



**Nduulu v National Oil Corporation of Kenya (Cause 2021 of 2017)
[2025] KEELRC 431 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 431 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2021 OF 2017
MA ONYANGO, J
FEBRUARY 13, 2025**

BETWEEN

BENEDICT NDUULU CLAIMANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. The Respondent is a state corporation wholly owned by the Government of Kenya involved in the supply of oil and gas.
2. The Claimant was until 3rd August, 2017, an employee of the Respondent having been employed by letter dated 27th February, 2015 as a Head of Operations of the Respondent in Job Group 3 - Senior Manager. His starting salary was Kshs.347,750 basic, house allowance of Kshs. 86,937.50 and unspecified other allowances of Kshs. 100,312.50 making a gross of Kshs. 535,000.
3. The Claimant was in addition to the salary entitled to annual leave of 21 days, and leave allowance of Kshs. 24,000 per year, in-patient cover of Kshs. 1,000,000 and out-patient cover of Kshs. 250,000 per year. He was further entitled to dental and optical allowance of 30,000 each and maternity of Kshs. 150,000 with 1st emergency C-Section of Kshs. 200,000 within the inpatient cover. The Claimant was also a member of the Respondent's contributory Staff Pension scheme where he contributed 7.5% of basic salary while the Respondent contributed 15% of his basic salary.
4. The Claimant reported to the General Manager – Downstream Operations, who at that time was Ms. Mary Jane Mwangi. At the time material to this suit Ms. Mary Jane Mwangi was the Acting Chief Executive Officer of the Respondent.
5. The Claimant states that due to his diligence, hard work and dedication, he attained in quick succession the following professional milestones from the time he joined the Respondent:



- a. Appointment as a member of the Tender Committee on the 07/05/2025
 - b. Appointment as Acting Chairman of the Tender Committee on the 04/08/2015
 - c. Appointment as the Chairman of Disciplinary Appeals Committee on the 15/06/2015
 - d. Appointment as a member of Disciplinary Appeals Committee on 15/06/2015
 - e. Appointment as a member of Disposal Committee on the 10/11/2016
 - f. Appointment as a member of Disciplinary/Appeals Committee on the 10/06/2015
 - g. Appointment as Chairperson of Tender Committee on 15/09/2015
 - h. Appointment as Acting Chairman Tender Committee on 17/08/2015
6. On 1st July, 2016 the Cabinet Secretary Ministry of Energy sent the then Chief Executive Officer of the Respondent, Ms. Sumayya Hassan-Athmani on leave pending expiry of her contract which was ending on 31st March, 2017, and Ms. Mary Jane Mwangi was appointed as Acting Chief Executive Officer (CEO).
 7. It is the Claimant's averment that his problems started immediately upon the appointment of Ms. Mary Jane Mwangi as Acting CEO. The Claimant avers that the Acting CEO started firing one memo after another on routine official functions, instead of the usual one-on-one engagement as was previously the case on all official matters.
 8. The Claimant further avers that the Acting CEO started undermining senior members of staff including the Claimant, by overlooking and by-passing them in executing the duties of her office thereby killing morale of the officers. For instance, on 19th September, 2016 the Acting CEO sent him an internal memo instructing him to make certain staff rotation and copied in Cecilia Kalungu, the Senior HR Officer bypassing Mabel Kibore, the Head of Human Resource. Again on 27th October, 2016 the Acting CEO appointed the Claimant to the Disciplinary Committee through a letter signed by Cecilia Kalungu-Uvyu, the Senior HR Officer instead of the Head of Human Resources and Administration.
 9. That Immediately she took over in acting capacity as the C.E.O, the said Mary Jane Mwangi, started harassing the Claimant with incessant memos calculated at portraying him as an incompetent person unworthy of the position he held as Head of Operations.
 10. The Claimant states that on 30th September, 2016 the Acting CEO sent him a letter asking him to explain the delay in conducting the price survey in Jua Kali artisans to establish whether the price and quality would warrant the Respondent to support the project in business development which he responded to by his memo dated 30th September, 2016.
 11. That he received memos on various issues dated 22nd March, 2017, 7th April, 2017, 16th May, 2017, two memos on 2nd June, 2017, and another 2 memos dated 10th July, 2017 all of which he responded to.
 12. The Claimant states that on 5th July 2017 he received a letter from the Acting CEO requiring him to appear before the Human Resource Committee of the Board on 2nd August, 2017 to respond to memos that he had already addressed to the Acting CEO. That on 3rd August 2017 he received a letter terminating his employment.



