



REPUBLIC OF KENYA



KENYA LAW
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**Onsarigo v Auditor General (Cause E674 of 2022)
[2025] KEELRC 507 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 507 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E674 OF 2022
HS WASILWA, J
FEBRUARY 25, 2025**

BETWEEN

JAMES MECHEO ONSARIGO PETITIONER

AND

AUDITOR GENERAL RESPONDENT

JUDGMENT

1. The Claimant instituted this suit through a Memorandum of Claim dated 14th September 2022, seeking relief for unlawful termination of employment and discrimination. The Claimant, a male adult of sound mind residing in Nairobi, was employed by the respondent in 1996 as an Auditor and was later promoted to the position of Supervisor Auditor, earning a monthly salary of KShs. 220,000/= . He diligently served the respondent until 2013, when he applied for unpaid study leave to pursue further studies at Queensland University of Technology in Australia.
2. Although the Claimant's study leave was eventually approved, the delayed approval resulted in his inability to secure admission at the intended university, prompting him to seek admission at Griffith University. He duly informed the Respondent's Director of Human Resources and the Deputy Auditor General of this development through a letter dated 1st June 2015.
3. The Claimant rescheduled his academic program in line with the Griffith University academic calendar and, despite experiencing health challenges that necessitated surgery, he completed his Master of Financial Planning and returned to Kenya on 7th July 2019, submitting his academic transcripts as proof of completion. Contrary to his expectation based on the Respondent's release letter dated 26th August 2013, the Claimant was not reinstated to the payroll upon his return.
4. He persistently followed up with the Respondent's office through written requests and physical visits, but his efforts were met with silence and neglect, subjecting him to untold suffering. On 28th September 2021, the Claimant's advocate served a demand letter upon the Respondent, prompting



- the Respondent to summon the Claimant before an Ad hoc committee of the Human Resource Management. The Claimant attended the meeting but was not granted an opportunity to make representations. Instead, he was asked to resubmit documents already in the Respondent's possession.
5. Despite complying with the Respondent's demands, the Claimant received a letter dated 27th January 2022, further requiring him to provide written evidence of communication with the Respondent between September 2013 and February 2016. The Claimant furnished the requested documents, but on 24th March 2022, the Respondent unlawfully terminated his employment without notice and backdated the termination to 1st October 2016, in violation of the *Employment Act*. Aggrieved by the Respondent's decision, the Claimant appealed against the termination, but the Respondent failed to act on the appeal, making the present suit necessary.
 6. The Claimant contends that the termination was unlawful, malicious, and contrary to the rules of natural justice, as he was neither issued with a notice to show cause nor given an opportunity to be heard. He avers that the Respondent was fully aware of his rescheduled academic program and health condition and deliberately chose to ignore his communication.
 7. The Claimant asserts that the Respondent's actions amount to discrimination under Section 5 of the *Employment Act*, 2007, and that the termination contravened Sections 5, 41, 44, and 45 of the same Act, as well as the Human Resource Policy Manual, 2014. He further claims that, having served the Respondent for over 17 years without any warning or disciplinary issues, the termination was unwarranted and founded on malice, causing him shame, psychological torture, and economic hardship.
 8. The Claimant prays for an award and/or judgment against the respondent for:
 - i. General damages for wrongful termination, discrimination, mental and psychological anguish.
 - ii. Terminal benefits as set out in paragraph 25(a-c) of the claim.
 - iii. Compensation for unlawful termination at the equivalent of twelve (12) months' gross salary.
 - iv. Loss of future earnings.
 - v. Reinstatement to employment thereof.
 - vi. Costs of this claim.
 - vii. Interest on the above at court rates.
 - viii. Such orders and directions as the Honourable Court may deem fit to meet the ends of justice.
 9. The Claimant swore a Verifying Affidavit dated 14th September 2022, stating that he is the Claimant in the matter and has instructed Messrs. Omwoyo Masese & Co. Advocates to pursue his claim against the Respondent. He affirmed that he had read and understood the contents of the Memorandum of Claim and verified the accuracy of the averments contained therein. He further confirmed that there is no other pending suit or previous proceedings between him and the Respondent over the same subject matter and that the cause of action solely relates to him. He concluded by stating that the contents of the affidavit are true to the best of his knowledge, information, and belief.
 10. The Claimant further filed his witness statement of even date and stated that he was employed by the Respondent in 1996 as an Auditor and was later promoted to the rank of Supervisor Auditor, earning a gross monthly salary of Kshs. 220,000/= . He averred that he diligently worked for the respondent until 2013, when he applied for unpaid study leave to pursue further studies at Queensland University of Technology in Australia.



