



**Ndung'u v African Mission Health Care (K) (Cause E859 of 2021)  
[2025] KEELRC 432 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 432 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E859 OF 2021  
JK GAKERI, J  
FEBRUARY 18, 2025**

**BETWEEN**

**JAMES MATHUKU NDUNG'U ..... CLAIMANT**

**AND**

**AFRICAN MISSION HEALTH CARE (K) ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a memorandum of claim filed on 21<sup>st</sup> October, 2021 alleging that termination of employment by the respondent was unfair.
2. The claimant's case is that he joined the respondent in February 2013 as a consultant and rose to become its first Finance Manager until termination of his employment vide letter dated 5<sup>th</sup> October, 2020.
3. The claimant avers that he was dismissed from employment on frivolous grounds and was not accorded a fair hearing prior to the termination of his employment.
4. That it was a witch-hunt, malicious and victimization orchestrated by his supervisor, one Beth Wangigi who was hostile to him allegedly because he questioned the fact that her husband was one of the respondent's suppliers, which occasioned a conflict of interest, but adduced no evidence of this allegation.
5. The claimant avers that he was invited for a disciplinary hearing vide letter dated 11<sup>th</sup> September, 2020, scheduled for 16<sup>th</sup> September, 2020 but the email message indicated that the hearing would take place on 17<sup>th</sup> September, 2020 to confuse him.
6. That the letter itemised the allegations against him but had neither a venue nor time of the meeting and learnt of it that morning.



7. That the disciplinary committee was unfairly constituted as the Human Resource Officer was not present and all members were in management and was ambushed with new offences at the hearing and was not accorded time to respond to the allegations and the committee ignored his response.
8. The claimant prays for:
  - i. A declaration that termination of his employment by the respondent was wrongful, unfair and unlawful.
  - ii. A declaration that the respondent violated the claimant's rights to fair administrative action, fair labour practices and freedom from discrimination under *the Constitution* of Kenya.
  - iii. 12 months compensation Kshs.1,809,345.6
  - iv. 2 month's salary in lieu of notice Kshs.301,557.6
  - v. Unpaid overtime Kshs.836,322.24
  - vi. Costs of this suit plus interest.

### **Respondent's case**

9. The respondent admits that the claimant was its employee from 1<sup>st</sup> June, 2013 and denies having dismissed him from employment unfairly.
10. The respondent's case is that the dismissal was conducted in consonance with the Respondent's Human Resource Manual and the provisions of the *Employment Act*.
11. That the letters dated 12<sup>th</sup> February 2020, 27<sup>th</sup> March, 2020 and 8<sup>th</sup> April, 2020 were necessitated by the claimant's failure to undertake assignments and a notice to show cause dated 27<sup>th</sup> August, 2020 followed and the claimant responded.
12. That the respondent found the response unsatisfactory and invited him for a hearing on 17<sup>th</sup> September, 2020, though the email message had a typo as it indicated 16<sup>th</sup> September, 2020 but the same was rectified and hearing took place on 17<sup>th</sup> September, 2020 and the claimant was accorded all attendant rights.
13. The respondent avers that at the conclusion of the hearing it was satisfied that a case for termination of the claimant's employment had been established and a letter to that effect was served on the claimant on 5<sup>th</sup> October, 2020 who appealed on 6<sup>th</sup> October, 2020 and was notified of the outcome on 9<sup>th</sup> October, 2020 and was paid all his dues and issued with a certificate of service.
14. The respondent prays for dismissal of the claimant's case with costs.

### **Claimant's evidence**

15. On cross-examination, the claimant confirmed that he received warning letters and the notice to show cause as well as the email that had a different hearing date but the same was clarified vide email and attended the hearing on 16<sup>th</sup> September, 2020.
16. The claimant admitted that he was given an opportunity to address the committee and received a copy of the minutes and did not object to any of the contents in writing.
17. It was his evidence that he received the letter of dismissal, appealed and complained that he was not given a fair hearing but had no evidence to demonstrate the allegation.



