



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Kenya Power Lighting Company Limited (Cause 568 of 2019)
[2025] KEELRC 635 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 568 OF 2019
MN NDUMA, J
FEBRUARY 27, 2025**

BETWEEN

LEAH JOAN ACHIENG' ONYANGO OTIENO CLAIMANT

AND

THE KENYA POWER LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant by the Memorandum of claim dated the 28th August 2019 and filed in Court on the same date is praying for the following remedies;
 - a. A declaration that the summary dismissal of 31st August 2016 amounts to unfair termination
 - b. An order for reinstatement to the position held prior to the dismissal on 31st August 2016 as a permanent and pensionable employee of the Respondent or Alternatively
 - i. Three months' salary in lieu of Notice; ksh. 930,000/=
 - ii. Compensation for unfair termination, being 12 months' earnings at the rate of ksh 310,000/= per month that is Ksh 3,720,000/=Total Ksh. 4,650,000
 - c. Damages for lost earnings from 1st September 2016 up to judgment date, being monthly earnings at a rate of Ksh. 310,000/= per month and any annual increment.
 - d. A declaration that the Respondent violated the claimant's right to fair working conditions
 - e. Damages for unfair working conditions, distress and discrimination
 - f. Any other compensation the court may deem fair and just to grant.
 - g. Costs and interests.



2. CW1 gave sworn testimony and adopted the witness statement dated the 28th August 2019 as her evidence in Chief. She also produced bundle of documents in volumes 1,2,3 and 4 dated the 28/8/2019 as her exhibits. She testified that she is an Electrical and Telecommunications Engineer. She was first employed by the Respondent as a Lecturer 1, Electronics, at its training School in Ruaraka, with effect from 4th May 1998. She was later transferred to the Respondent's headquarters as a 4th Assistant Engineer-Data Networks and rose through the ranks and by 31st August 2016, she was the regional IT & Telecommunications Engineer, Nairobi North Region earning approximately ksh. 310,000/=.
3. She testified that on 29th July 2016, she was served with an explanation letter. The explanation letter (show cause) cited 2 emails, one dated 27th July 2016 and another dated 11th July 2016. The concerns were insubordination, to which she responded. The claimant stated that the show cause was later not copied to the Regional Human Resources and Administration Manager, Chief Manager, HRA and the Divisional Chief Manager as required in the Respondent's Human Resource and Administration staff regulations and procedures, 1999.
4. That she was not provided with the email of 27/7/2016 which was the basis of the disciplinary process and the email of 25/7/2016 varies substantively from what was quoted in the letter of explanation (show cause). In the Respondent's letter of 24/08/2016, the documents received did not match the explanation and this caused further confusion on what the disciplinary process was about and she never received explanation on how the affected ICT Manager, Mr Titus Kitavi interpreted the contents as insulting and disrespectful. The claimant added that she never received an explanation on how Mr. David Mburu interpreted the content as disrespectful or insulting.
5. She was invited to a disciplinary meeting on 15th August 2016 at 11:36 A.M for a hearing that was set for 18th August, at 10.30 am. That she immediately notified the Respondent of her concerns on the said hearing, including concerns on the non-existence of one of the emails cited, *the constitution* of the disciplinary panel and also asking for facilitation of her witnesses, as they were colleagues. Similarly on the 22nd August 2016, at 16:29 she was notified of a rescheduled hearing that was set for 25th August 2016 at 8:15 A.M and once again immediately raised various concerns in the hope that these would be considered but unfortunately, they were not and only learnt that the Respondent proceeded in her absence when she received the dismissal letter. She questioned *the constitution* of the disciplinary panel and the less than 72 hours given to her to prepare was also short. That this was accentuated by the failure to provide her with evidence before hearing and failure to facilitate her witnesses who were in the employ of the Respondent. That an additional ground (2nd) was added in the dismissal letter, deviating from the original complaint and showing prejudice/bias. This new charge according to her needed fresh explanation as per the Respondent's human resource manual.
6. She appealed against summary dismissal on 5th September 2016 with a legitimate expectation that the appeal would be concluded as per the policy, or within a reasonable time but the same was processed almost 3 years later only after the intervention by the Commission on Administrative Justice (CAJ)
7. That even after the intervention by CAJ the appeal hearings were set outside the workplace. She was invited for a hearing after working hours, in Stima Club Executive Lounge, a members' only club yet she was not a member of the club and raising concerns why the Respondent wanted a venue outside the workplace.
8. The Claimant states that the work environment was also unsafe for some staff, processes and equipment in that for example on 14th September 2014, radio communications were switched off with the instructions and/or knowledge of the General Manager-ICT, one Eng. Samuel Ndirangu, when Nairobi North region's operational team was conducting a Boresha Stima exercise. This move trapped



over 100 Nairobi North Region's operational workers in the electrical power structure for hours. The Telecommunications outage quickly spread to Mount Kenya Region, Central Rift and the whole of Nairobi Region. The Telecommunications outage lasted 5 days. She also says that in October 2015, her request for procurement of crucial radio spares and digital RF meter was stalled without feedback. That on 30th August 2016, a portion of the Respondent's telecommunications network failed due to lack of a spare/equipment which was in this procurement, once again, endangering lives and this would have been blamed on her.

