



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Almasi Beverages Limited & another (Cause 37 of 2019)  
[2025] KEELRC 535 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 535 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 37 OF 2019  
MA ONYANGO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**ISSAC MWANGI KARIUKI ..... CLAIMANT**

**AND**

**ALMASI BEVERAGES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ALMASI BOTTLERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant is a former employee of the Respondents. The Respondents are both described in the Memorandum of Claim as limited liability companies incorporated in Kenya pursuant to the provisions of the *Companies Act* having their registered offices and carrying on business in Nairobi.
2. The 1<sup>st</sup> Respondent is stated to be a holding company which has acquired the 2<sup>nd</sup> Respondent and is therefore a subsidiary of the 1<sup>st</sup> Respondent.
3. The Claimant avers that he was employed vide a letter of appointment dated 9<sup>th</sup> December, 1987 by Rift Valley Bottlers Limited which was later acquired and taken over by the Respondents. That pursuant to the acquisition he signed a new employment contract dated 1<sup>st</sup> April, 2018.
4. The Claimant avers that having successfully completed his probation period he was confirmed as a mechanical technician at a salary of Kshs. 164,896 which was gradually increased to Kshs. 178,512 per month.
5. The Claimant avers that during the course of his employment the Respondents through the Chief Executive Officer, General Manager, Commercial Manager and Group Human Resource Manager engaged in unfair labour practices and made the Claimant's working environment and conditions deplorable and unfavourable. The Claimant particularized the unfair labour practices as hereunder:



- a. Failing to provide a relevant job description to the Claimant for the work that he had been employed for and was continuously tossed from one position to another at the Chief executive officer, General Manager, and Group Human Resource Managers will without any certainty as to which work he was to do and how to do it;
  - b. Forcing the Claimant to work and or undertake work in an area that he had not been hired for and not of his area of expertise. The Claimant had been hired for his expertise in maintenance and technical skills, but was forced to work and serve in the garage without being offered any training or consultations whatsoever;
  - c. The Respondent often introduced unattainable and unrealistic targets through a very questionable and misused assessment criteria contrary to the terms of the employment and labour laws with the penalty of countless threats of dismissal from employment if the targets are not met;
  - d. Forcing the Claimant to work overtime without pay and very late in the nights, during public holidays and on Sundays with threat of termination of his employment if he does not and;
  - e. The perpetual insulting, abusing and use of profanities by the Respondents Chief executive officer, General Manager and Group Human Resource Manager from time to time against the Claimant; and
  - f. Subjecting the Claimant to unfavorable and harsh working conditions and environment as described above including forcing the Claimant to work very late in the night without caring about his safety.
  - g. Withholding the Claimant's payment from the moment his services were unfairly terminated.
  - h. The Respondent subjected the Claimant to ridicule constantly discriminated against him based on his age; tentatively coercing him into such emails and communication from the Respondent are annexed to the claim and marked as exhibit "IMK-4".
  - i. The Respondent's often bad-mouthed and engaged the Claimant in unnecessary confrontation. Many are the times the Chief executive offices openly verbally confronted the Claimant for no apparent reason.
  - j. Withholding the Claimant's Certificate of Service.
  - k. Subjecting him to an unfair hearing.
6. The Claimant avers that by a notice to show cause dated 24<sup>th</sup> April, 2019, he was required to explain alleged loss of company assets and poor performance which according to him were driven by bad faith and ill-will orchestrated by pressure for him to retire which he responded to.
  7. He avers that the Respondents thereafter subjected him to a disciplinary process which in his opinion was flawed, after which his employment was terminated by letter dated 30<sup>th</sup> May, 2019.
  8. The Claimant averred that the termination of his employment was unfair for reasons that:
    - a. The Respondents conduct and decision to terminate the Claimant's employment on grounds of gross misconduct and summary dismissal fails the test of lawful summary dismissal as provided for under section 44 of the *Employment Act*, 2007, hence, unfair and wrongful termination and the Respondents are put to strict proof hereof.