18. That he addressed issues that arose at the hearing and received payments as per the discharge voucher and received a certificate of service.
19. On re-examination, the claimant testified that the employer alleged that they could not reset the password and logged into his gmail account.
20. He admitted having been paid for the days worked in October, 2020, untaken leave days and gratuity and the hearing was physical. In his claim, the claimant avers that the hearing on 16<sup>th</sup> September, 2020 was virtual and was not heard on the appeal but received a decision of the Appeal Committee.  
That he chose to proceed with the hearing without a colleague.

### **Respondent's evidence**

21. RWI, M/s Beth Wangigi confirmed on cross-examination that she authored the warnings and the notice to show cause letters as the respondent had a part-time HR person who was not involved in signing of letters and was the claimant's supervisor.
22. The witness confirmed that Human Resource was not involved in the hearing.
23. It was RWI's testimony that she had 7 allegations against the claimant and insubordination was illustrated by the bullets with dates.
24. On LPOs, RWI testified that the respondent had a finance manual but there were inconsistencies in the purchase of a laptop and the claimant was supposed to ensure consistency and the LPO had to be attached for all payments.
25. That on 19<sup>th</sup> August, 2020 the claimant was working selectively, though on sick leave and his email to the witness was acknowledged but not responded after the 3 days or at all until the notice to show cause was issued.
26. As regards dishonesty, RWI confirmed that the claimant was copied all emails and responded but denied awareness of the email on request for information.
27. It was RWI's testimony that finance does not come at the tail end of the procurement process and it was copied emails and documentation is required.
28. That on 18<sup>th</sup> August, 2020, the claimant, stated that he was in a meeting and would respond, but did not.
29. On deliberately slowing down work processes, RWI cited the LPO issue and lack of teamwork and frustrating the team. The issues of LPO and delay in conclusion of the matter was cited as example since finance is the custodian of all documents and initiates the payment process and the claimant was not co-operating, and although administration received the vouchers, the claimant failed to work with them to resolve the issue.
30. The witness admitted that she had no evidence on the claimant's lack of leadership save for the long standing issue on the office line and the claimant had the invoices to sought out the matter with the other departments as finance was involved in reconciliation as repository of the documents.
31. Similarly, or segregation of duties in finance, RWI stated that a member of staff was proceeding on leave but the claimant did not respond to the request for a plan to ensure continuity.
32. On lack of integrity, RWI testified that the claimant would input figures into the sage system for computation and had control over verification whether the computation was correct. It was her



- evidence that finance was supposed to verify tax computation and in this case the claimant had not detected the discrepancy until the witness isolated it and the claimant acted. The witness, however had no evidence that employees lost any money in the mix up.
33. Finally, RWI confirmed that as the claimant's performance manager she issued the notice to show cause, made the decision on the disciplinary hearing and attended the hearing as the complainant, was the sole accuser and was obligated to prove the allegations.
  34. On re-examination the witness testified that the claimant was accorded 5 days to prepare for the hearing and attended the typo of the hearing date notwithstanding and had the opportunity to respond to all the issues raised and the committee was properly constituted.
  35. The witness testified that the claimant had not complained about her at any time and he did not raise the issue of bias and there was none.
  36. RWII, Dr. Jonathan Mwindi confirmed that the disciplinary hearing was conducted on 17<sup>th</sup> September, 2020, but he did not attend and there was a performance issue.
  37. The witness testified that although the respondent had provision for a Performance Improvement Plan (P.I.P), he could not recall the claimant being placed on it.
  38. That the claimant was the first Finance Manager and received the largest salary adjustment an indication of absence of bias.
  39. That the claimant ensured tax compliance and the respondent had not been accused of any non-compliance by the NGO Registration Board.
  40. The witness testified he was part of the executive team and signed the dismissal letter issued on 5<sup>th</sup> October, 2020 and added that although the appeal was heard on 8<sup>th</sup> October, 2020, the claimant was not invited for a hearing and minutes were not recorded.
  41. It was RWI's testimony that although he was based out of the county, he and the claimant were good friends and trusted the Performance Manager, RWI.
  42. On re-examination RWI testified that he had been the Vice President of respondent since 2010 and supervised the claimant's supervisor and had had several conversations with the claimant and read the claimant's appeal and did not raise any complaint on the disciplinary hearing.
  43. RWIII Mr. Lampert Kerio testified that the disciplinary hearing took place on the 17<sup>th</sup> September, 2020 and he prepared the minutes dated 16<sup>th</sup> September, 2020 which was a clerical error and was aware of the erroneous date communicated to the claimant on email dated 15<sup>th</sup> September, 2020 and all evidence adduced at the hearing was recorded, principally copies of emails, and it emerged that the claimant did not respond to emails from the supervisor.
  44. The witness admitted that the claimant was on sick off from 19<sup>th</sup> August, 2020 and was to resume duty on 22<sup>nd</sup> August 2020 and was paid terminal dues Kshs.218,343.31 vide two cheques.
  45. He admitted that although the claimant signed the discharge voucher, there was a disclaimer.
  46. On re-examination, the witness stated that the claimant complained that the hearing notice was short but declined the offer to adjourn the hearing to enable him secure a colleague to attend the hearing and did not ask for any evidence to be availed to him.