13. The Claimant states he had prior to that never received any warning letter or notice to show cause why disciplinary action should not be taken against him. That he had not been given any verbal or written warning on any impending disciplinary action against him.
14. The Claimant states that the letter of termination purports that the reason to terminate his employment was ratified by the full board yet he appeared before the HR Committee on 2nd August 2017 and the decision could not have been ratified by the board by 3rd August, 2017 as board papers are circulated at least 7 days to the meeting of the Board.
15. The Claimant states that in the circumstances the termination of his employment must have been premeditated and had nothing to do with the mock hearing of 2nd August, 2017 by the HR Committee of the Board. That the hearing of the Committee was a charade to meet the provisions of the National Oil Corporation Human Resources Policy Manual which at Clause 13.4.1 provides for various stages that must be followed in any disciplinary process.
16. The Claimant states that he appealed to the full Board against the termination of his employment by letter dated 11th August, 2017 and received a letter from the Acting CEO dated 25th August, 2017, informing him that the Board had decided to dismiss his appeal, which decision he avers had been predetermined based on the letter dated 7th August, 2017 asking him to hand over even before the time for appeal had lapsed.
17. The Claimant avers that the Respondent stripped him of his dignity, discriminated against him and denied him fair hearing and fair administrative action. That the treatment was high handed, inhuman and reeks of impunity by the Acting CEO.
18. The Claimant prays for the following remedies against the Respondent:
 - a. A permanent injunction to restrain the Respondent, its agents and/or servants from terminating the services of the claimant
 - b. A declaration that the disciplinary process against the Claimant was irregular, unlawful and a nullity
 - c. An order lifting the termination of the claimant and a mandatory injunction directed at the Respondent to reinstate the Claimant to employment
 - d. An order directing the Respondent to stop the recruitment process of the Claimant's successor.
 - e. In the alternative and without prejudice to the foregoing an order that the Respondent compensates the Claimant for wrongful/unlawful/unfair termination in the equivalent of the remained of her working years until he attains retirement age and to recall the termination letter dated 03/08/2017 and to pay the Claimant an equivalent of 3 months salary in lieu of notice.
 - f. Any further or other relief that this Honourable Court may deem fit and just to grant.
 - g. Costs of this suit.
 - h. Interest on all monetary awards including costs at court rates from 3/8/2017 until payment in full.
19. On 30th October, 2017 the Respondent filed a Memorandum of Response dated 27th October, 2017 in which it admitted that the Claimant was its employee. The Respondent averred that the Claimant



was appointed to the various committees in his capacity as Head of Operations whose role entailed inter alia:

- a. Initiating procurement and disposal requirements and forwarding them to the procurement unit;
 - b. Participating in the evaluation of tenders, proposals 1133 Kenya
 - c. Subsidiary Legislation, 2006 and quotations;
 - d. Reporting any departure from the terms and conditions of the contract to the procurement unit;
 - e. Forwarding details of any required variations to contracts to the procurement unit for consideration and action;
 - f. Maintaining and archiving records of contract management;
 - g. Preparing any reports required for submission to the procurement unit, the procurement committee, the tender committee, head of procuring entity or the accounting officer;
 - h. Undertaking conformity assessments of supplied goods, works and services with the specifications of the contract documents
 - i. Endorsing the issuance of goods, works and services received notes; (i) preparing technical specifications and submitting the same to the procurement unit; and
20. The Respondent denied the rest of the averments in the Memorandum of Claim and stated that the termination of the Claimant's employment was for valid reason and complied with fair procedure. That it also complied with the Respondent's Human Resource Manual.
21. The Respondent prayed that the suit be dismissed with costs.
22. At the hearing of the suit the Claimant testified on his behalf while the Respondent called Susan Karimi, Assistant Manager, Human Resources and Administration who testified on its behalf as RW1. The parties thereafter filed and exchanged written submissions.