- b. The Respondents conduct and decision to terminate the Claimant's employment fails the test of justice and fairness in the circumstances particularly on the issue of notification, trial by ambush, fair hearing and no person can be a judge in their own case as provided for in Article 48 of *the Constitution*, the rules of Natural Justice and under section 41 of the *Employment Act*, 2007.
  - c. Proceeding to terminate the Claimant's employment when well knowing that the Claimant had not been given a chance to be heard amounts to unfair, discriminatory and unjust termination of the claimant's employment. This is a violation of Articles 27, 41, 47 and 50 of *the constitution* and a contravention of section 5 of the *Employment Act*, 2007
  - d. The Respondents failure to provide the Claimant with a particular job description contravenes section 10 of the *Employment Act*, 2007 with regard to providing particulars of employment.
  - e. The Respondents conduct of forcing the Claimant to work in an area where he had not been hired for, not of his expertise and without any training offered to that effect amounts to forced labour and violates Article 30 of *the Constitution*, 2010 and section 4 of the *Employment Act*, 2007.
  - f. Introducing unattainable and unrealistic targets towards with the intention of threatening to dismiss the Claimant from employment if the targets are not met amounts to unfair labour practices and contravenes Article 41 of *the constitution*, 2010 and it amounts to constructive dismissal.
  - g. Forcing the Claimant to work overtime without pay and beyond normal working hours without any particular day of rest contravenes section 27 of the *Employment Act*, 2007 and also amounts to forced labour and unfair labour practices.
  - h. Forcing the Claimant to work overtime without pay and very late in the night with threats of terminating his employment and without caring for his safety amounts to slavery and servitude in employment which contravenes Article 30 of *the Constitution* and it unfair labour practice.
  - i. Refusing and/or neglecting to issue the Claimant with a certificate of service violates section 51 of the *Employment Act*.
  - j. Failings/refusing to pay the Claimant his payment in lieu of notice equivalent to his monthly salary contravenes section 36 of the *Employment Act*, 2007
  - k. Failing to pay the Claimant his terminal dues as provided for under the law is unlawful withholding of the Claimant's terminal dues.
9. The Claimant seeks the following reliefs:
- a. A declaration that the Respondents conduct in handling the Claimant's employment period amounted to unfair, unlawful and constructive dismissal and in breach of the *Employment Act* and principles of employment law.
  - b. Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months gross salary totaling to Kshs. 2,142, 144/= with interest thereon at court rates from the date of Award until payment thereof in full.
  - c) Three month's salary in lieu of notice of Kshs. 535, 536/=.
  - d) Unpaid Leave allowance for the period worked.



- e) Service pay at the rate of 15 days salary for every year worked.
  - f) Certificate of service
  - g) Costs of the suit plus interest thereon from the date of Award.
  - h) Any other relief that this honourable court may deem fit to and just to grant in the circumstances.
10. The Respondent filed a Memorandum of Defence dated 10<sup>th</sup> February, 2020 in which it states that the Claimant was employed on 9<sup>th</sup> December, 1987 as a stores attendant by Rift Valley Bottlers which was later purchased by Almasi Bottlers.
11. That in 1988 the Claimant was sponsored by the company for a diploma course in Plant Engineering at Eldoret Polytechnic which he completed in 1994 following which he was re-designated a Mechanical Technician and later promoted to Mechanical Supervisor.
12. The Respondent states that the Claimant's duties and responsibilities as stores supervisor was to ensure the following:
- a. Company vehicles and lift trucks are properly maintained according to both company and manufacturer's procedures.
  - b. Fleet planning for preventive maintenance of company vehicles and lifts.
  - c. Proper documentation is secured on vehicle maintenance.
  - d. Fleet legal planning to ensure that company vehicles meet the statutory and company requirements.
  - e. Advise procurement on spare parts sourcing in order to maintain high company standards.
  - f. Set and maintain SOP on motor vehicle repairs including time to be used on different part repairs.
  - g. Account for all spares removed and fitted on company motor vehicles and lift trucks.
  - h. Timely submission of daily, weekly and monthly status report for the garage.
13. The Respondent avers that the Claimant's employment was procedurally terminated on 31<sup>st</sup> May, 2019 and he was paid the following:
- Basic salary Ksh.69,104.00
  - House allowance Ksh.23,766.00
  - Car allowance Ksh.76,117.00
  - Other allowances Ksh.9,525.00
14. The Respondent avers that after the disciplinary hearing the disciplinary committee recommended as follows:
- It is clear that the company is exposed to serious losses to the tune of almost a million shillings. Mr. Isaac Kariuki's conduct in regards to the garage issues is questionable and this claim is supported by practical logic. The company may be exposed to further loss if he is allowed to continue serving in the same capacity.