9. She also testifies that there were instances of bullying through false and malicious allegations, bullying through unauthorized alteration of her performance appraisal results, refusal/ delay of her appraisals and other forms of bullying such as job mismatch for her staff, irregular transfers of her best staff and offloading problematic staff to her department. She also mentions that in her early years she was repeatedly berated by her seniors for what she believed was the refusal to flirt around. When she stood her ground, she was then assigned duties outside her purview, and outside working hours in awkward places. She says that it seems the culture of bullying was rampant in the Company despite it being explicitly outlawed in the Respondent's code of ethics.
10. CW1 further testified that she was a victim of a systemic wish by some of the staff to compromise procedures and integrity, and believe this did not auger well with the Respondent's management. That she feels she was targeted for being ethical and fully compliant to procedures and practice manuals. That on 26th May 2016, she handed to the then Respondent's MD & CEO, Dr. Ben Chumo a complaint report of ethical breaches in its ICT division for investigations and action, but which complaint remains undressed to date.
11. That in the wake of the Country's fight against corruption her concerns should have been given a lot of weight. She says that it is a well-known fact that in July 2018, the top management team at KPLC was relieved off duty for misappropriating public funds and fraud. The immediate former Managing Director & CEO, Dr. Ben Chumo, his successor, Dr. Ken Tarus and 17 top Managers including General Manager, ICT, Eng Samuel Ndirangu were charged in court with conspiracy to defraud the Respondent approximately Ksh. 409 million, abuse of office and economic crimes.
12. That these arrests, subsequent charges and the country's drive to fight corruption, her numerous complaints on fraud, nepotism, corruption and other concerns at Kenya Power on Leadership, ethics and integrity under Chapter 6 of *the Constitution* validate her complaints on ethical breaches and she believes influenced her being targeted for dismissal, accentuated by her own concerns on working conditions which have been ignored for years. She says that it is only fair that the Court knows the 'inside story' surrounding her dismissal.

Cross- Examination

13. On cross examination, she said that her supervisor was Engineer Charles Mwaure and Mr. Benjamin Muoki and she knows Gitari who was IT Manager and sometimes acted as the personnel manager. Mr Kitavi was senior to her but was not her supervisor.
14. On being asked whether she wrote the email dated 25/7/16 to Mr Kitavi she answered that she told him he was interfering with IT operations in her area. She said he forced staff to her without following procedure and she did not want one Mr. Mugo to her office. She said that the email of 11/7/2016 was not disrespectful
15. On the question being put to her that she had used derogatory language at the workplace she said that she was given a warning in that respect and that she had protested when her work was sabotaged.



16. She stated that she joined KPLC on 4/5/1998 and was promoted to various levels. She does not wish to retract her allegation of non-promotion. She did not earn promotion at the appropriate time and when she left, she was earning ksh. 310,000. She mentioned that she was invited to a disciplinary hearing and there was a NTSC issued to her which she responded to. She failed to attend disciplinary hearing for the 1st and 2nd time. She filed the appeals but failed to attend the appeal hearings twice and attended the 3rd hearing with a representative from the ombudsman. The appeal decision was given to her and the dismissal was upheld. She said that she was accused of insulting the IT Manager on 27/7/16, one Benjamin Muoki. She got two warning letters in 2014 and a dismissal in 2016 and was not given opportunity to defend herself
17. She also said that she had gone to the KPLC several times to claim her pension and she had a loan of ksh 800,000 with the respondent which she has cleared. She is not currently doing anything and is not teaching.

Re-exam

18. On re-exam she said that as per the staff regulations when one does well for 3 years he/she is promoted. She got commendation for very good results and was not promoted. She was promoted after 7 years and 4 years. She said that she was first Assistant Engineer and was a lecturer prior to that. She was not promoted but was added more work. She did not attend the 2nd disciplinary hearing. The NTSC was not by the HR and she had her suspicions and that she also feared for her personal safety. She communicated those concerns to the Respondent. Her accusers were anarchists and she communicated those concerns and was dismissed.
19. She said that she lodged an appeal on 6/9/16. There was another appeal at the instance of NCAJ who intervened to complete the internal procedure and it took 3 years to put a 2nd appeal and got final verdict on the 2/5/2019 following which she filed the suit. She objected to Mr. Simon Mugo being deployed to her area without following the procedures and complained about her appraisal also which over the years were very good or excellent but which had dropped. This was not addressed. She got no warning letter prior to the dismissal and her work was being sabotaged at one point. Radio communication was switched off and her team was deployed in completing the project. She enquired about that from Mr. Ndirangu her supervisor who said there was radio outage. She had an emergency operation and she wondered why this happened on that particular day. CW1 prayed that she be awarded as prayed.
20. RW1 Charles Mwaure gave sworn testimony and adopted the witness statement dated the 31/10/2019 as his evidence in chief. He also adopted documents dated 1/11/2019 as respondent's exhibits. RW1 testified that the claimant whilst working for the Respondent has had various misconducts. That on 23rd September 2014 she was issued with a show cause letter for using impolite and disrespectful language to address her superiors and fellow colleagues by telling them to keep off and stay away from Telecommunications System in Nairobi North thus on 15th December 2014 she was issued with a warning letter.
21. That on the 31st March 2015 the claimant was issued with a warning letter for the discourteous treatment of fellow colleagues and failure to follow laid down procedures in relation to transfers. On the 11th July 2016 the claimant wrote to the Manager Performance complaining on the issue of her performance appraisal results. The emails were found to be disrespectful and, on the 25th July 2016, the claimant used inappropriate language to address a colleague.
22. RW 1 said that he is aware that by a letter dated 31st August 2016, the Respondent dismissed the claimant from the Company services for use of inappropriate and disrespectful language and failure