Claimant's Case

23. The Claimant adopted his witness statement and documents filed with the Memorandum of Claim. He testified that he attended the disciplinary committee hearing where he was required to explain two issues being a memo dated 7th April, 2017 on liquified petroleum gas which was procured before he joined the Respondent's employment and was due to expire on 14th September, 2016. He testified that he initiated the procurement of a new contract but was delayed by procurement department which he had no control over. That the extension of the contract was authorized by the CEO
24. He testified that the second issue he was required to explain was the allegation that he had pending maintenance work at the stations which he explained in his response to the letter inviting him for disciplinary hearing at page 78 of his bundle of documents.
25. He testified that another issue he was required to explain was closing of issues affecting staff which he responded to at page 79 and 80 of his bundle of documents.
26. He testified that another issue he was required to explain was delay in payment to suppliers which he explained at pages 102 and 103 of his bundle of documents. His explanation was that his department had raised requisitions for payment which were not approved.



27. The Claimant testified that the letter of termination raised 17 issues excluding the sub-items. That he had not been given a chance to respond to those issues.
28. It was the Claimant's averment that the Respondent did not comply with its manual on termination for misconduct. That he was never warned verbally, was never issued with a verbal and written warning letter. That he was never issued with a show cause letter. He testified that his disciplinary hearing should have been by the State Corporations Advisory Council (SCAC), referring to page 141 of his bundle of documents.
29. The Claimant testified that he believed he became a target of malice when he led a team that prepared two reports dated 10th October, and 24th November, 2016 which unearthed system failures which impacted on the leadership of the organization. That the failures were in customer service desk which was the department that the Acting CEO was directly in charge of before she was promoted.
30. Under cross examination the Claimant stated that his letter of appointment set out the functions of his office as Operations Manager. That the letter stated he could be assigned other duties.
31. The Claimant stated the HR Manual did not state the Managing Director had power to initiate disciplinary proceedings against any officer.
32. The Claimant stated that he was never issued with any memo regarding performance or inefficiency of his department.
33. The Claimant testified that he was invited to the disciplinary hearing and was informed of the reasons for the hearing. That his employment was terminated after the disciplinary hearing. He stated that he appealed against the termination and received a response.
34. The Claimant testified that he was blamed about procurement for LPG when he had already done the requisition 5 months before the contract expired. On the issue of wrong specifications for ERC the Claimant stated that there were no standards and they had been given wrong professional advice. That the specifications were prepared by the person preparing the tender documents in procurement department for which he could not be blamed.
35. The Claimant conceded that there were complaints about maintenance of some petrol stations whose maintenance works had not been completed but were ongoing which was outside his mandate.
36. He stated that there were delays in payment of contractors because there was a delay in procurement. That the delays in payment of suppliers was because the contractor had not invoiced.

Respondent's Case

37. RW1 Susan Karimi adopted her witness statement dated 18th November, 2019 and the Respondent's bundle of documents dated 20th November, 2019.
38. She testified that as head of operations the Claimant was to oversee the planning, development and implementation of engineering projects for the effective performance of activities as was stated in his letter of appointment. That the Claimant was supposed to ensure legal compliance in all activities and was expected to adhere to the laws of Kenya for procurement and employment.
39. She testified that there were allegations against the Claimant and he was subjected to a hearing. That he was issued with notice to show cause and he responded to the allegations and complaints. That he was invited to a hearing which he attended before the Respondent's Human Resources Board Committee. That the Committee recommended to the full Board the decision to terminate