In view of the above, Mr. Isaac Kariuki's performance in the past four months has been evaluated below average.

Therefore the committee recommended that Mr. Isaac Kariuki be terminated from employment with immediate effect for gross misconduct in accordance with the law and policy."

15. The Respondent avers that the Claimant's employment was terminated pursuant to the advisory Committee and the reasons for termination were well enumerated in the letter of termination dated 30<sup>th</sup> May, 2019 and the Claimant was paid all his terminal benefits
16. The Respondent denies the reasons for termination enumerated in the Memorandum of Claim and avers that the performance of the Claimant deteriorated over time and the Claimant was issued with show cause letter in respect thereto. The Respondent further states that the termination was procedurally fair.
17. The Respondent denies that it forced the Claimant to work as a garage supervisor which he was not conversant with. That on the contrary, the Claimant was sponsored for Diploma and Higher National Diploma which training was geared towards the operations at the Respondent's plant and specifically the garage. The Respondent denies the Claimant's contention that he was not aware of his job description.
18. The Respondents further aver that the Claimant's averments that he was forced to work overtime without pay, or working on public holidays and Sundays, perpetual insults, abuse, and subjection to unfavourable and harsh working conditions, ridicule and discrimination which the Respondents state are all unfounded since no substantive evidence has been adduced to support the allegations. The Respondents assert that they are equal opportunity employers and all staff are treated equally and fairly. They urged the court to reject the averments.
19. The claim was heard on 7<sup>th</sup> November, 2023. Both parties called their witnesses who testified. The parties thereafter filed and exchanged submissions.

#### **Claimant's case**

20. The Claimant adopted his written statement dated 15<sup>th</sup> August, 2019 and the documents filed with his claim. He testified that he was trained in machinery maintenance. That around 2017 he was transferred to maintenance of vehicle fleet which he was not trained in. That he did his best but there was a problem as no spares were procured. That sometimes he would be given cash to buy the spares and other times he was told to obtain credit from suppliers for payment later.
21. The Claimant testified that his dismissal was on poor performance and loss of company assets which related to vehicle repairs. He stated he was not told which spares were lost.
22. On poor performance he stated that appraisals were done yearly and quarterly and he used to score over 60%. That he was not told anything about poor performance. He stated that when Kisii Bottlers was acquired by Almasi he was a garage supervisor. That he was never taken for training when he moved to garage supervisor.
23. The Claimant testified that he received a notice to show cause on loss of assets and poor performance. He was later called for a disciplinary hearing when he was asked why vehicles were not working and he responded to all questions. According to him the meeting went well.



24. He testified that at the hearing his accuser was the Human Resource who was not his supervisor. He stated that he was issued with a report of the disciplinary case.
25. Under cross examination the Claimant stated that to him Almasi Bottlers and Almasi Beverages are the same. That they did not employ him but he sued them because they are the ones who terminated his employment.
26. The Claimant testified that his basic salary was Kshs. 69,104. House allowance was Kshs. 23,766. Car allowance was Kshs. 76,117 and other allowances was Kshs. 9,525. Gross was Kshs. 178,512 as per pay slip of May, 2019. He stated he did not attach any other pay slip.
27. He testified that after termination he cleared and was paid some money. That he was informed the balance was used to pay for spares. That the amount deducted was about Kshs. 400,000. He testified that he was not given a certificate of service.
28. In the submissions filed on behalf of the Claimant, he identified the following issues for determination:
  - i. Whether there was a proper hearing conducted before terminating the Claimant;
  - ii. Whether the Claimant's employment was unlawfully terminated;
  - iii. Whether the Claimant is entitled to the reliefs sought herein; and,
  - iv. Who bears the cost of the claim.
29. On the first issue the Claimant submitted that during the hearing no evidence was produced to prove the loss of any company asset and poor performance. For emphasis the Claimant relied on the case of CMC Aviation Ltd v Crusair Ltd (No.1) (1987) KLR 103 where the court stated that pleadings to a suit are not normally evidence, that they become evidence if expressly or impliedly admitted as an admission is evidence.
30. It is submitted that the minutes of the hearing were not produced to prove there was a hearing. That the Respondents further did not prove performance appraisal reports to prove poor performance. That there was further no audit report to prove loss of assets. Counsel referred to the case of Re H and Others (Minors) (Sexual Abuse – Standard of Proof) 1969 where Lord Nichol of the House of Lords stated:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”
31. The Claimant further relied on the decision in Miller v Minister of Pension (1947) ALL ER 373 where the standard of proof in civil matters was stated as follows:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party



bearing the burden of proof will lose, because the requisite standard will not have been attained.”