to obey lawful instructions to attend disciplinary hearing meetings as invited on 18th August 2016 and 25th August 2016. He prays that the suit be dismissed.

Cross-Examination

23. Upon cross examination he said he was the regional manager, Nairobi and was the supervisor of the claimant. He was aware there was a dispute relating to an appraisal issue. Upon being referred to the email dated the 11/7/2016 he said that the issue had not been resolved by the time the claimant left. That the claimant served the Respondent for 18 years, and grew in her career normally. He said promotions vary and depend on the positions and policy. He added that three promotions in 18 years was normal and a promotion normally takes four years.
24. RW1 also said that the email dated the 25/7/2016 is one of the emails that led to the disciplinary hearing. That the claimant in the email informed IT Manager to let go of her docket and to stop interfering. That this was an exchange and it was a light complaint.
25. On being referred to the NTSC, RW1 confirmed it was written by Samuel Ndirangu to the claimant and the email written by the claimant was the subject of the NTSC. The dispute had not been addressed then and the Boresha was being implemented. That safety precautions had to be put in place to make sure power is switched off before workers move in. If not switched off results could be fatal.
26. He said that he was not aware of any whistleblowing by the claimant. He said that the same was confidential and anonymous and he was not in charge when Boresha was in place. That he was aware why the claimant was dismissed. That after the NTSC and invitation to attend disciplinary hearing she failed to attend the hearing hence the dismissal on the 31/8/2016. RW1 stated that the reasons for the dismissal were in the dismissal letter and the claimant was dismissed for use of disrespectful language in emails to IT Manager and Manager Personnel Management and failure to obey instructions to attend disciplinary hearing. RW1 said he was not aware of the appeal as he had left the region in December 2018 but participated in the disciplinary hearing as a member of the panel.
27. RW1 further stated that the complaints were by the managers but did not see the complaints. Upon being referred to page 48-350 he confirmed that it is the disciplinary panel report dated 29/8/16 and the minutes are at page 347. He also said that Mr. Mburu and Mr. Kitavi did not appear before them at the disciplinary hearing. That investigations were not carried out and did not know if the claimant was issued with the certificate of service.

Re exam

28. On re exam, he said the claimant was reporting to two offices functionally and administratively. That the line Manager should have been asked to intervene on the grievances by the claimant and the letter was cited at the disciplinary hearing.
29. RW2 Ruth Kariuki gave sworn testimony and said that she was the Human Resource Officer of the Respondent. She adopted the witness statement dated 31/10/2019 as her evidence in chief and the documents filed as exhibits in the case.
30. RW2 testified that following various email correspondences between the claimant and the information technology manager and manager performance, a complaint was lodged against the claimant for indiscipline, insubordination and disruptive conduct to office environment with the human resource manager. That vide a letter dated 29th July 2016, the Respondent requested from the claimant an explanation/response to the aforesaid offences/misconduct.



31. She said the claimant issued a response which was unsatisfactory and in addition her language in the response was found wanting. The claimant addressed the General Manager as well as the IT Manager as 'the bully' and claimed that they were malicious and cheating and as such lacking in integrity. That the Respondent thus invited the claimant to a disciplinary hearing on 18th August 2016.
32. On the 18th August 2016, when the disciplinary hearing committee convened at the Human Resource Meeting Room Stima Plaza the claimant failed to attend despite having received the invitation and being called on the morning of the hearing. The claimant cited several reasons for her non-attendance and the panellists of the disciplinary hearing concluded that the panel be reconstituted and for the sake of fairness, the General Manager IT who was her supervisor, would be there to confirm or clarify any concerns raised by either panellists or the claimant and it was agreed that the claimant would be given a second chance. That a second invitation to another disciplinary hearing was forwarded to the claimant scheduled for 25th August 2016.
33. That the claimant wrote an email informing the Respondent that she will not appear for the second time citing various reasons. The claimant failed to appear for the scheduled disciplinary hearing. The Committee considered her email communications, her response to the show cause letter dated 8th August 2016 and her previous disciplinary records and therefore opined that the claimant had declined to attend the hearings and efforts to get her to attend did not bear fruit. The claimant was dismissed from work with effect from 31st August 2016 on the grounds of use of inappropriate and disrespectful language, and also failure to obey lawful instructions to attend disciplinary hearing. The Claimant appealed the decision to dismiss her from employment.
34. That the Respondent again extended an invitation to the claimant to appear before the appeals committee on Wednesday 8th February at Stima Club and the claimant was advised to appear with a witness who is an employee of the Respondent. The Respondent convened the Appeals hearing but the claimant again failed to show up and never gave any reason yet she sought for such an opportunity. Notwithstanding the non-appearance of the claimant on the 8th February 2017, the panel again decided to accord her a second invite for her to appear on 7th March 2017 at Stima Club. That the claimant still failed to appear on the set date. The panel deliberated and decided that the claimant had forfeited her right to be heard and the matter was closed.
35. The Respondent notified the ombudsman of the failure by the Claimant to appear and also notified the claimant that her appeal was unsuccessful on the ground that she did not attend any of the hearings as invited. That the dismissal was not only warranted, but that the Respondent had followed due process in dealing with the misconduct of the claimant. The dismissal was neither arbitrary, unfair nor unlawful as alleged or at all.