### **Claimant's submissions**

47. As to whether the respondent had a reason (s) for termination of employment, the claimant submitted that the alleged insubordination of refusing to respond to emails was on account that he was on sick leave from 18<sup>th</sup> – 20<sup>th</sup> August, 2020 and the respondent was aware of that fact.
48. As regards dishonesty, the claimant urged that finance came in at the tail end in a purchase and the claimant wanted the prescribed procedure followed.
49. On unavailability for meetings, the claimant's counsel submitted that claimant explained that he was unwell and the delay in payment was explained.
50. Counsel submitted that the respondent did not avail evidence of the emails the claimant did not respond to and there were invoice issues in relation to the Absolute Cab on services rendered and payment could not be effected.
51. As regards the alleged lack of leadership, the counsel submitted that statements from Airtel would come from administration/operations for finance to pay and there were reconciliation issues and the allegation on failure to give business continuity was not proved.
52. Finally, on lack of integrity, counsel submitted that the system computed staff PAYE and the claimant's role was to input staff salaries and the discrepancy was occasioned by tax reliefs and unknown to the claimant the tax changes had not been incorporated in the system.
53. According to the claimant's counsel, none of the allegations was proved.
54. On procedure, counsel submitted that the prescribed procedure was not followed as the claimant was not supplied with evidence during the hearing, was accorded a short notice to attend the hearing and was not heard on appeal.
55. Counsel submitted that termination of the claimant's employment did not meet the threshold and was thus unfair and he was thus entitled to the reliefs sought including over-time.

### **Respondent's submissions**

56. Concerning the reasons for dismissal from employment, counsel for the respondent submitted that the respondent had reasonable grounds to do so as confirmed by the witnesses as the claimant was dishonest, slowed down work, lacked team spirit, refused to co-operate with colleagues and lacked leadership and integrity the sensitivity of his position notwithstanding. Counsel submitted that a fair procedure was followed as it was not a criminal trial where proof beyond reasonable doubt is required, as held by the court of Appeal in Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others [2019] eKLR.
57. It was submitted that the respondent genuinely believed that there were reasonable grounds to terminate the claimant's employment.
58. As regards the procedure employed by the respondent, counsel submitted that the respondent complied with the provisions of the *Employment Act*, and in particular Section 41 of the Act.
59. That the claimant's appeal did not fault the procedure employed by the respondent and did not question the record of the hearing and he was aware of the venue as explained by Lampart Kerio and was accorded ample time to prepare for his defence.



60. Reliance was made on the decision in *Kenya Revenue Authority V Menginya Salim Morgan* [2010] eKLR, to urge that the appeal hearing was not oral.
61. As regards reasonableness of the action taken by the respondent, the respondent's counsel submitted that the respondent acted in the manner reasonable employer would have acted in similar circumstances and employment law protected both the employer and the employee as the respondent acted in good faith.
62. Reliance was made on the sentiments of the Court in *Shianzwi V Teachers Service Commission* [2024] KEELRC 1965 (KLR) and *Galgalo Jarro Jillo V Agricultural Finance Corporation* [2021] eKLR to urge that the respondent had demonstrated on a balance of probabilities that the claimant was guilty of misconduct.
63. On reliefs, counsel submitted that the claimant was not entitled to any as he had not shown that the termination of employment was unfair and was paid all his terminal dues and cleared with the respondent and could not show why he did not proceed on leave.
64. According to the respondent, termination of the claimant's employment was substantively and procedurally fair.