32. It was further submitted that the Claimant was never given an opportunity to be accompanied to the disciplinary hearing relying on the decision in *Margaret Auma Ingwe v Kenya Power and Lighting Company Limited* [2015] eKLR.
33. It is further submitted that the Respondent did not produce a report to show how the Claimant’s performance was measured relying on the decision in *Francis Aboge Oduk v Hasbah Kenya Kimited*.
34. It is further submitted that principles of natural justice that you should not be a judge in your own case was not complied with as the Human Resource Manager who was the Claimant’s accuser is the one who wrote the notice to show cause and was also part of the disciplinary panel.
35. It is further submitted that the Claimant proved that he was tossed from one job to another without further training then accused of poor performance.
36. It is submitted that the Claimant had proved that there was no valid reason for termination and that the procedural steps in the termination of his employment as set out in section 43(1) and 47(5) of the *Employment Act*. that the Claimant proved unfair termination and is entitle to the remedies under section 49(1)(a) and (c) of the Act.

#### **Respondent’s Case**

37. The Respondent called Timothy Mwinzi Muthini, RW1, its Human Resource Manager who adopted his witness statement dated 1<sup>st</sup> April, 2022 and documents attached to the Memorandum of Defence filed on 17<sup>th</sup> February, 2020. He stated that he had worked with the Respondents since 2011.
38. Under cross examination he testified that the Claimant had a job description in the contract dated 1<sup>st</sup> April, 2018 at page 4 to 6 of the Respondent’s bundle which was issued to the Claimant when Rift Valley Bottlers was acquired by the Respondents. He testified that all employees were transited.
39. RW1 testified that before the show cause letters the Respondent conducted appraisal which are in its ERP System. He stated that the case in court does not touch on the annual appraisal but on the charges in the show cause letters dated 24<sup>th</sup> April, 2019. That it related to cash which the Claimant misappropriated.
40. He testified that on the issue of performance the Respondents were specific on mismanagement. That performance is very general and the specific issues were called out at the disciplinary hearing
41. RW1 testified that the Claimant was referred to specific assignments he has been given which he attended to poorly. That the Claimant was also questioned on how he used to ask for money. That at times he would ground all vehicles when not given the specific amount he asked for.
42. He testified that the issues were raised in the show cause letters which the Claimant admitted received all but one. RW1 submitted that this was not a matter that required investigations as it was done through the Respondent’s Finance System. That the Claimant also obtained spares from unapproved vendors. That all these are contained in the documents filed in court by the Respondent.
43. RW1 testified that the Claimant was issued with the Disciplinary Report which was also filed in court, and he did not raise any objections over the same.



44. RW1 testified that the Clearance form signed by the Claimant contained a tabulation of the amount the Claimant owed the Respondents at No. 13 thereof. He testified that there is also a tabulation which also includes loans borrowed by the Claimant at page 46 of the Respondent's bundle.
45. In their submissions filed on behalf of the Respondents it is stated that the burden of the Respondent in the suit is in respect of proof of substantive and procedural fairness and the reliefs sought that can be granted.
46. The Respondent submitted that it complied with substantive fairness as it proved that the Claimant was involved in negligence of duties assigned to him with the result that the Respondent suffered loss.
47. It is further submitted that the Claimant was procedurally terminated on 31<sup>st</sup> May, 2019. That on 27<sup>th</sup> September 2018, the Claimant was served with a letter to show cause as to why he should not be disciplined for negligence of duty and insubordination for a misconduct he committed on 25<sup>th</sup> September 2018. He was served with a stern warning vide a letter dated 1<sup>st</sup> October 2018.
48. On 18<sup>th</sup> March 2019, the Claimant was again required to show cause why disciplinary action should not be taken against him for poor performance in fleet management. He responded to same vide his letter dated 19<sup>th</sup> March 2019.
49. It is contended that the nature of the office warranted dismissal but the Respondent elected to serve him with a second warning which clearly stated that "second and last warning". The warning clearly stated that if the offence was repeated, this would warrant termination of his services.
50. On 24<sup>th</sup> April, 2019 the Claimant was further served with a letter to show cause why disciplinary action should not be taken against him for loss of company assets and poor performance of work. The Claimant responded to the same vide a letter dated 25<sup>th</sup> April 2019 in which he denied the alleged offense. He was invited for a disciplinary hearing with an employee of his own choice/witness vide a letter dated 25<sup>th</sup> April, 2019. The staff advisory and disciplinary meeting was scheduled for 29<sup>th</sup> April, 2019 at 3.00p.m.
51. The meeting progressed as scheduled on 29<sup>th</sup> April, 2019. The Claimant elected not to come with a co-worker or witness. The staff advisory and disciplinary committee recommended as termination of the Claimant's employment.
52. Upon recommendation of the staff advisory and divisor and disciplinary committee the Claimant's employment was terminated with effect from 31<sup>st</sup> May, 2019 vide a letter dated 30<sup>th</sup> May 2019.
53. It was submitted that the reasons that warranted the termination were well enumerated in the latter. That the Claimant was asked to clear with the company which he did without coercion. He was thereafter paid all his terminal benefits which included wages in lieu of notice. He was also issued with a certificate of service.