Cross-examination

36. Under cross-examination, RW2 said that she is the Human Resource Officer of the Respondent. That she was not licenced to practice. She said that the claimant was served with a NTSC which the claimant responded to. That there was need to clarify and RW2 invited her to a disciplinary hearing which she did not attend.
37. The panel invited her again but she did not attend. That the claimant raised reasons in writing in an email dated 24/8/2016. She was then dismissed and appealed and was invited to attend an Appeal hearing upon the intervention by the Commission on Administration of Justice. The witness added that Appeals are scheduled quarterly and so claimant's Appeal had not been scheduled and had not responded when the CAJ intervened. Upon being asked why they were scheduling Appeals



quarterly, RW2 answered that it was an internal procedure which was not in the manual and was not documented. That the claimant appealed upon a third invitation.

38. The outcome of the Appeal was on 2/5/2019 which was two and a half years later. That the claimant raised concerns which were addressed. The claimant had asked for evidence against her to be tabled and was told it was the two emails. That the claimant questioned the selection of the panel and was told that the management had prerogative on the matter. RW2 said the two complainants were not part of the selection panel. That the claimant also complained that management and accusers were one. The panel was not changed. The claimant also complained about Samuel Ndirangu who was the General Manager of ICT. That he was not changed from the panel.
39. She further said that the complainants did not appear. The two managers did not complain but forwarded the two emails to the HR that decided the two emails formed the basis for a NTSC. Upon being asked whether the two emails were in fact complaints, RW2 said that the two emails constituted a grievance to be addressed but the Respondent decided to issue the Claimant with a NTSC. That the Respondent did not address the grievance.
40. RW2 added that the HR and the supervisor should have come to address the grievance but they did not. She was referred to page 1101 Vol.4 on the claimant's reply on the ethical practices of KPLC addressed to CEO and which was received by the Respondent. RW2 said that she had not seen the Report and that the claimant was a good a worker. The claimant was to attend the appeal hearing on the February and March 2017. On being referred to page 353 she said that the appeal was scheduled for 8/2/2017 at Stima Club. RW2 said that the claimant was based at Ruaraka, outside stima club. The witness added that the claimant has not collected her certificate of service and they do not owe her any terminal benefits.

Re exam

41. On re-examination, RW2 said that the Respondent explained the reason for the delay in delivery of the decision of appeal. That CAS wrote to General Manager HR, requesting matter be brought to close, and the Respondent said the Claimant had failed to attend the two hearings. That the Respondent went ahead to make a decision. RW2 explained that Samuel Ndirangu was not a complainant. She said he was the General Manager conversant with ICT operations, and the line Manager was also a panellist by fact of his proximity to the matters in issue. RW2 mentioned that investigations should have been commenced by the Managing Director upon receipt of the grievances by the claimant.
42. RW3 Titus Kitavi gave sworn testimony and said he works as the Enterprises Systems Manager. He adopted the witness statement dated the 31/10/19 as his evidence in chief. He testified that he is the ICT Manager and his work is to ensure availability and reliability of the systems. RW3 said that the claimant worked as the Regional IT Manager at Ruaraka. He said he interacted with the claimant in the last 3 weeks of July 2016 while the substantive General Manager was away. He said the claimant did not ordinarily report to him except during this period. That he had the authority to give directions to junior staff as head of ICT. That the Respondent had the issue of downturn of ICT services at Ruaraka at the time. That he was told that the staff were not sufficient and he communicated via email and verbally.
43. That on the 25th July 2016 the claimant used inappropriate language to address him. As a result of the claimant's indiscipline, insubordination and disruptive conduct in office environment, he lodged a formal complaint to his supervisors and the human resource manager. The witness said that the Respondent then initiated disciplinary hearing against the claimant. That he is aware that the claimant



was issued with a show cause letter dated 29th July 2016, by the Respondent requesting for explanation/response to the aforesaid offences/misconduct.

44. The claimant vide letter dated 8th August 2016, issued a response addressing him as well as the General Manager as the ‘Bully’ and claimed that they were malicious and cheating and as such, lacking in integrity. That he was well informed that there were a series of invitations to the Claimant to attend disciplinary hearings as well as appeal hearings which the claimant failed to attend. That it is evident that the dismissal was not only warranted, but the Respondent had followed due process in dealing with the misconduct of the claimant.