- the Claimant's employment. That the Claimant appealed to the Board which upheld the decision to terminate his employment.
40. RW1 testified that the decision of the Board was not biased because the CEO does not make decisions and the Board cannot be influenced by the CEO.
 41. She testified that the Claimant did not raise any issue of harassment against the CEO.
 42. She testified that the CEO communicates to staff through memos and emails depending on the gravity of the issue.
 43. She testified that the Claimant was appointed to various tender committees because heads of departments were the ones who were members of tender committees.
 44. She testified that the Claimant was responsible for supervising contracts, not executing the contracts.
 45. On cross examination RW1 stated that the procedure for termination in the HR Manual Clause 13.4.1 was complied with in the case of the Claimant. She testified that she did not know the dates of the Claimant's verbal warnings because she was not present. She testified that there were no written warnings issued to the Claimant.
 46. She testified that the Claimant was issued with a show cause letter. That he was issued with memos to show cause.
 47. She testified that there were no charges in the disciplinary letter.
 48. She stated that the complainant in the Claimant's case was the CEO. That the Human Resource Board Committee heard the Claimant's disciplinary case on 2nd August, 2017 and the full Board sat on 3rd August, 2017, a day after receiving the report of the HR Committee.
 49. She stated that in both the Response to Claim and in her witness statement there is reference to Mwongozo which was not produced in court. She testified that Mwongozo provides for Board Papers to be sent but there are provisions for waiver. That if the full Board did not hear the matter it would have delayed the hearing. That the CEO sat with the Board.
 50. She testified that the Claimant filed his appeal on 11th August 2017 and it was received on 14th August, 2017. That the hearing was on 22nd August, 2017. That there was no 14 days between the date the appeal was received and the date it was heard. That there was no representation of SCAC in the Appeal.
 51. RW1 testified that she was aware of Clause K3 and K4 of Human Resource Policies and Procedures Manual 2916 under Public Service Act. That the procedures therein were not followed in the case of the Claimant.
 52. RW1 testified that the minutes of the hearing of Board Committee on HR and the appeal by the full Board were not provided to the court.
 53. RW1 stated that the Claimant raised the issue of theft in the report dated 19th October, 2016. That there was no memo on performance of the Claimant before 19th October, 2016. RW1 stated that the letter dated 28th October, 2016 was issued a week after the Claimant's letter dated 19th October, 2016.
 54. RW1 testified that the Claimant's position is not available in the Respondent's new structure developed in 2019.



Analysis and Determination

55. I have considered the pleadings, evidence adduced in court and the submissions filed by the parties. The issues that arise therefrom for the court's determination are whether there was valid reason for termination of the Claimant's employment, whether the termination complied with fair procedure and if the Claimant is entitled to the remedies sought in his prayers in the Memorandum of Claim.

Validity of reason for termination of employment

56. Validity of reason for termination of Employment is provided for in section 43 of the [Employment Act](#) as follows:
43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) 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 caused the employer to terminate the services of the employee.
57. The Claimant's disciplinary process was initiated by the letter dated 5th July 2017 which is reproduced below-

National Oil Corporation

Internal Memo

TO: Head of Operations -Ben Ndullu

FROM: Ag. Chief Executive Officer

DATE: 05th July 2017

SUBJECT: DISCIPLINARY HEARING

Reference is made to the memo dated 07th April, 2017 on contract expiry for Manpower Services for operation of LPG Plant and NNT Warehouse - Gas and Diesel Limited and your response dated 12th April 2017.

The issues contained in the above memo together with the memo dated 24th May, 2017 from Age GM -Downstream Operations to the AG CEO on performance of Operations Department (copy attached for ease of reference) were escalated to the Board and discussed at the meeting of May 2017.

At the said meeting, a resolution was passed that you appear before the Human Resources Board Committee for disciplinary hearing in line with the provisions of the HR manual for officers in grades 1 - 4 under which you fall.

In preparation for the hearing kindly prepare and submit to the AG CEO a detailed response to the allegations raised in the memos to the HR Board Committee accompanied by any supporting documents for onward transmission to the HR Board Committee. The response and supporting documents should be received by COB 11th July 2017.

The disciplinary hearing shall be held on 2nd August 2017. Should there be any other changes to the date you will be informed.



Kindly refer to the Human Resources Policy for further information on the disciplinary procedures and processes.

MaryJane N. Mwangi

A.G. CHIEF EXECUTIVE OFFICER

58. It was the submission of the Respondent that the Claimant was issued with a letter in October, 2016 asking him to show cause on irregular contracts given to Roy Hauliers, Brits Freighters and Futureway. That the Claimant was again in April, 2017 issued with an email inquiring why his department was engaging a service provider whose contract had expired which was against the provisions of the Public Procurement and Disposal Act. That the Claimant was in June 2017 further issued with an email inquiring why final dues of a staff member namely Silvester Kimani were unpaid and why he had delayed in signing staff mileage claims which was inconsistent with the role of a Head of Operations.
59. The letter dated 5th July inviting the Claimant to the disciplinary hearing does not state the charges that the Claimant was to respond to at the disciplinary hearing. The letter refers to Memos dated 7th April, 2017 and 24th May, 2017 both of which did not put the Claimant on notice that disciplinary action was contemplated either before or after responding to the two memos.
60. The reasons for termination of employment are stated in the letter of termination dated 3rd August, 2017 reproduced below-

National Oil Corporation of Kenya

NOCH/HR/PF027/672

03rd August, 2017

Mr. Bn Nduulu

Head of Operations

National Oil Corporation of Kenya

Kawi House

Red Cross Road, Off Popo Road

Nairobi

Dear Ben,

RE: TEMINATION OF EMPLOYMENT

The above matter and the disciplinary hearing of 02nd August, 2017 refer.