### **Analysis and determination**

65. It is not in dispute that the claimant was an employee of the respondent from June 2013 to 5<sup>th</sup> October, 2020 when his employment was terminated on various grounds.
66. It is equally not in contest that the claimant was the respondent's first Finance Manager, and for some time the only person in the department and received accolades including the best performing employee in 2015 and salary increments for exemplary performance.
67. RWII confirmed, on cross-examination that the respondent had no regulatory issues with the NGO Coordination Board and no evidence was adduced to show that it had challenges with the Kenya Revenue Authority on matter relating to tax.
68. Although the claimant alleged that his challenges commenced when one Beth Wangigi became his supervisor in 2018, that was not borne by evidence as no complain appear to have been recorded against him before 2020, yet RWI joined the respondent earlier and none of the allegations made by the supervisor predated late 2019.
69. Similarly, the allegation by the claimant that his woes were traceable to an issue he had raised with the supervisor on conflict of interest as her husband was one of the suppliers was not evidentiary demonstrated yet the claimant as Finance Manager was the custodian of all financial documents and records of payments.
70. Similarly, the allegation that the consultant in finance, one Jacky Wanza was engaged to replace him was not proved by relevant facts. As a board member, she may have been requested by the board to assist as necessary or oversight the department and the claimant adduced no evidence that she took over the position of the Finance Manager after his employment was terminated.
71. Briefly, the claimant was issued with a notice to show cause by the supervisor dated 27<sup>th</sup> August, 2020 outlining seven (7) allegations, responded vide letter dated 30<sup>th</sup> March, 2020, was invited for a disciplinary hearing vide letter dated 11<sup>th</sup> September, 2020 attended, responded to the issues raise, and received a copy of the minutes and did not raise any issue on the minutes, received a letter of termination of employment dated 5<sup>th</sup> October, 2020, appealed and received the outcome vide email.



72. The claimant faults the dismissal on both substance and procedure, referring to it as witch-hunt, malicious and victimization.
73. The respondent maintains that it had reasons to dismiss the claimant and complied with the relevant procedural requirements.
74. Having considered the pleadings, evidence and submission by the parties, the issues for determination are:
- i. Whether the termination of the claimant's employment by the respondent was fair.
  - ii. Whether the claimant is entitled to reliefs sought.
  - iii. Whether the claimant waived his right to pursue other claims against the respondent.
75. Concerning the 1<sup>st</sup> issue, the law on termination of employment is well settled.
76. Section 45 of the *Employment Act* is unambiguous that for a termination of employment to pass the fairness test, it must be shown that the employer had a valid and fair reason to do so relating to the employee's conduct, capacity or compatibility or operational requirements of the employer, and significantly that the termination was conducted in accordance with a fair procedure.
77. In other words, there must have been a substantive justification for the termination of the employee's employment and procedural fairness as espoused by Ndolo J in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press EA Ltd* [2017] eKLR.
78. In the *Walter Ogal Anuro* case (Supra) Ndolo J stated:
- “...However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness...”

### **Reason for termination**

79. It is common ground that the claimant's supervisor isolated seven (7) allegations against the claimant namely;
- a. Insubordination and wilful refusal to carry out lawful instruction.
  - b. Dishonesty.
  - c. Lack of availability for meetings with your supervisor.
  - d. Deliberately showing down work processes.
  - e. Lack of leadership.
  - f. Lack of integrity.
  - g. Lack of teamwork and generally frustrating team members.
80. The supervisor illustrated each allegation with occurrences the claimant could associate with.
81. As adverted to elsewhere in this judgment, the claimant responded vide letter wrongly dated 30<sup>th</sup> March, 2020. The claimant's response identified only five (5) of the allegations and addressed the same in fairly general terms avoiding the specific issues raised by the supervisor save for the issue on objectives



setting which he explained, citing specific dates and why he could not send the objectives until 28<sup>th</sup> January, 2020, having received the template on 15<sup>th</sup> January, 2020.