11. He stated that his application for study leave was approved late by the Respondent's Human Resource Department, and upon arrival in Australia, he was unable to secure admission at Queensland University of Technology, forcing him to seek admission at Griffith University instead. He communicated this predicament to the Director of Human Resource and copied the Deputy Auditor General via a letter dated 1st June 2015.
12. The Claimant further stated that he rescheduled his study program in line with Griffith University's academic calendar, and upon completing his Master of Financial Planning, he returned to Kenya on 7th July 2019 and submitted his academic transcripts as proof of course completion. Contrary to the Respondent's Release Letter dated 26th August 2013, the Claimant was not reinstated to the payroll upon his return.
13. He explained that his academic program had been further disrupted by his health condition, which necessitated medical surgery, delaying his studies. This rescheduling and medical condition were duly communicated to the Respondent, and on 31st October 2018, the Deputy Auditor General acknowledged receipt of the same and promised to forward the Claimant's request for consideration. Despite his various visits and written requests for reinstatement, the Respondent ignored and refused to act for over three years.
14. On 28th September 2021, the Claimant served the Respondent with a demand letter through his advocates, prompting the Respondent to summon him before the Ad hoc Committee of Human Resource Management on 22nd October 2021. The Claimant stated that he was not given an opportunity to be heard but was instead directed to resubmit documents proving communication between himself and the Human Resource office during his study period.
15. Despite complying with the directive, the respondent, via a letter dated 27th January 2022, further demanded written evidence of communication for the period between September 2013 and February 2016, which the Claimant duly provided. He asserted that despite his continuous communication during the study period, the Respondent deliberately failed to respond.
16. On 24th March 2022, the Respondent terminated his employment and backdated the termination to 1st October 2016, without issuing a show cause letter or affording him a hearing, contrary to the Human Resource Policy Manual, the *Employment Act*, and *the Constitution* of Kenya. Upon receiving the termination letter, the Claimant appealed to the Auditor General, but the appeal remains unheard to date. He contended that, having served the Respondent diligently for over 17 years without a single warning, the termination was unwarranted, malicious, and unlawful.
17. He stated that the termination subjected him and his family to shame, psychological torture, and economic hardship. The Claimant maintained that he is entitled to reinstatement and promotion, having successfully completed his studies. He further emphasized that his study leave was unpaid and that his delayed return to work was caused by late admission at Griffith University and his health condition, both of which were known to the Respondent. In the alternative, he indicated that he would seek full terminal benefits, including pension scheme benefits and compensation for loss of employment. He concluded by affirming that this was all he had to say.

Claimant's Written Submissions

18. The Claimant filed written submissions dated 15th December 2024, seeking various reliefs against the Respondent, including general damages for wrongful termination, discrimination, mental and psychological anguish, terminal benefits, compensation equivalent to twelve months' gross salary, loss



of future earnings, reinstatement, costs of the claim, interest at court rates, and any other orders the court may deem fit.