The Board after consideration of the various issues at hand resolved at its meeting of 03rd August, 2017 to terminate your employment with the Corporation with immediate effect in line with Section 44(3) of the *Employment Act* which provides that; an employer may dismiss 1 an summarily when the employee hos by his conduct indicted that he has fundamentally breached his obligations arising under the contract of service and 44(4)(c) which provides that if on employee willfully neglects to Perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed and Properly the same amounts to gross misconduct so as to justify the summary dismissal by the employer for



lawful cause. The omissions below on your part as the Head of Operations - amounts to gross misconduct:-

- i. Continued on use of Services from Gas & Diesel without a valid contract despite being aware of the expiry of the same contrary to the provisions of the *Public Procurement and Asset Disposal Act* as read together with the Public Procurement and Disposal Regulations, 2006.
- ii. Failure to close out pending maintenance works in Service Stations.
- iii. Delays in closing issues affecting staff, which includes but not limited to, staff final dues and mileage claim.
- iv. Delays in closing out procurements;
 - a. Procurement of Transportation services for white products;
 - b. Procurement of transportation services for LPG in an effort to ensure that the Corporation is paying market rates for the same;
 - c. Procurement of civil works service provider;
 - d. Procurement of contractor to complete works at Changamwe Service station.
- v. Delayed Payment to Various Suppliers;
 - a. Fast Signs Adverts Ltd
 - b. Sirius Contractors Ltd
 - c. premier Agencies Ltd
 - d. Kurraent Technologies
 - e. Printridge
 - f. Brownbark contractors

Based on the above and as per the provisions of your employment contract dated 27th February 2015 you failed in the discharge of your duties and responsibilities which included but not limited to:-

- i. Developing and implementing departmental objectives plans through adequate monitoring for budgetary, EHS and Quality Compliance;
- ii. Ensuring legal compliance in all operational activities and adherence to the Company's policies and standards;
- iii. Preparing and reporting on required parameters by all sections of operations;
- iv. Managing throughput and transport(road) arrangements to optimize value for the Company;
- v. Employing adequate maintenance and repair programs to optimize asset/facilities availability and productivity across the Company;
- vi. Providing projects engineering support for new facilities and upgrades across the Company service stations;



- vii. Preparing and monitoring the departmental budget;
- viii. Coaching, mentoring and developing the operations team and ensuring excellent performance and effective succession planning in the Department.
- ix. Performing your duties diligently and faithfully;
- x. Employing your time, attention and abilities to the services of the Corporation as the Head of Operations;
- xi. Abiding by all the Laws of Kenya in the Performance of your duties; and
- xii. Performing any other duties given from time to time.

Yours faithfully,

Signend

Maryjane N. Mwangi

Chief Executive officer

Cc: Mr. Andrew Kamau Ng'ang'a, CBS

Principal Secretary -PETROLEUM

State Department of Petroleum

Ministry of Energy & Petroleum

Nyayo House, 23rd Floor

Nairobi

- 61. The grounds for termination stated in the letter of termination were explained at length in the Claimant's internal memo dated 18th July, 2017 in response to the letter inviting him for disciplinary hearing. There is no evidence that the explanations of the Claimant were not satisfactory or were taken into account.
- 62. A perusal of the said memo reveals that the extension of contract for gas and diesel was approved by the CEO. The memo also outlines the action taken by the Claimant and points out that the delay was occasioned by the Procurement Department.
- 63. The Claimant also explained the reasons for delay in payments and delays in closing of issues affecting staff, closing out procurements and payments to various suppliers. The letter of termination does not specify the delays that were attributable to the Claimant.
- 64. It was the Claimant's averment that the disciplinary process and subsequent termination arose from perceived grudges the Acting CEO held against him making the whole process biased and malicious. These averments were not responded to or denied by the Respondent.
- 65. From what is on record, it is my finding that there were no specific charges against the Claimant either in the letter inviting him for disciplinary hearing or in the letter of termination.