82. By design or default the claimant did not respond to the allegation on dishonesty, integrity and lack of team work and frustrating team members.
83. It is unclear to the court why the claimant did not state anything about these allegations including denying the same altogether.
84. Although a response was required by Monday 31<sup>st</sup> August, 2020, the claimant was still an employee of the respondent and had access to relevant records to embellish his response.
85. As 27<sup>th</sup> August, 2020 was a Thursday, the claimant had Friday and Saturday to prepare and submit a detailed and properly illustrated response by 10:00am on Monday 31<sup>st</sup> 2020 and ought to have responded to all the allegations.
86. The failure, neglect or refusal to respond to some of the allegations would appear to suggest that the claimant did not take the respondents notice to show cause seriously.
87. In the Court's view, the supervisor may not be faulted for having found the responses unsatisfactory and escalated the process to the next level.
88. In a similar vein, the claimant sought more information on the alleged insubordination yet the allegation referred to email communication he had not responded to and identified 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> August as relevant dates on the email communication.
89. In the court's view, the claimant could have sought more time to respond and perhaps requested for specific documents or evidence of the alleged transgressions as opposed to being unresponsive on some of the allegations.
90. And as fate would have it, the claimant was invited for a disciplinary hearing on all the seven 7) allegations outlined in the notice to show cause, vide letter dated 11<sup>th</sup> September, 2020.
91. At the hearing, the claimant was taken through the essential preliminaries including presence of a colleague or witness and was taken through all the allegations.
92. The minutes of the disciplinary hearing reveal that the claimant was accorded time to respond to the allegations by the supervisor, which contradicts the allegation that he was not accorded time to do so.
93. Minutes are explicit that on the issue of dishonesty the claimant shared some email communication though not all so as to give a true picture.
94. The committee isolated communication as one of the challenges the claimant had and he admitted the same and requested for time to address it.
95. The minutes clearly state that the organization's mode of communication was via email and written documents and the claimant was not responding to emails from the supervisor.
96. It also found that the manner in which the employee salary was handled by the claimant raised issues of integrity and honesty.
97. The respondent's dismissal letter dated 5<sup>th</sup> October, 2020 identified five (5) grounds or reasons for termination of the claimant's employment namely; insubordination for failing to respond to the supervisor's emails communication, selective responses, delay in responding, being dismissive and being unavailable to the meet the supervisor.



97. Dishonesty by regularly claiming that he did not see email communication sent to him and even having responded or emails were in the spam folder, having responded to earlier emails from the supervisor on the same email address.
98. Lack of leadership and co-operation by not assisting the administration team with information to sort out a reconciliation issue with Absolute Cab as Finance Manager, and reluctance to assist the team, coupled with arbitrary introduction of financial processes without proper guidance.
99. Lack of integrity on the discrepancy on staff salaries and correcting the error without notifying the supervisor and admitting the same to the committee AMH – Way that the claimant did not lead by example as Finance Manager, did not take responsibility to find solutions for a win – win situations as exemplified by the LPO issue and Absolute Cab and had broken trust by his conduct.
100. In his letter, RWII summarised the reasons for termination of the claimant’s employment as follows:

“In conclusion, the committee deliberated to the allegations levelled against you together with the facts presented and determined that their offence amounted to insubordination, lack of leadership, unwillingness to perform your duties as required by your supervisor and lack of teamwork which has made it difficult for colleagues that you collaborate with to work effectively which has negatively impacted the delivery of their roles. They also found that you provided false evidence and did not address the specific issues that were raised against you.

Your actions are material in nature and contrary to the organization’s policies. Accordingly, they amount to serious offences to the detriment of the reputation of the organization which will not be tolerated whatsoever...”
101. The dismissal of the claimant’s employment was justified on the provisions of Section 44(4)(c) and (e) of the *Employment Act*.
102. The letter informed the claimant of his right to appeal to the Executive Vice President (Operations) within 48 hours.
103. Significantly, what the claimant dismissed as witch-hunt, malicious and victimization were undoubtedly serious issues touching on the claimant’s role as Finance Manager, leader, team member, work relationship with supervisor and integrity, in sum, the trust the respondent reposed in him.
104. It is not in dispute that the claimant’s position was one of the essential cogs in the operations of the respondent and was involved in virtually all issues that had a financial implication and played an indispensable facilitative role which was not operating optimally.
105. On insubordination for instance the claimant was accused of unavailability to perform a task on 18<sup>th</sup> August, 2020 and could not be reached on phone.
106. In his witness statement, dated 8<sup>th</sup> October, 2020, claimant stated that he was on sick leave from 18<sup>th</sup> to 20<sup>th</sup> August, 2020 but the sick leave form from Metropolitan Hospital, Buru Buru, Nairobi dated 19<sup>th</sup> August, 2020, shows that the claimant checked in on the same day at 9:30am and was found to be unfit to attend work by one Dr. Maurice Muchui Kirimi and the three (3) days sick off commenced on that day.
107. In his response to the Notice to Show Cause, the claimant did not explain why he was unavailable on 18<sup>th</sup> August, 2020.