### **Analysis and Determination**

54. From the pleadings of the parties herein, the evidence adduced and the submissions filed by the parties, the issues that present themselves for determination are:
  - i. Whether the termination of the Claimant was fair both substantively and procedurally
  - ii. Whether the Claimant is entitled to the remedies sought.
55. Substantive fairness is provided for in section 43 of the *Employment Act* while procedural fairness is provided for in section 41 of the Act.



56. In the instant case it was the Claimant's averment that the termination of his employment by the Respondent was unfair as no evidence of a disciplinary hearing was produced in court. Further that there was no proof of loss of the Respondent's assets and no proof of poor performance.
57. On its part the Respondent submitted that the Claimant was served with several show cause letters which he responded to and was cautioned. These included the show cause letter dated 27<sup>th</sup> September, 2018 and stern warning of 1<sup>st</sup> October, 2018, show cause letter dated 18<sup>th</sup> March, 2019 and second and last warning letter dated 20<sup>th</sup> March, 2019, the show cause letter dated 24<sup>th</sup> April, 2019 which the Claimant responded to on 25<sup>th</sup> April, 2019. It is the show cause letter dated 24<sup>th</sup> April, 2019 that culminated in termination of the Claimant's employment. The same is reproduced below:

ALMASI  
BEVERAGES LIMITED  
ALMASI BOTTLERS LTD  
PO BOX 51  
ELDORET

From: Human Resource & Administration Officer

To: Isaac Kariuki

Date: 24<sup>th</sup> April 2019

REF: SHOW CAUSE- LOSS OF COMPANY ASSETS AND POOR PERFORMANCE.

Reference is made to the above issues, whereby the new ice plant machines which are kept at the garage was found ice plant pumps, elevators and cables were missing. As a manager in charge of the garage you take the full responsibility. Also not that several issues have been raised on your poor performance which includes that following.

Failure to implement preventive maintenance resulting in frequent emergency breakdown maintenance.

Failure to do motor vehicle safety inspection resulting to road accidents (door felling on the road).

Failure to plan for fleet legal inspections on time resulting in excessive downtime.

Expenditure without approval as per the company policy.

Delay in implementing management instructions on fleet maintenance such as painting of trucks and Forklifts.

Management therefore finds you highly culpable of serious negligence of your duty thus exposing the company into the unnecessary risks. Consequently, you are hereby required to write and show cause why severe disciplinary action should not be taken against you for negligence of your duty and be surcharged on the loss.

Your Written explanation must reach the undersigned not later than the close of day on 25<sup>th</sup> April 2019, failure to which disciplinary action deemed fit shall be taken against you without further reference to you.

Yours faithfully,

For: HR & ADMINISTRATION OFFICER



Signed  
Dennis Nyandika  
HR & Administration Officer  
CC: Chief Human Resource Officer  
General Manager  
Supply Chain Manager  
Personal file

58. The Claimant responded on 25<sup>th</sup> April, 2019 and was thereafter invited for a disciplinary hearing by letter dated 25<sup>th</sup> April, 2019 which is reproduced below:

ALMASI  
BEVERAGES LIMITED  
ALMASI BOTTLERS LTD  
PO Box 51  
Eldoret  
From: Human Resource Officer  
To: Isaac Kariuki  
Date 25th April 2019

**STAFF ADVISORY & DISCIPLINARY MEETING.**

I refer to the letter from your supervisor requiring you to show cause why disciplinary action should not be taken against you for poor performance, resulting in several gaps in your area as enumerated in the above quoted letter had been identified as well as your response to the same.