19. The Claimant, James Mecheo Onsarigo, was employed by the Respondent in 1996 as an Auditor and was later promoted to Supervisor, earning a monthly salary of Kshs. 220,000. He diligently served the Respondent until 2013, when he applied for unpaid study leave to pursue a Master's program at Queensland University of Technology, Australia. His study leave was approved late, and upon arrival in Australia, he was unable to secure admission at Queensland University and instead enrolled at Griffith University.
20. He communicated this change to the Respondent's Director of Human Resources and the Deputy Auditor General through a letter dated 1st June 2015 and various emails. Due to health complications requiring surgery, his academic program was delayed, and he eventually completed his Master of Financial Planning. Upon his return to Kenya on 7th July 2019, he submitted his academic transcripts as proof of course completion. However, contrary to the expectations set in the Respondent's release letter dated 26th August 2013, he was not reinstated to the payroll.
21. Despite repeated visits and written requests, the Respondent refused to reinstate him, subjecting him to financial and emotional suffering. On 28th September 2021, through his advocates, the Claimant served a demand letter to the Respondent, which led to his summons before the Ad Hoc Committee of Human Resource Management. However, he was not given an opportunity to present his case and was merely directed to resubmit documents already in the Respondent's possession.
22. No notice to show cause was ever served upon him. The Respondent, through a letter dated 27th January 2022, demanded additional written evidence of his communication with the Respondent between September 2013 and February 2016. The Claimant complied, yet on 24th March 2022, the Respondent terminated his employment without notice, backdating the termination to 1st October 2016 in violation of the [Employment Act](#).
23. He appealed against the decision, but no action was taken. Mediation efforts also failed to yield an amicable solution after six months. During the hearing, the Respondent's witnesses provided conflicting testimony, admitting that the Claimant had applied for and been granted unpaid study leave for a Master's degree. The Respondent claimed to have sent a notice to show cause to Nakuru as the Claimant's last known address, yet he had never worked there.
24. The Respondent's witnesses also admitted that the Claimant communicated via the official email but alleged that the email account was last accessed in 2015. The Claimant, who was abroad at the time, was never informed of this, and the Respondent failed to communicate during the period in question. The case was filed on 23rd September 2022, yet the Respondent only filed its documents in March 2024.
25. During the hearing, the Respondent's witnesses were unable to explain their documents and even disowned some of them. The Claimant argues that he was not accorded a fair hearing and that his termination was unlawful, malicious, and in total disregard of natural justice. Section 41 of the [Employment Act](#) mandates that an employer must explain the reason for termination in a language the employee understands and allow them to have a representative present.
26. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited*, Cause No. 74 of 2013, the court emphasized that failure to follow this process renders termination procedurally unfair. Additionally, Sections K.3 and K.4 of the Public Service Commission HR Manual 2016 require that disciplinary cases be finalized within six months and that officers facing charges be issued with a show-cause letter and given 21 days to respond before a decision is made.



27. The Claimant contends that this procedure was not followed since he was not given a chance to respond before the Ad Hoc Committee, which had already made a decision against him. The committee also failed to forward its recommendations to the Public Service Commission as required. His appeal was ignored, and his termination did not comply with Sections 41 and 45(5)(n) of the *Employment Act* and the Public Service Commission HR Manual, rendering it unfair under Section 45 of the Act.
28. The Claimant's case is based on Sections 43, 45, and 47(5) of the *Employment Act*, which require the employer to prove valid and fair reasons for termination. Section 43 states that if an employer fails to prove the reasons for termination, it is deemed unfair.
29. The Respondent failed to provide any valid reason for the termination. The Claimant was never given a fair hearing, and no minutes of the Ad Hoc Committee proceedings were provided. Furthermore, no notice to show cause was served upon him. Had the committee properly analyzed the allegations, he would have been reinstated.
30. The Respondent acted as the complainant, prosecutor, and judge in violation of the rules of natural justice, denying the Claimant his right to be heard. In *David Onyango v Attorney General*, Civil Appeal No. 152 of 1986, Nyarangi J.A. held that a decision in breach of natural justice is not cured by the fact that the decision would have otherwise been correct. The Respondent failed to inform the Claimant of the alleged offense, allow him to defend himself, or communicate its decision in good time.
31. *The Constitution* guarantees the right to a fair hearing in accordance with fundamental justice. The rules of natural justice require a hearing, unbiased adjudication, and a fair procedure. The Respondent's conduct flouted these principles and demonstrated bad faith, discrimination, and abuse of power. A tribunal's actions are unlawful if they are fraudulent, discriminatory, unjust, or tainted by bad faith.
32. The Respondent failed to explain its illegal actions, and the Claimant has proved that the termination was unconstitutional, arbitrary, unreasonable, and contrary to the rule of law. The court should declare the dismissal unlawful to uphold the integrity of the judiciary and the rule of law. The Claimant was denied a fair hearing and an opportunity to appeal, violating his fundamental rights. His dismissal was wrongful and unfair both procedurally and substantively, warranting an award of benefits as prayed.
33. The Claimant seeks reinstatement, arguing that he served the Respondent diligently and submitted his Master's degree upon his return. In Industrial Court Cause No. 509 of 2022, *Edgar Ndemo Momanyi v Catering & Tourism Development Levy Trustees*, Hon. Lady Justice Maureen Onyango reinstated the Claimant, treating him as if he had never left employment, entitling him to all benefits, including promotions.
34. If reinstatement is not granted, the Claimant seeks general damages for mental and psychological anguish amounting to Kshs. 8,000,000. His wrongful dismissal traumatized his family and wasted years of effort in obtaining a Master's degree in Australia. In ELRC No. 1902 of 2015, *Daniel Mungai Karanja v The Attorney General and Another*, the court awarded Kshs. 3,000,000 as general damages for malicious prosecution, mental, and psychological anguish.
35. The Claimant also seeks general damages for wrongful dismissal and future earnings, arguing that he lost his job at his prime age when he was earning Kshs. 220,000. His colleagues in similar positions now earn over Kshs. 300,000 per month. Having worked for over 17 years, he expected to retire at 60, but his employment was arbitrarily terminated.
36. He seeks Kshs. 36,000,000 for loss of future earnings (Kshs. 300,000 × 12 × 10), three months' salary in lieu of notice amounting to Kshs. 900,000 (Ksh. 300,000 × 3), and twelve months' compensation