Cross examination

45. On cross examination, the witness said that he was the functional supervisor. RW3 said it was technical work. That the Regional Manager was Mwaura who was also a functional manager and he was at the same level with him. RW3 said that when acting, he was senior to him. RW3 said that the claimant used inappropriate language to address him. He was aggrieved and reported to her supervisors verbally then forwarded an email to the supervisor but did not have the forwarded email. Hearings were done but not on several matters raised by him. That he did not participate in the disciplinary hearing.
46. RW3 said he was aware of a grievance by the claimant about Simon Mugo that Simon Mugo was not of standard required. The witness said there was an exchange of CVs and certificates. That the said Simon Mugo was an employee and was doing his work and he was not aware of any complains by the claimant on the appraisals. Upon being asked whether the Respondent had a code of conduct, he agreed there was one, and that cheating is not allowed nor is malice and corruption allowed. That integrity is key and would not know if the claimant was justified in making the remarks.

Re-exam

47. On re-examination, RW3 said that he saw the claimant’s grievance on appraisal but was not aware of it. That he responded verbally and forwarded the email correspondence between himself and the claimant which he regarded to be offensive. The witness said that he did not take any other action and he handed over when the General Manager came back. That there is a reporting procedure via supervision to the Human Resource Manager. He added that Mr. Mugo was employed to work as an Assistant Manager, and his performance was okay.
48. RW4 Mercy Njeri gave sworn testimony and said she was HR Manager at KPLC and currently she is Deputy Director support services. She adopted the witness statement dated the 31/10/2019 as her evidence in chief.
49. The witness testified that following various email correspondences between the claimant and the Information Technology Manager and Manager Performance, a formal complaint was lodged against the claimant for indiscipline, insubordination and disruptive conduct to office environment with the Human Resource Manager. That vide letter dated 29th July 2016, the claimant was requested for an explanation. She said that the claimant vide letter dated 8th August 2016, issued a response which was unsatisfactory and in addition, her language was found wanting. That the claimant addressed the General Manager as well as the IT Manager as ‘The Bully’ and claimed they were malicious and cheating as such lacking in integrity.
50. The witness said that the Respondent invited the claimant for a disciplinary hearing on 18th August 2016 which was convened at the Human Resource Meeting Room Plaza but the claimant failed to attend despite having received the invitation and being called on the morning of the hearing. RW4 said that the claimant cited several reasons for her non-attendance and the panellists of the disciplinary



hearing concluded that the panel be reconstituted. It was agreed that the claimant be given another chance.

51. The witness testified that on the 19th August 2016, a second invitation to another disciplinary hearing was forwarded to the claimant scheduled for 25th August 2016.
52. That the claimant wrote an email informing the Respondent that she will not appear for the second time citing various reasons. The claimant failed to appear for the scheduled disciplinary hearing. That the Committee considered her email communications, her response to the show cause letter dated 8th August 2016 and her previous disciplinary records and therefore opined that the claimant had declined to attend the hearings and efforts to get her to attend did not bear fruit. The witness said that the claimant was dismissed from work with effect from 31st August 2016 on the grounds of use of inappropriate and disrespectful language, and also failure to obey lawful instructions to attend disciplinary hearing.
53. The witness said that the Respondent again extended an invitation to the claimant to appear before the appeals committee on Wednesday 8th February at Stima Club and the claimant was advised to appear with a witness who is an employee of the Respondent. The witness said that the Respondent convened the appeals hearing but the claimant again failed to show up and never gave any reason yet she sought for such an opportunity. Notwithstanding the non-appearance of the claimant on the 8th February 2017, the panel again decided to accord her another chance and a second invite for her to appear on 7th March 2017 at Stima Club was sent. That the claimant still failed to appear on the set date. RW4 said that the Disciplinary Committee deliberated and decided that the claimant had forfeited her right to be heard and the matter was closed.
54. RW4 testified that the Respondent notified the ombudsman of the failure to appear and also notified the claimant that her appeal was unsuccessful on the ground that she did not attend any of the hearings as invited. That the dismissal was not only warranted, but that the Respondent had followed due process in dealing with the misconduct of the claimant. The witness stated that the dismissal was neither arbitrary, unfair nor unlawful as alleged or at all. She prayed that the case be dismissed.

Cross examination

55. On cross examination she said that support services include HR functions. That she is an HR practitioner and a member of the profession. The witness said that KPLC has a grievance procedure and a whistleblowing policy documented in integrity office. She said that the ICT Manager was David Mburu. That formal complaint was lodged against the claimant for indiscipline, insubordination and disruptive conduct. On the complaint by Mr. Kitavi, the witness said that she did not have them and offences were emails written by the claimant and the formal complaint was by RW1. She said she was not aware if David Mburu complained and did not investigate. That the Respondent commenced disciplinary proceedings by issuing a NTSC. That she was not aware if the claimant had lodged a complaint. Upon being referred to page 1101 of the claimant's bundle, she said she is not aware of the documents. RW4 noted the document had the stamp and must therefore have been received. She said that a disciplinary process led to the dismissal and not because of the complaint. That she did not participate in receiving complaints. Upon being asked whether she was aware how often the complaints against Eng Ndirangu were, she answered no.
56. RW4 stated that she was aware that the claimant had complained about quarter three appraisal report. The witness said that she was aware that there was beef between the claimant and her supervisor Mr. Kitavi. RW4 said that the claimant did not say in the appraisal that she had an issue and witness had no outcome of the grievance. The witness said she was not sure if the complaint was received. That was a



matter for performance management done by Mr. David Mburu and he oversaw entire performance management for all staff. The witness said she did not see any report. She said the report is finalised in that department.