The management has reviewed your response and wishes to invite you to a disciplinary committee on Monday 29th April 2019 at 3.00 pm to shed more light on the issues raised in the communication quoted above.

Please be accompanied by your witness if any.

Signed  
Dennis Nyandika  
HR & ADMINISTRATION OFFICER  
CC: Chief Human Resource Officer  
General Manager  
Supply Chain Manager  
Personal file

59. The minutes of the disciplinary hearing at page 32 of the Respondent's bundle sets out the attendance, purpose of the hearing, objectives of the hearing and the minutes and recommendations of the disciplinary panel.



60. I am satisfied that the Respondent complied with section 41 of the *Employment Act*.
61. On the grounds for termination of employment the letter inviting the Claimant for disciplinary hearing did not set out the charges which the Claimant was to respond to at the hearing. The letter referred him to the notice to show cause dated 24<sup>th</sup> April, 2019 where the Respondent had listed 5 bullets for the Claimant to respond to.
62. The minutes of the hearing show that at the beginning of the hearing no charges were specified. The Claimant was however required to respond to 8 charges being use of unethical language, safety issues due to lack of daily/weekly and monthly inspection of fleet/vehicles, insubordination in September, 2018, poor performance, expenditure without approval of approximately Kshs. 800,000, loss of company assets, delay in implementing management instructions on painting of trucks and failure to perform his day to day duties. These charges are not specified in the notice to show cause letter dated 24<sup>th</sup> April, 2019.
63. In *Sani v JSC (Cause 7 of 2019) [2022] KEELRC 4000 (KLR) (26 September 2022) (Judgment)*, Radido J quoted with approval the decision of the Labour Appeal Court of South Africa *OH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Ors (2019) 40 ILJ 2477* where the court faced with the question of framing charges in employment disciplinary hearings, opined:
- One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge or add new charges after the commencement of the hearing, where it would be prejudicial to do so. However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance. Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterization, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place, he is alleged to have acted wrongfully or in breach of applicable rules or standards.
64. In the instant case the Claimant was not informed of the charges he was expected to respond to at the hearing. He was referred to the show cause letter dated 24<sup>th</sup> April, 20219. The show cause letter contained only 5 charges while at the hearing the claimant was required to respond to 8 charges, some of which were never included in the show cause letter.
65. It is my finding that the Claimant was not given specific charges to respond to at the hearing and was made to respond to some issues that were not included in the notice to show cause dated 24<sup>th</sup> April,



2019. To this extent the reasons for dismissal included grounds that the Claimant was never given an opportunity to respond to.

66. The Respondents further did not address the Claimant's responses to some of the charges against him. For example the Respondent did not give credit to the fact that there was a mismatch between the Claimant's qualifications and the role he was given, which from the evidence on record, greatly impacted on his performance.
67. For the foregoing reasons it is my finding that the Claimant's disciplinary hearing did not pass the test of fairness.

### **Remedies**

68. On the remedies the Claimant is not entitled to any damages for constructive dismissal as he was not constructively dismissed.
69. He is not entitled to service pay as he was a member of both NSSF and the Respondent's staff pension scheme.
70. The Claimant was issued with a certificate of service so the prayer for the same is redundant.
71. The Claimant was paid 90 days pay in lieu of notice. He was also paid 11.5 days leave earned but not taken.
72. The only prayer that the Claimant is entitled to is compensation for unfair termination of his employment. I have considered the Claimant's long service of 31 years and 5 months as stated in the Employee Discharge Computation (Final Dues) at page 46 of the Respondent's bundle. I have further considered the circumstances under which the Claimant was terminated and all relevant factors under section 49(4) of the *Employment Act*. It is my view that 6 months salary is reasonable compensation in the circumstances of this case. I accordingly award the Claimant Kshs. 1,071,072 based on his last gross pay of Kshs. 178,512.
73. The Respondent shall bear the costs of the suit and interest shall accrue from the date of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**MAUREEN ONYANGO**

**JUDGE**