108. In determining this issue the court is guided by the provisions of Section 43(2) of the *Employment Act* and relevant case law.

109. Section 43(2) of the Act provides that:

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which cause the employer to terminate the services of the employee.

See the sentiments of the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR.

110. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR B. O. M. Manani held as follows:

In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination”.

111. Relatedly, in *Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 Others* [Supra], the Court of Appeal held:

“We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.

The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test”.

112. The court, additionally, made reference to the guidelines in *Halsbury’s Laws of England*, 4<sup>th</sup> Edition Vo. 16 (1B) Para 642, concept or principle of band of reasonable responses test adopted by Lord Denning in *British Leyland (UK) Ltd V Swift* [1981] I.R.L.R 91.

113. Having regard to the allegations made against the claimant, his response to the notice to show cause, at the hearing, considering the overall findings of the disciplinary committee and the evidence on record, it is the finding of the court that the respondent has demonstrated on a preponderance of probabilities that it had a substantive and fair reason to terminate the claimant’s employment on 5<sup>th</sup> October, 2020.

## Procedure

114. It requires no belabouring that as held by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR, the procedural tenets or precepts prescribed by Section 41 of the *Employment Act* are mandatory and non-compliance renders the resultant termination procedurally flawed and thus unfair.



115. The employee must be notified the grounds on which the employer is considering termination of employment and the same must be explained to the employee in a language he/she understands and on the presence of a colleague on his choice or shop floor representative. The employee and/or the colleague or shop floor representative is entitled to make representations and the employer must hear and consider those representations in determining whether or not to terminate the employee's employment.
116. It is common ground that the respondent issued a notice to show cause setting out seven (7) transgression by the claimant. Respondent equally, the notice inviting the claimant for the disciplinary hearing itemized the same allegations, absent the particulars in the notice to show cause, and the claimant attended and a copy of the minutes availed, the contents of which the claimant did not contest when he received them. The minutes reveal what transpired at the hearing.
117. The letter of termination of employment sets out the reasons for the dismissal.
118. It is not in contest that the claimant appealed and the appeal was unsuccessful.
119. The claimant assailed the procedure employed by the respondent on several grounds namely; the disciplinary committee was not properly constituted, there was only one accuser who was his supervisor and who drafted the notice to show cause, was not accorded a chance to respond at the hearing and was accorded a very little time to respond to the notice to show cause, prepare for the hearing and appeal and was not invited for an appeal hearing.
120. On *the constitution* of the disciplinary committee the claimant tendered no evidence to demonstrate that the respondent violated any of its internal manual, policies or procedure as far as the composition of the committee was concerned.
121. The respondent's witness (RWI) testified that she attended as the accuser and there were 3 other persons.
122. The absence of a Human Resource Officer, Manager or person does not vitiate a disciplinary process unless the internal policies make the departments' presence mandatory.
124. In this case the respondent had no employee who was performing Human Resource functions.
125. On the supervisor being the one who drafted the notice to show cause tendered evidence and prosecuted the case, this is typical as supervisors interact with their supervisees routinely, more than any other senior employee. Supervisors are the most likely accusers of their supervisees and if the organizations policies or practice permits, the supervisor may draft the notice to show cause.
126. No evidence was adduced to prove that RWI violated any rule, policy or practice on writing the notice to show cause to the claimant.
127. Both in his claim and witness statement, the claimant alleged that he was not accorded a chance to respond and was ambushed with new allegations during the hearing.
128. As regards the new allegations, neither the claim nor the witness statement nor the oral evidence adduced in court set out the alleged new allegations as the notice to show cause raised the issue of LPOs and discrepancies in salaries among other issues.
129. Similarly, as regards not being afforded a chance to respond to the allegations, the minutes on record tell a different story and as mentioned elsewhere in this judgment the claimant did not contest any aspect of those minutes and availed no evidence of any objection.



