, and the advertisement was not shaken at all.
92. I have carefully considered the evidence in chief of the Respondent's witnesses as contained in their witness statements, and with great respect, hold that the same misguidedly suggest that the process of the purchase of the motor vehicle was sole handily undertaken by the Claimant, yet it was a whole detailed process involving several departments and people, to an extent that blame on a single person could only succeed with cogent evidence.
93. Through the Consolidated procurement plan 2014/2015, the KWS Vote Book System extract, the Audit report, and the Purchase requisition for the five motor vehicles, the Claimant was able to demonstrate that; at the material time, there were funds budgeted for the purchase of the motor



vehicles, and that the said funds were available for that purpose. This Court hasn't lost sight of the fact that in their evidence under cross-examination, on being shown these various documents, the Respondent's witnesses admitted their existence, and their implication that the vehicles were purchased within a budget and when funds for the same were available.

94. I agree with the Claimant's position both at the disciplinary hearing and in the proceedings before this Court that a funds availability certificate was not a requirement in the procurement process, and that the Respondent's Procurement Process Manual didn't provide for it. In fact, the Respondent's 1st witness admitted this position.
95. In the upshot, I come to the inescapable conclusion that in the circumstances of this matter, and considering the analysis above, no reasonable employer could dismiss its employee from employment on the grounds that the Respondent herein did. Consequently, I hold that the Respondent failed to prove that the termination of the Claimant's employment was on valid and fair grounds. As such, the termination was unfair by dint of the provisions of section 45[2] of the *Employment Act*.

Whether the Claimant is entitled to the Reliefs Sought.

96. Having found as I have that the termination of the Claimant's employment was both procedurally and substantively unfair, I now turn to consider whether he is entitled to the reliefs sought in the statement of claim.
97. The Claimant sought inter alia Gratuity Payment for the period 11th October 1995 to 1st July 2002, and gratuity for under-deducted pension at the rate of 31% gross pay from 1st of July 2002-31st December 2006. In his evidence, he elaborately explained and referred to documents inclusive, of the minutes of the Board of Trustees - 26th April 2007. The RW 1 under cross-examination testified that though the Claimant was entitled to the gratuity sought, it could not be availed to him because the entitlement was not incorporated into any contract. The Respondent's Counsel in his submissions in support of this submission taken by the Respondent cited the decision in *Pathfinder International Kenya Limited and Stephen Ndegwa Mwangi [2019] eKLR*.
98. I am not convinced by the position taken by the Respondent and submitted by their Counsel. A decision was made by the Management organ of the Respondent concerning their entitlement to the benefit under special circumstances. The organ didn't deem it fit to insist on crafting a contract or a document to capture this, and as can be discerned from the material before me, other employees benefited. It will be discriminatory, unreasonable and in breach of a legitimate expectation to disentitle the Claimant of this benefit, in the circumstances.
99. The Claimant sought for reinstatement into employment. In the circumstances of this matter and, in light of the analysis above, this is a remedy that this Court could have granted. However, the statutory limitation on grant of the relief in situations where three years have elapsed since the date of termination [see section 12 of the *Employment and Labour Relations Act*] inhibits this Court from exercising authority to grant the relief.
100. Section 49[1] [c] of the *Employment Act* bestows upon this Court authority to grant a compensatory relief for an employee who has successfully challenged his or her employer's decision to terminate his or her employment. However, it is pertinent to point out that the relief is discretionarily granted depending on the circumstances of each case. I have carefully considered; the fact I could have reinstated the Claimant but for the limitation pointed out hereinabove; that the Claimant served the Respondent for approximately twenty six and half years; that he had only four years to reach the mandatory retirement age; that due to age, he could not get another employment after the dismissal; and the Respondent's want of care on what the law required of them on matters procedural and



substantive fairness, and come to the conclusion that he is entitled to the relief and to the extent of ten [10] months' gross salary.

Whether the Counterclaim herein is merited.

101. I have no reason to hesitate in concluding that the Counterclaim is destitute of merit and it is a fit candidate for dismissal. The Respondent through the Counterclaim sought a liquidated sum. The sum needed to be proved specifically. In his own admission, RW3 couldn't be able to explain where the figure was derived from The Respondent didn't place forth before this Court any document the basis for the Claim. In any event, from the material before this Court, I am not able to fathom how the Claimant suffered a loss of 31, 023,70.80 claimed by the Respondent.

102. The Claimant lacks merit. It is hereby dismissed.

Of Costs

103. Costs follow the event. Having succeeded in his claim, and successfully challenged the Respondent's Counterclaim, the Claimant is entitled to the costs of the suit and the dismissed Counterclaim

104. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

- I. A declaration that the termination of the Claimant's employment was unfair.
- II. A declaration that the Claimant was entitled to gratuity payment pursuant to the Respondent's document referenced KWS /BO5/WP/ 03/34/2007. The cumulative gratuity payable to the Claimant for the periods set out in paragraphs [b] and [c] of the Memorandum of Claim shall be computed by the Respondent within 14 days of today. The computation shall be served upon the Claimant for concurrence and recording the figure in court on a date convenient to both parties by consent. In the defaulting, the Claimant is to compute and share the computation with the Respondent for concurrence within 14 days. The matter shall thereafter be mentioned for the recording of a final judgment on this aspect of gratuity.
- III. Compensation pursuant to section 49[1][c] of the Employment Act, ten [10] months' gross salary, KShs. 3, 440, 000.
- IV. Interest on the awarded sum in [II]and [III]above at court rates from the date of this suit till full payment
- V. Costs of the suit and the dismissed Counterclaim.

READ SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

In the Presence of:

Mr. Runo for the Claimant.

Mr. Ochieng for the Respondent.