for loss of employment totalling Kshs. 3,600,000 (Kshs. 300,000 × 12). Including service gratuity, his total claim is Kshs. 48,500,000, plus costs and interest. The court is urged to grant these prayers in the interest of justice.

Respondent's Case

37. The Respondent filed a Statement of Defence dated 29th November 2022 and denied most allegation contained in the Memorandum of Claim. The contents of paragraphs 1 and 2 of the Memorandum of Claim were admitted only to the extent that they were merely descriptive of the parties.
38. The Respondent admitted paragraph 3 of the claim only to the extent of the Claimant's year of employment into the Office of the Auditor General but impeached the Claimant's alleged high standing and diligent service, putting the Claimant to strict proof thereof. It was averred that the Claimant lost the tag of a dutiful and diligent officer by failing to comply with the conditions attached to his study leave.
39. The contents of paragraph 5 were denied, and the Claimant was put to strict proof regarding the alleged late approval of his study leave, which purportedly caused his failure to secure admission into Queensland University of Technology (QUT) for a master's degree in business with a Human Resource Management major.
40. Paragraph 6 of the claim was similarly denied, with the Respondent challenging the Claimant to provide evidence of having communicated his predicament regarding late admission to the Director of Human Resource at the Office of the Auditor General. Paragraphs 7 and 8 were admitted only to the extent that the Claimant submitted his academic transcripts to the Office for reinstatement back to the payroll. The Respondent denied paragraphs 9 and 10, asserting that no communication was made to the Office regarding the Claimant's health challenges.
41. Further the Respondent denied paragraph 11 and stated that the Claimant only resurfaced on 29th July 2019, when he forwarded his transcript and certificate to the Office. The Claimant's allegations of having communicated challenges related to late admission and medical surgery that delayed his study completion were denied, with the Respondent asserting non-receipt of any such communication and the Claimant's failure to provide rebuttal evidence.
42. Paragraph 12 was admitted only to the extent that the Claimant was invited to appear before the Office of the Auditor General's HR Committee to make his representations. Paragraph 13 was denied, with the Respondent maintaining that the invitation aimed to afford the Claimant an opportunity to present his case. The contents of paragraphs 13, 14, and 15 were denied, with the Respondent asserting that the Claimant failed to avail the required documents contrary to the allegations in his Memorandum of Claim and witness statement.
43. Paragraphs 16, 17, and 18 were admitted to the extent that the Office communicated its decision to terminate the Claimant's employment. The Respondent denied paragraph 19, asserting adherence to the principles of natural justice by affording the Claimant a chance to be heard before determining his termination.
44. Paragraph 20 was admitted only to the extent of the Claimant's employment status with the Respondent. Paragraph 21 was denied, with the Respondent asserting that the termination decision was made within the confines of *the Constitution* and the law by following due process.
45. The Respondent further contended that no demand and notice of intention to sue was issued, and even if it had been, it lacked legal or factual basis. The Respondent admitted the jurisdiction of the Honourable Court and confirmed that no suit was pending between the Claimant and the Respondent



regarding the same subject matter. The Respondent prayed for the dismissal of the Claimant's suit with costs.