130. Concerning invitation for an appeal hearing, the law does not prescribe any hearing at the appellate stage and many employers do not conduct appeal hearings. In most instances, the appellate panel relies on the record from the disciplinary hearing committee.
131. The claimant led no evidence to prove that the respondent's policies, rules, procedures or manual or practice provided for an appellate hearing.
132. However, the claimant's assailment of the limited time accorded by the respondent to respond to the notice to show cause, prepare for the hearing, attendant confusion on hearing date and appeal is significant as they impact on his right to be heard and the process is viewed in a wholistic manner.
134. Firstly, the notice to show cause dated 27<sup>th</sup> August, 2020 gave the claimant 2 working days and a Sunday to effectively respond to the seven (7) allegations.

### **Was the 3 day's notice sufficient?**

135. The court is not persuaded it was for the simple reason that the notice to show cause had many allegations touching on various aspects within the claimant's mandate and required examination of emails communication and other records.
136. RWI did not explain to the court why she could not have accorded the claimant more time, perhaps one (1) week to respond.
137. The one (1) day given and the weekend was in the court's view unfair.
138. As regards the notice to attend the disciplinary hearing, although it summarised the charges and gave the hearing date, it had no time or venue or the nature of hearing bearing in mind that this was at the height of the COVID-19 pandemic. Was the hearing physical or virtual and/or where would it take place?
139. The foregoing was exacerbated by the confusion of the hearing date as the letter and email had different dates and although the error was corrected, the correction came too late.
140. Importantly, the notice accorded the claimant a total of 4 working days namely Saturday, Monday, Tuesday and Wednesday, to prepare for the hearing and secure a colleague to accompany him.
141. Although the claimant declined the offer for time to search for a colleague to accompany him, he may not be faulted in light of what he was going through.
142. It cannot be gainsaid that disciplinary hearings are matters of life and death and employees take them seriously owing to these possibility of losing employment.
143. The employer is equally obligated to take the process with the seriousness it deserves.
144. A four days notice to prepare for a hearing based on seven (7) allegations, is in the court's view not reasonable time as it impacted on the claimant's right to be heard and fair hearing which are constitutional imperatives.
145. Finally, the 48 hours accorded for the claimant to lodge his appeal against the dismissal was similarly not reasonable.
146. An employer is required to accord an employee who has been dismissed reasonable time to prepare and file his or her appeal as it requires a thorough understanding of the notice to show cause, minutes of the hearing and the termination of employment.



147. These documents are necessary in formulating the grounds of appeal.
148. A duration of 48 hours is patently too short and not reasonable.
149. In the end, applying the provisions of Section 45(4) and (5) of the *Employment Act*, the court is satisfied that the respondent employer did not in the circumstances of the case act according with just and equity in terminating the claimant's employment and the same was procedurally unfair and the court so finds.
150. As to whether the claimant waived his rights to pursue further or other claims against the respondent, it is common ground that the claimant and the respondent executed a discharge voucher dated 12<sup>th</sup> February, 2021, a copy of which the respondent filed.
151. However, the claimant inserted a disclaimer.
152. While to the respondent claims that the claimant is not eligible for any other payment, the claimant maintains that he is, on account of the disclaimer.
153. The principles that govern discharge vouchers and settlement agreements in employment contracts are well settled.
154. The jurisprudence espoused by the Court of Appeal in its decisions in *Thomas De La Rue (K) Ltd V David Opondo Omutelema* [2016] eKLR, *Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. Ltd* [2015] eKLR and *Coastal Bottlers Ltd V Kimathi Mithika* [2018] eKLR, is that discharge vouchers and settlement agreements executed between an employer and an employee are binding contracts provided the employee was aware of its import and executed the same voluntarily.
154. A duly executed discharge voucher or settlement agreement absolves the employer from further claims under the contract of employment and termination of the employment relationship.
155. In *Coastal Bottlers Ltd V Kimathi Mithike* (Supra) the Court of Appeal held that:  
  