Whether the termination complied with fair procedure

66. The Respondent's Human Resources Policy Manual provides for disciplinary process at clause 12 under the heading "Grievance and Disciplinary Procedure". Clause 12.4 provides:

In case there is a disciplinary case to answer; the Head of Department will consult with the HRM before establishing a disciplinary hearing.

The HRM will bring the alleged offence to the attention of the MD. The HR will recommend to the MD provisional measures. Upon receipt of the case of MD shall cause a full investigation by the Disciplinary Committee. A disciplinary committee will be convened by the MD as appropriate, consisting of two senior managers, and one middle manager, one of Senior Managers should be Chair. A member of the HUMAN Resources Department must be present during the hearing to give professional advice to the Disciplinary Committee members. An officer from the union will attend the meeting if the case involves unionable employee.

The order of the hearing will be as follow:-

1. Introductions as appropriate
2. Panel Chair will explain the complaint/charges.
3. The Disciplinary Committee members will appoint investigation team.
4. The investigating officer will present the findings of their report and present any witnesses and explain the evidence supporting the charges to the Panel
5. The Chari shall have the opportunity to ask questions to investigating officer and any witnesses.
6. The employee (or his/her case and present any witnesses in response to the charges.
7. The Panel Chair shall have the opportunity to ask questions of the employee and any witnesses.
8. The investigating officer shall have the opportunity to ask question of the employee and witnesses and raise points about information provided by them.
9. The panel shall have the opportunity to ask any final questions of the employee, investing officer or witnesses.
10. The panel shall have the opportunity to ask any final questions of the employee, investigating officer or witnesses
11. The investigating officer shall have the opportunity to sum up his/her case
12. The employee (or his/her chosen companion) shall have the opportunity to sum up his/her case
13. The Panel Chari and members shall sum up the main points of the evidence put forward.



14. If considered necessary by the Panel Chair, the meeting shall be adjourned to allow further investigation into the matters raised or to ask questions of any witnesses who were unable to attend the hearing.
15. If further evidence or witnesses are sought, and the Panel Chair relies on this evidence to form a decision, they will reconvene the hearing to allow consideration of the evidence by both parties and/or cross-examination of witnesses.
16. The hearing should end with the Panel Chair asking the employee if they have anything further to say.
17. The Panel Chair should advise the employee when they might reasonably expect a response within the timescales of this procedure.
18. The Disciplinary Committee shall draft a report summarizing the investigation findings and make its recommendation to the MD.

The disciplinary procedure should be conducted within the following timescales. In exceptional circumstances, it may be necessary to extend these time limits in discussion with both parties.



Disciplinary Committee Chair notifies employee in writing that s/he is required to attend a disciplinary hearing. Employee provided with details of the disciplinary charge	No later than 15 working days before the date of the hearing.
Employee contacts HR department to request witnesses to be called at hearing. Employee organizes own witnesses' statements.	No later than 12 working days before the date of the hearing
HR department invites required witnesses to hearing, proving a copy of this procedure.	No later than 10 working days before the date of the hearing
All written submissions including witness statements Disciplinary Committee Chair.	No later than 5 working days before the date of the hearing.
Both parties involved in the hearing to be provided copies of all written submissions received.	No later than 5 working days before the date of the hearing

67. The manual also provides for performance appraisals. The termination of the Claimant's employment having been based on performance, the provisions of the Respondent's HR Policy Manual are relevant. The same are as follows:

7.

8 Application of performance results

Consistency or trends in performance results are important reference points when considering compensation reviews, promotions or disciplinary actions.

Upon completion of annual appraisals and on review of performance results. all staff are expected to identify any performance gaps or inconsistencies and put the right interventions/measures.

7.

9 Performance management Tool

A standard performance management tool designed to suit the corporation environment is used for planning, managing and appraising performance. Sample of the reviewed appraisal tool is attached as an appendix and part of this policy.



All employees are expected to be fully conversant with the application of the performance Management tool in order to effectively use it during the three phases of performance management (i.e. planning, managing and appraising: This includes developing the relevant technical skills to use the tool and soft skills to prepare proper contents that constitute quality objectives. performance tracking information and performance results that are recorded on the tool, and supporting discussions to make the process truly effective in improving performance.