46. The Respondent filed a Witness Statement dated 20th January 2022 through Ben Muok, the Deputy Director of Human Resource and Administration at the Office of the Auditor General (OAG), who stated that he had authority to make the statement on behalf of the Office. He stated that the Claimant, Mr. James M. Onsarigo, began his service at the OAG on 15th February 1996 as an Auditor II and rose through the ranks to the position of Auditor I, which he held until 31st August 2013.
47. Mr. Onsarigo requested study leave to pursue a Master's degree in Business (Human Resource Management major) at the Queensland University of Technology (QUT), Australia, through a letter dated 1st July 2013. His unpaid study leave was approved for a period of twenty-five months beginning 1st September 2013. The Claimant was expected to resume duty on 30th September 2015 upon expiry of the unpaid study leave, but he failed to report back to work.
48. On 3rd November 2016, the OAG served Mr. Onsarigo with a letter to show cause why disciplinary action should not be taken against him for desertion, which was posted to his last known postal address. The Claimant was expected to respond within seven days, but he did not do so.
49. Mr. Muok further stated that the Claimant requested reinstatement into active employment following the successful completion of his training through a letter received on 9th July 2019. The Claimant also submitted his transcripts and certificate to the office on 29th July 2019. In his letter, the Claimant indicated that he encountered challenges during his studies, including late admission and health issues. However, the office had not received any prior communication regarding the same throughout the period the Claimant was away.
50. A letter from Griffith University, attached by the Claimant to his reinstatement request, indicated that he commenced his Master of Finance Planning program on 29th February 2016 and completed it on 18th June 2019. Mr. Muok stated that the request for reinstatement was forwarded to the HR Committee for deliberation and advice to the Auditor General. The Claimant subsequently appeared before the Sub-Committee of the HR Management Advisory Committee on 22nd October 2022 to make his representations.
51. Following this appearance, the committee observed that there was no sufficient justification for reinstatement and recommended that the Claimant's unauthorized absence from work be treated as desertion. Consequently, a decision was made to terminate the Claimant's service for unauthorized absence from duty or desertion.
52. Mr. Muok asserted that due process was followed and the dismissal was conducted in accordance with the law and standard practice. He concluded that the present suit by the Claimant was bad in law, an abuse of the court process, devoid of merit, and should be struck out with costs to the Respondent. He confirmed that this was all he wished to state.

Respondent's Written Submissions

53. The Respondent filed written submissions dated 20th January 2025, arguing that the issues for determination by the Court are whether the Claimant was wrongfully terminated and whether he is entitled to damages. On the issue of wrongful termination, the Respondent submitted that the Court must determine whether there was a valid reason for the termination and whether the process was conducted fairly.