“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter the amount there under would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties...”
156. The court expressed similar sentiments in *Trinity Prime Investments Ltd V Lion of Kenya Insurance Co. Ltd* (Supra).
157. In the instance case, the claimant signed the discharge voucher on 7<sup>th</sup> February, 2021.
158. The discharge voucher stated in part:  
  
“I James Mathuku hereby acknowledge receipt of cheque No.5084 for Kshs.201,550 and cheque number 5086 for Kshs.16,793 from African Mission Health Care Kenya and confirm that this amount represents payment for:Salary for 5 days in October 2020Travel



housing allowance 5 days of 31 calendar days Leave days 18 of 22 working days Gratuity 9 months.....Deductions.....Net salary.....Amount Payable 218, 343.31

I also acknowledge that the organization has taken the decision to settle the above itemized dues despite the following issues remaining unsettled.

1. ...
2. ...

I confirm that this document has been read over and explained to me prior to my signing it and that accordingly I both understand and accept the contents of this document in full”.

159. The claimant signed the discharge voucher voluntarily, a fact he admitted in evidence and was thus bound by its contents.
160. Clearly the document neither indicates that the sum paid to the claimant was accepted or paid in full and final settlement of the claimant’s terminal dues nor does it bar the claimant from making any other claim against the respondent after the payment.
161. More significantly, the claimant executed a disclaimer to the discharge voucher which states inter alia:

It is also my understanding that the signing of a disclaimer voucher neither does nor bar me from making any further claims from the company”.

162. The net effect of the foregoing, in the court’s view, is that although the discharge voucher was a binding contract, it did not by itself bar the claimant from pursuing any further or other claim he may have had against the respondent as evidenced by the instant suit and the Claimant’s disclaimer to the discharge voucher confirmed the same.
163. The court so finds and holds.

### **Reliefs**

164. Having found that the termination of the claimant’s employment was procedurally unfair for want of procedural propriety, the claimant is entitled to certain reliefs as follows:
  - i. Declaration that termination of the claimant’s employment was unfair.  
The declaration is merited.
  - ii. Declaration that the respondent violated the claimant’s constitutional rights
165. Neither the memorandum of claim nor the witness statement of the claimant provided particulars on how the rights were allegedly violated and when.
167. The prayer lacks merit and it is dismissed.

### **ii. 12 months compensation**

168. Having found that termination of the claimant’s employment was unfair, the claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act* subject to the provisions of Section 49(4) of the Act.
169. The court has taken into consideration that the claimant was an employee of the respondent for about 7 years, which is not long, and had no previous recorded cases of misconduct and appealed the dismissal by the respondent.



170. However, the claimant's conduct substantially contributed to the termination of his employment.
171. In the circumstances, the court is satisfied that the equivalent of three (3) months salary is fair, Kshs.452,336.40

**ii. 2 months salary in lieu of notice Kshs.301,557.60**

172. Having found that the respondent had a substantive justification to terminate the claimant's employment in the manner it did pursuant to the provisions of Section 44(4)(c) and (e) of the *Employment Act*, the claim for salary in lieu of notice is unsustainable and it is accordingly dismissed.

**ii. Unpaid overtime Kshs.836,322.24**

173. This prayer lacks the necessary factual grounding. The memorandum of claim makes no reference to particulars of the alleged unpaid overtime nor does it indicate that the claimant worked over time on any particular day and was not paid.
174. From the record, it is unclear as to when such a huge amount accrued and the claimant's written statement is silent on the issue.
175. Clause 7 of the contract of employment prescribed the entry and exit times as 8:00am to 5:00pm with a one (1) hour lunch break from 12:00pm to 1:00pm and expressly stated that the claimant would not be entitled to overtime if he worked outside the stipulated time if exigencies of duty dictated so.
176. Finally, it is unclear to the court how the sum of Kshs.863,322.24 was arrived at.
177. It is trite that it is not sufficient for a party or litigant to throw figures at the trial court without any supportive evidence.
178. The prayer lacks merit and it is dismissed.
179. In the upshot, judgment is entered in favour of the claimant against the respondent as follows:
- a. Declaration that termination of the claimant's employment by the respondent was unfair.
  - b. Equivalent of three (3) month's gross salary Kshs.452,336.40.
  - c. The claimant is awarded 50% of the costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