68. The provisions in the Respondent's HR Policy Manual on disciplinary process is not clear. My understanding of the same is that the Respondent was expected to comply with procedures in both its HR Policy Manual and the Employment Act which sets minimum standards as provided in section 26 thereof.
69. The Claimant was expected to have been put on notice that his performance was wanting and that disciplinary action was contemplated. The grounds for such disciplinary action should have been clearly communicated to the Claimant who should then be asked to show cause why disciplinary action should not be taken against them. It is after the Claimant's response to the disciplinary action is considered and found wanting that the he should be subjected to the disciplinary hearing. This in my view is what is provided for in section 41 of the Employment Act which provides:
41. Notification and hearing before termination on grounds of misconduct
- (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.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
70. This procedure was not complied with in the case of the Claimant. He was out of the blues issued with a letter inviting him for disciplinary hearing without first being asked to show. The internal memos referred to in the hearing notice did not intimate to the Claimant that he may be subjected to disciplinary hearing should he fail to absolve himself of wrong doing.
71. No charges were framed for the Claimant to respond to. He was left to anticipate whatever charges were likely to be made against him and then respond. After responding he was not given any feedback. He was not called to the HR Committee meeting of 30th May, 2017 referred to in the disciplinary hearing memo.
72. The Claimant was also not informed of his rights as provided for in section 41 such as being accompanied by a colleague and the right for him and the employee accompanying him to make representations at the hearing.
73. The hearing was conducted on 2nd August, 2017 and the letter of termination written on 3rd August, 2017. There is no evidence that the Claimant's case was presented to a full Board meeting for ratification. No minutes or other evidence that such meeting was held was presented to the court.



Further no report of the HR Board Committee to the Board was presented to court to confirm if such report existed.

74. The Claimant further complained that he was issued with a letter dated 7th August, 2017 requiring him to clear by 11th August, 2017, even before the time for lodging his appeal had expired.
75. When he appealed, he was not invited to present his appeal as provided in clause 12.5 of the Respondent's HR Policy Manual. The appeal was received on 14th August, 2017 and the response on outcome of the appeal communicated to the Claimant by letter dated 23rd August, 2017. There is no evidence that the Appeal was presented to the full board for consideration.
76. The whole process adopted by the Respondent would lend credence to the Claimant's averment that the decision was predetermined and the whole disciplinary process was only intended to pay lip service to the HR Policy Manual.
77. From the foregoing it is my finding that the termination of the Claimant's employment was unfair both substantively and procedurally. I further find that the procedural shortcomings are so gross as to make the whole process a sham and lend credence to the averments of the Claimant that the decision was predetermined and therefore biased and malicious.

Remedies

78. The Claimant's prayers for a permanent injunction to restrain the Respondent from terminating his employment was overtaken by events as the court cannot restrain that which has already taken place.
79. The Claimant's prayer for lifting of the termination and reinstatement is also not capable of being granted as it has been overtaken by events. Section 12 of the [Employment and Labour Relations Court Act](#) permits this court to reinstate an employee only within 3 years from the date of termination which in the instant case was long past at the time of hearing of conclusion of the Claim herein.
80. The prayer for an order directing the Respondent to stop the recruitment of the Claimant's successor is also overtaken by events. RW1 informed the court that the Respondent's organizational structure adopted in 2019 abolished the position of Head of Operations previously held by the Claimant.
81. The Claimant's prayer for payment of compensation equivalent to the remainder of his working years until he attains retirement age is not supported by the law on compensation for unfair termination of employment which caps compensation at 12 months gross salary.
82. The Claimant is however entitled to a declaration that the disciplinary process against him was irregular and unlawful which I hereby do.
83. The Claimant is awarded maximum compensation of 12 months in the sum of Kshs. 6,420,000 (535,000x12) which is based on his starting salary as per his letter of appointment or the actual gross salary that he was receiving at the time of termination of employment which was not disclosed to the court. In awarding the Claimant maximum compensation I have taken into account the gross manner in which the termination of the Claimant's employment was handled which points to malice and bias which would entitle him to damages. I have further taken into account all relevant provisions of section 49(4) of the [Employment Act](#).
84. The Claimant is also entitled to pay in lieu of notice equivalent to two (2) months gross salary as provided in his letter of termination and to all other terminal benefits according to his terms of service.
85. The Respondent shall pay the Claimant's costs of this suit.



86. Interest shall accrue at court rates from date of the Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO

JUDGE