57. On being referred to the report on page 48 she said that she did not participate in the disciplinary proceedings and that an officer from the HR participated. That according to the Disciplinary committee the claimant had a complex temperament. The witness said they did not have a psychology report. That the issue of complex temperament did not feature in the appraisal reports over the years. That the issue was observed in the disciplinary hearing and there were no prior reports. The witness said that there were no prior disciplinary records before court regarding the claimant. She said that a certificate of service was prepared but he she does not know if the claimant had picked it.

Re-examination

58. On re-examination, RW4 said that the Claimant had received warning letters. That there is a letter seeking explanation dated 24/4/2012 and claimant was warned one year prior. She said temperament matters are dealt with in HR Management and HR adopted the recommendation of the Committee. She said Mr. David Mburu dealt with appraisal report and Titus Kitavi lodged a complaint. Investigations were conducted and a NTSC was issued. The witness said that expert report would not be required to determine the temperament of a person

Determination

59. The court has considered the testimony by CW1 and RW1, RW2, RW3 and RW4 together with the written submissions filed by both parties. The issues for determination are:
- a. Whether the termination of employment of the Claimant was for a valid reason(s) following a fair procedure.
 - b. Whether the Claimant is entitled to the reliefs sought.
60. Section 43(1) and (2) read with section 47(5) obliges an employer to prove that it had a valid reason(s) to terminate the employment of an employee.
61. Section 41 on the other hand obliges the employer to provide an employee with opportunity to be heard, accompanied by a colleague or a union official to explain why he/she should not be punished for misconduct notified to the employee in advance by way of a notice to show cause.
62. In *Walter Ogal Anuro versus Teachers Service Commission 2013 eKLR* it was held, ‘that there must be both substantive justification and procedural fairness and that substantive fairness has got to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination’.
63. The Supreme Court in *Ken freight (EA) Limited v Benson K. Nguti [2016] eKLR* held:-
- “It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”
64. The NTSC letter dated the 29/7/2016 discloses the issue leading to termination of the claimant to be the email communication dated the 27/7/2016 to the IT Manager which the Respondent found to



- be disrespectful. The Claimant was also said to have used disrespectful and insulting language while addressing seniors and giving ultimatums, the subject email in this respect being the email dated the 11th July 2016.
65. It is to be noted that the claimant disputes having sent any email correspondence to the IT Manager on the 27/7/2016. The evidence given in court was in relation to the email sent on the 25/7/2016 from the claimant to the IT Manager, Mr. Titus Kitavi. The Court proceeds on the basis that the subject emails referred to as constituting the disciplinary offences are the ones dated the 25/7/2016 and the other one dated the 11/7/2016 to Mr. David Mburu, the performance manager. The Court will, also consider the adverse effect, if any, that this disparity had on the fairness of the process. The Court will consider this in light of the previous warnings given to the claimant as shown in the letters dated 15/12/2014, 23/09/2014 and the one dated the 24/4/2012.
66. The Response to the NTSC letter dated the 8/8/2016 was also found to be disrespectful for referring to both Mr. Kitavi and the General Manager IT, Mr. Ndirangu as ‘bully’. The Respondent did not issue fresh NTSC in respect of this allegation, though it did consider it in conjunction with other reasons mentioned as reasons leading to the dismissal. The court will consider whether the said response NTSC constituted a valid reason to dismiss the Claimant and what the attendant failure to issue fresh notice had on the disciplinary proceeding.
67. On the evidence given in court, CW1 says she does not see how the subject emails can be interpreted as disrespectful. She also takes issue with the short period given for preparation for the hearing, being the 3 days for the hearing on the 18/8/2016 and similarly for the hearing slated for 25/8/2016. She says she raised various concerns including failure to facilitate her witnesses, provide her with evidence requested and concerns about her safety as a whistle-blower which were not resolved leading to the hearings taking place in her absence.
68. The court has considered whether it was in order for the claimant not to avail herself for disciplinary process on account of the reasons complained of as well as the impact the failure to turn up for the disciplinary process had on the fairness of the process. The Respondent maintains that it did give the claimant ample opportunity to be heard and failure to turn up for the disciplinary process was also one of the reasons that led to her dismissal from employment. The Court has considered the novel question whether it is necessary for the Respondent to issue a NTSC in this particular occasion.
69. The Respondent has submitted that the claimant was given two opportunities for an appeal hearing which were not taken, the 1st appeal being on the 8/2/2017 and another on the 7th /3/2017 even after she was called and emailed. The claimant’s evidence in relation to the appeal hearings is that they were set outside working place, in very informal settings and outside official working hours. She said the hearing were set to take place in Stima Club Executive Lounge, a members only executive lounge yet she was not a member of the club. She also says that she was also given less than 24 hours’ notice for some of the appeals hearings. The Court has additionally considered the above in making the decision on the fairness of the process. The claimant also tendered evidence on what she considers to be unsafe working environment and concerns that she was targeted and was a victim of systemic wish by some employees to compromise procedures and integrity that contributed to dismissal. The court has considered whether there is merit in the said assertions on the fairness of the decision taken to dismiss her from employment. There is also the complaint that the Respondent did not comply with its own human resource manual in the period leading to the dismissal.
70. The court notes that whilst it is common ground that the claimant never attended the disciplinary hearings, it is also not disputed that the two complainants who were said to be the recipients of the subject emails sent by the claimant on the 25/7/2016 and 11/7/2016 were never called as witnesses