54. Regarding the reason for termination, the Respondent contended that the Claimant requested a twenty-five-month study leave on 1st July 2013, which was granted, and he was expected to resume duty on 30th September 2015. However, the Claimant failed to report to work, and on 3rd November 2016, the Respondent issued a Show Cause Letter requiring the Claimant to explain why disciplinary action should not be taken against him for desertion, pursuant to Section 41 as read with Section 44(3) (a) of the [Employment Act](#).
55. The letter was served to the Claimant's last known address, but the Claimant failed to respond, thereby constructively resigning from duty in accordance with the Office of the Auditor General (OAG) Human Resource Policy Manual. The Respondent relied on *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR and *Godfrey Otieno Sewe v Housing Finance Corporation Limited* [2022] eKLR, where the courts held that even a single day of absence from work without lawful cause constitutes misconduct justifying dismissal.
56. On the aspect of due process preceding termination, the Respondent submitted that the Claimant, fully aware of the consequences of his failure to respond to the Show Cause Letter, only sought reinstatement through correspondence dated 29th July 2019, three years after his constructive resignation. The Respondent, acting with leniency, granted the Claimant an opportunity to appear before the Human Resource Management Advisory Committee on 22nd October 2021 to present his case.
57. However, the committee found the Claimant's explanations unsatisfactory, and on 24th March 2022, the Respondent issued a formal termination letter, marked as Defence Exhibit 9 on page 16 of the Respondent's Bundle of Documents. The Respondent argued that this process complied with Section 41 of the [Employment Act](#) and that the termination was procedurally fair and lawful.
58. On the issue of whether the Claimant is entitled to damages, the Respondent submitted that the evidence before the Court demonstrated that the Claimant was summarily dismissed lawfully and that the dismissal process was fair and reasonable. Therefore, the Claimant's claim for compensation should fail. Without prejudice to the foregoing, the Respondent contended that if the Court were inclined to award damages, the award must not be arbitrary but should be guided by judicial principles.
59. The Respondent relied on *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR, where the Court of Appeal held that while the Court has discretion in awarding damages, such discretion must be exercised judiciously, based on sound reasoning, and without considering irrelevant factors or overlooking relevant considerations.
60. The Respondent further submitted that the Claimant's conduct demonstrated a lack of diligence and commitment, citing a prior incident where the Claimant failed to respond to a show cause letter dated 5th March 2010, which resulted in him being bypassed for promotion. The Respondent argued that this reflected the Claimant's attitude toward his employment.
61. Regarding the claim for general damages for mental and psychological anguish, the Respondent submitted that the Claimant failed to meet the required evidentiary threshold under established legal principles. The Respondent again relied on *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR, where the Court held that the burden of justifying compensation rests on the Claimant and that any injured feelings or difficulty in finding alternative employment could not be attributed to the Respondent but rather to the Claimant's poor communication skills and lack of work ethic.



62. The Respondent submitted that the Claimant's attempt to seek compensation under multiple headings amounted to an abuse of the court process. Consequently, the Respondent argued that if the Court deemed any compensation necessary, which it firmly opposed, the Claimant should only be entitled to one month's salary in lieu of notice, amounting to Kshs. 220,000.00. The Respondent thus prayed for the dismissal of the Claimant's suit with costs.
63. I have examined all the evidence and submissions of the parties herein. The claimant was indeed granted unpaid leave for 25 months as per the letter of 26th August 2013. Assuming he proceeded as scheduled, the study leave was to expire by September 2015.
64. On 1/6/2015 before the expiry of the 25 months leave, the claimant wrote a letter to the director HR as follows:

James Onsarigo
5 Kate street, Indexomopilly 4068.

Queensland
Australia.

1/6/2015

The Director-Human Resource
Office of the Auditor General
PO Box 30084-00100 Nairobi.

Kenya

Dear Sir,

UNPAID STUDY LEAVE.

I refer to the above subject matter. As you may be aware I applied for my leave in 2013 which was approved late after seeking intervention from the Auditor General. This resulted to loss of my admission with more cost implications. I was unable to join the program as at then but despite all the ups and downs I managed to secure another admission to pursue a Master of Financial Planning at Griffith University.

This is a two-year program of sixteen courses (160 credit points). Having lost some costly time. I foresee a situation whereby it will take me up to September 2017 to complete my studies. Since I will be taking lesser courses per a semester so as to manage the cost of tuition fees

Upon completion of this program, I will gain wider knowledge which will enable me to be more effective and productive at work. I hereby request the office to allow me the needed time to complete my studies.

James Onsarigo.

Copy to; Deputy Auditor General- (Corporate services)

Auditor General.



65. There seems to have been no response to the above letter and so on 10/11/2016, over a year later the claimant wrote another letter as follows:

James Onsarigo.
5 Kate Street, Indooroopilly, 4068.
Queensland, Australia
+61 422223810
Jamesonenter@yahoo.com
James.onsarigo@griffithuni.edu.au

10/11/2016
The Director-Human Resource
Office of the Auditor General-
PO Box 30084-00100
Nairobi

Dear Sir,

UNPAID STUDY LEAVE

I refer to the above subject matter. On 6th Jan 2015, I wrote a letter to the Director-Human Resource Informing the office on my progress in my studies. In the letter, I highlighted the concerns of the delays that happened before I was awarded the study leave. The letter was send via post addressed to the office of Director General. Unfortunately, I did not receive any communication of receipt of the letter. Attached herein is a copy of the same letter.