to the disciplinary hearing to elaborate the charges laid before the disciplinary panel. The disciplinary committee did not therefore have any evidence tabled before them as the basis to dismiss the Claimant. The charges remained unproven in respect of the alleged offensive language used so as to conclude that it was a valid reason for the dismissal in the absence of the witnesses. Indeed, RW4 confirmed in court that they only received a formal complaint from the IT Manager, Mr. Titus Kitavi and was not aware if Mr. David Mburu had complained. She also added that there was never an investigation in relation to the email sent by the claimant to the performance manager, Mr. David Mburu.

71. 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.

72. The Respondent failed to adduce evidence and could not therefore be said to have proved that the emails in question constituted disciplinary offences for which dismissal of the Claimant from employment was the proper recourse.

73. There was also confusion relating to when the email communication was sent by the claimant to Mr. Titus Kitavi which was not properly resolved by the Respondent. The claimant gave evidence that she was unsure which particular email the Respondent was referring to by saying that she had sent an email on the 27/7/2016 when she did not send an email to Mr. Kitavi on that particular date.

74. This could have of course been easily resolved by later explanation which in this instance was not done. The dismissal letter also simply referred to inappropriate and disrespectful email communication to IT Manager and Manager, performance. It was at the trial that the Respondent referred to the email sent on the 25/7/2016 without saying that the date of 27/7/2016 was mistakenly stated in the NTSC. The letter dated 24/8/2016 on the invitation to disciplinary hearing also added to the confusion as it referred to emails attached as forming the basis for disciplinary hearing. The said emails were completely unrelated to the charge the claimant was facing. There was accordingly no clear evidence as to what was to be responded to by the claimant at the disciplinary hearing.

75. The Responded also combined the disciplinary issues that arose after the NTSC had been issued with the charges said to have been facing the claimant without issuing fresh NTSC as the letter of dismissal mentioned the failure to attend the disciplinary hearing as a reason going to the decision to dismiss. And it is also clear in the Committee report that the Respondent considered the tone of the claimant’s response letter to the NTSC with the other evidence in coming to the decision to dismiss. The proper course of action was to simply issue another Notice then invite the claimant to a hearing on all the issues the Respondent considered to have been grounds for dismissal.

76. The Respondent’s Human Resource Manual at page 316 on Management of employees provides that in:-

‘All discipline cases, investigations should be carried out by the appropriate functional head who will thereafter issue and sign an appropriate explanation in liaison with the Regional Manager. The letter is then to be copied to the Regional HR and Admin Officer, the



Chief Manager Human Resource and Administration and the appropriate Divisional Chief Manager. After the explanation is received the appropriate functional head shall forward a recommendation on the appropriate disciplinary action to be taken to the Chief Manager Human Resource and Admin through the appropriate Departmental Manager who shall append his or her recommendations and observations on the disciplinary actions to be taken’.

77. In the case before court, the explanation letter was not copied to the Regional Human Resource and Administration Manager, Chief Manager and the Divisional Chief Manager. The place of Human Resource Manual in regulating employee/employer relationship was aptly stated by the Court in the Cause No 273 of 2019 Edah Cheronoi Maiywa versus University of Nairobi Enterprises & Services Limited , where Onesimus Makau J had the following to say as regards employer policy document:

“The above provision of the Human Resource Policy and Procedures manual cannot be wished away as it is founded on the law and it is incorporated into the contract of service of every employee of the respondent’.

‘ In Civil Appeal No 114 of 2016 - Heritage Insurance Company Limited –vs- Christopher Onyango & 23 Others [2018] eKLR, the Court of Appeal observed that: “..... It is axiomatic that companies as employers do from time to time come up with new Staff Handbooks or Staff Manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff Handbooks as forming part of the terms of employment

78. The Respondent was therefore obliged to follow its Human Resource manual in dismissal of the claimant from employment. The import of the above provision of the human resource manual was that the Chief Manager Human Resource and Admin had to make his or her observations known on a disciplinary process before the decision to dismiss is made and by following the procedure outlined which was not the case in the matter before court. This said views may include observations as to whether there were grounds warranting dismissal of an employee. The Court is of the view that on this score alone, the grounds said to have led to the dismissal cannot be said to be valid nor can the Respondent be said to have followed the steps necessary to found a fair hearing.

79. In Grace Gacheri Muriithi versus Kenya Literature Bureau 2012 KLR, it was held that;

‘Employees must be committed to the implementation of the employer’s policies and programmes. Employers are entitled to determine and prescribe such policies and programmes. In performance of their respective duties, employees are entitled to raise valid complaints or grievances in relation to the employer’s operational policies and programmes. Employees are also entitled to raise grievances about their work place welfare. Grievances or complaints may relate to fellow staff, clients or the employer. Where operational policies, manuals or systems expose the employee to risks, it is sufficient that the employee raises the deficiencies or reports them and, in particular circumstances, takes such decisions that shall be reasonable in view of the deficiencies. Employers expect employees to remain committed and take decisions of omission and actions towards satisfactory performance of the contract of employment. To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer



to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of *the Constitution* that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust'.

80. The claimant during her employment also raised a number of issues which were not adequately addressed during her employment with the Respondent. She testified that she had complained about sabotage, failure to be appraised and delayed appraisals. There was also a complaint going to the safety of the Respondent's employees in relation to the Boresha Stima campaign which had the potential to cause electrocution and fatal injuries if the safety systems were ignored. The Respondent had the Responsibility to comprehensively investigate these incidences and provide prompt resolution which it unfortunately never did in the case before court.
81. The claimant also gave evidence which was never explained away by the Respondent's witnesses that she had provided information to the Respondent on the ethical breaches at the ICT division for investigations to the then MD & CEO, Dr. Ben Chumo which remained unaddressed but several officials of the Respondent including General Manager ICT, Eng Samuel Ndirangu were later charged in Court with conspiracy to defraud the Respondent approximately ksh. 409 million.
82. The claim by the claimant in relation to this is that she was targeted as the result of her whistleblowing which eventually led to the decision to dismiss her from employment.
83. The procedure provided for complaint as in the above case under page 16 of the Human Resource Manual (page 315 of the claimant bundle) was that witness statement was to be recorded as soon as possible after the incident. A copy of any statement made was then to be forwarded to the Chief Manager, Human Resources and Administration by the relevant Regional/Divisional Head together with any explanatory information relating to the case in question, and a recommendation as to an appropriate course of action. This procedure was not complied with as relates to the complaints by the claimant.
84. The court holds the dismissal of the claimant to have been unlawful for want of valid reason(s) and that the procedure used to arrive at the decision to dismiss was unfair.
85. The claimant in her submissions was alive to the fact that reinstatement was time barred, and expressly abandoned the prayer for reinstatement to the position held prior to the dismissal. Instead, she is praying for the 3 months' salary in lieu of notice and the 12 months' salary compensation. In addition, she is praying for damages for unfair working conditions, distress and discrimination.
86. The Court of Appeal in *Ken freight (EA) Limited v Benson K. Nguti* [2016] eKLR
We come to the conclusion and find, in agreement with the trial judge, that the termination of the respondent's contract of service, in the circumstances, was unfair, the payment in lieu of notice notwithstanding. What then are the remedies for unfair termination under the law" Where it is demonstrated that the termination of a contract of service was unjustified, a range of remedies is available, subject to certain considerations. An employer can pay to an employee whose services are unfairly terminated;
 - i. The wages which the employee would have earned had he been given the period of notice to which he was entitled,



- ii. The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- iii. Reinstatement of the employee
- iv. Re-engagement

87. At the Supreme Court in the same case, the Court held that;

Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m)

88. The statutory, considerations under section 49 (4) include the following-

- a. The wishes of the employee;
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c. the practicability of recommending reinstatement or reengagement.
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonable incurred by the employee as a consequence of the termination;
- k. any conduct of the employee which to any extent caused or contributed to the termination;
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m. any compensation, including exgratia payment, in respect of termination of employment paid by the employer and received by the employee.

89. In the present case, the court has accordingly taken the following into consideration

- a. The 18 years the claimant worked for the Respondent;
- b. The fact that the claimant is of advanced age and may not secure alternative employment;
- c. The fact that she was not paid any benefits;



- d. The failure to address grievances raised by the claimant;
- e. The loss and damage suffered;
- f. The wish of the claimant to be reinstated but for the passage of time;

And awards the claimant the equivalent of 12 months' salary in compensation and 3 months' salary in lieu of notice.

90. In the final analysis, the court has considered the prayer for award of damages in respect of discrimination in addition to maximum compensation under section 49(4) of the Act and found that to be unwarranted for want of prove of specific violation of the Claimant's right not to be discriminated by the respondent. Judgment is entered in favour of the claimant as against the Respondent as follows;
- a. A declaration that the summary dismissal of 31st August 2016 amounts to unfair termination
 - b. Three months' salary in lieu of notice at ksh. 930,000/=
 - c. Compensation for unfair termination, being 12 months' salary earnings at a rate of ksh. 310,000/= per month that is ksh 3,720,000
Total award Kshs. 4,655,000.00
 - d. Interest at court rates from date of judgment till payment in full.
 - e. Costs of the claim.

DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025

MATHEWS NDUMA

JUDGE

Appearances

Ms Kareithi for the claimant

Mr. Macharia for the Respondent

Court Assistant; Kemboi