I received a communication from a colleague via WhatsApp on 10th Nov. 2016 who scanned for me a letter from your office inquiring my whereabouts. The letter required my response within seven (7) days from the date it was written. Unfortunately, my response is late because I got the information late.

Though I did not state in my first letter, I had also family medical issues whereby my wife had to undergo an eye surgery which further constrained my finances since my family and I do not have any medical cover.

However, as indicated in my earlier letter, I anticipate to complete my studies in September 2017.

Upon completion of this program, I will gain wider knowledge which will enable me to be more effective and productive at work. I continue to appreciate your support and hereby request again your office to allow me the needed time to complete my studies.

James Onsarigo
P/No 1996001426.
Copy to: Auditor General
Deputy Auditor General- (Corporate services)

66. On 23/7/2019 the claimant finally graduated from Griffith University Queensland Australia and was awarded a master in financial planning degree. He had previously written to the respondents vide



a letter of 30/10/2018 indicating that he had been undergoing some health issues which delayed completion of his studies and indicating that he hoped to complete his studies by June 2019. The fact of his health challenges was also communicated to the International Advisory Committee vide a letter from one Marisol Ferreria a counsellor of students services Gryfith University, Nathan campus and another on 5/4/2018. Medical documents produced dated 16/11/2018 show that he was admitted for surgery due to some thyroid goitre issues.

67. Upon returning to Kenya, the claimant wrote to his employer requesting to be reinstated in employment vide a letter of 27/1/2022. He was informed that his request had been placed before the ad hoc committee of HRM Advisory Committee on 22/10/2021 and that the request had been considered and that he was expected to submit written evidence of the alleged communication between himself and the office for the period covering September 2013 and February 2016. The claimant wrote back and submitted some documents. The letter stated as follows:

Dare Tuesday, October 30 2018, 09:22 AM GMT+3

From: James Onsarigo

Sent: Tuesday, 30 October 2018 4:10 PM

To: directorate humanresource@oagkenya.go.ke

Cce.ouko@cagkonya go ke

Subject: STUDY LEAVE

Dear Sir,

Attached kindly find the updates of the status of my study leave. I have been undergoing health issues which has delayed completion of my studies. The situation has grown worse and I am supposed to undergo an operation. Believing the Procedure will be successful, I will finish my studies in June. Attached is my progress Transcript to date.

Ahy support accorded to me will be highly appreciated

Yours sincerely

James Onsarigo

PINO. 1996001426

68. He was terminated w.e.f 1/10/2016 for prolonged absence from work. From the documents produced by the claimant, his study leave was to be for 25 months w.e.f 2013 August.
69. As indicated within this judgment the 25 months period would have lapsed by around September 2015.
70. The claimant indicated in his letter of June 2015 to the respondents that he had to get a new university as he arrived in Australia late after the programme had started and so missed out on start dates. There is however, no communication from the claimant that this was the case and the earliest he communicated if at all was in June 2015 and then 10th November 2016.
71. Despite the challenges the claimant had faced of starting late his course and even evidence of sickness later on, this was not communicated to the respondents. The claimant did not even seek extension of his leave. It is therefore apparent that the claimant failed to adhere to the leave dates as granted and never sought extension of time for the said leave.



72. Having indicated as above, it is clear that there were valid reasons to warrant dismissal of the claimant. After the claimant came back from Australia, he sought to be reinstated to work but he was instead dismissed. There was no indication however that the respondent subjected him to any due process as envisaged under section 41 of the *employment act* 2007 which states as follows:

41.

- (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

73. Section 45(2) of the employment act states as follows:

- (2) A termination of employment by an employer is unfair if the employer fails to prove——
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason——
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.

74. In view of the fact that the claimant was not given any hearing before his dismissal, I find his dismissal unfair. Unfairness speaks of the process in this case despite there being valid reason for the dismissal.

75. In terms of remedies, I therefore find for the claimant and I award him as follows:

1. 1 months' salary in lieu of notice=220,000/-
2. 6 months salary as compensation for the unfair termination = 6x220,000/- = 1,320,000/-
Total – 1,540,000/-
3. His terminal dues as per the employment contract.
4. The respondents will pay costs of this suit plus interest at court rates w.e.f the date of this judgement.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2025.

HELLEN WASILWA

JUDGE

