Ayora v United International States University -Africa (Cause E311 of 2020) [2025] KEELRC 1023 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1023 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E311 OF 2020

JW KELI, J

MARCH 28, 2025

BETWEEN

DAVID AYORA ..... CLAIMANT

AND

UNITED INTERNATIONAL STATES UNIVERSITY -AFRICA .. RESPONDENT

JUDGMENT

1. The Claimant instituted this case vide a statement of claim dated the 19th day of June, 2020 which inter alia sought the following prayers before this Honourable Court:-

    a) A declaration that the Claimant's dismissal by the Respondent was illegal;

    b) A declaration that the refusal by the Respondent to grant the Claimant information before dismissal was an infringement of the Claimant's right under Section 4(1), (3)a, b, f and g and 4(a) and (c) of the Fair Administrative Actions *Act No. 4 of 2015*;

    c) A declaration that the Respondent's action to bar the Claimant to Counsel was illegal;

    d) The Honourable Court do award terminal dues to the Claimant;

    e) A declaration that the Claimant be paid 10 years monthly salary of Kshs. 25,692,000/= at a rate of Kshs. 224,805/= per month as provided in the letter dated the 1st day of November, 2016 and received on the 4th day of November, 2016;

    f) General damages; g) A declaration be made that the Claimant be compensated for loss of expectation;

    h) An order directing the Respondent to issue the Claimant a certificate of good service for the period served; and

    i) Costs of the petition and interest on all monetary awards.

2. Together with the claim the claimant filed his witness statement dated 20th July 2020, list of documents dated 20th July 2020 and the bundle of documents. The claimant filed further list and bundle of documents dated 26th April 2022 being 3 payslips.

3. The respondent entered appearance through the lawfirm of Nyachae & Ashitiva Advocates and filed statement of response dated 23rd September 2020 together with list of witnesses, witness statement of Prof. Paul Tiyambe Teleza dated 29th September 2020 and the respondent's list of documents dated 30th September 220 and the bundle of documents. On the 21st july 2022 the respondent filed witness statement of Peter Kuta Omusula dated 19th july 2022.

Hearing and evidence

4. The claimant's case was heard on the 10th December 2024 where he testified on oath, adopted his witness statement dated 20th July 2020 as evidence in chief and produced as his evidence documents under list dated 20th july 2020 and the further list of 26th April 2022. The claimant was cross-examined by counsel for the respondent Mr. Ashitiva and re-examined by his counsel.

5. The Respondent's case was heard on even date with Peter Omusula as RW. He testified on oath , adopted his witness statement dated 19th july 2022 as his evidence in chief, produced documents under list of 30th September 2020 as D-exh 1-3. RW was cross-examined by counsel for the claimant Mr. Ayora and re-examined by his Counsel.

6. The parties filed written submissions.

Determination

7. Issues for determination by claimant: –

    i. Whether or not the disciplinary process violated the Claimant's constitutional right to fair administrative action, fair labour practices and access to information?

    ii. If the answer is in the affirmative whether or not the termination was illegal, unfair, unjustified and an infringement of the constitutional right of the Claimant?

    iii. b) Whether or not the witness availed by the Respondent was a credible witness?

    iv. If the answer is in the negative what is the probative value of his evidence in support of the Respondent's case?

    v. Whether or not the emails filed and produced by the Respondent is admissible before this Honourable Court?

    vi. Whether or not the Claimant is entitled to reliefs sought?

    vii. Who shall bear the costs of this suit?

8. Issues by the Respondent -

    i. Whether the termination of the Claimant's employment was illegal?

    ii. Whether the Claimant deserves the reliefs being sought?

9. The court on perusal of the claim and the issues raised by the parties found the substantive issues for determination in the claim were :

a. Whether the termination was lawful and fair

b. Whether the claimant was entitled to the reliefs sought.

Whether the termination was lawful and fair

10. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—

    (a) that the reason for the termination is valid

    (b) that the reason for the termination is a fair reason—

        (i) related to the employees conduct, capacity or compatibility; or

        (ii) based on the operational requirements of the employer; and

    (c) that the employment was terminated in accordance with fair procedure." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR)

10. On the validity of the reasons-The claimant, an ex - chief security manager of the respondent employed in 2024, stated that he received a letter of suspension dated 5th February 2018 on allegations of soliciting for money from a member of the public, Tabitha Kanyi, and another undisclosed candidate with promise to secure employment at the university. On 15th February 2018 he received a show cause letter for gross misconduct dated 14th February 2018 for same reasons. He was to respond in 9 days. He contended the notice had missing details of the amount of money solicited and currency thereof, the particulars of the job and the complainant's details of which on even date of receipt of the letter he requested for the documents which were not availed. He submitted response on the 22nd February 2018. He was informed to appear before the disciplinary panel on the 10th of May 2018 at 10.00 am at the Deputy Vice Chancellor's office. On receipt of the notice, he informed the university in writing of his wish to have counsel during the hearing. On the 10th of May 2018, he appeared for the disciplinary hearing with counsel. He was at the gate with counsel at 9.45 am. He was informed of the decision to deny the counsel entry. He entered alone and raised the issue of representation, which was denied by the panel. The hearing went on despite the fact that the university was represented by an advocate in the form of its director for legal services. He received a decision of dismissal 4 months after the hearing.

11. The claimant stated that the deliberations were unfair and tainted by malice and gross violation of his rights and devoid of merit. He raised issue of witch hunt being on past incidents at work.

12. The dismissal letter was dated 20th September 2018 (R-exh 2). It was authored by the Vice Chancellor Prof. Zeleza and referred to the show cause and stated that the claimant's response and representation at the disciplinary hearing were found unsatisfactory. The reason was stated as : 'it was concluded that as the chief manager security you were grossly negligent , engaged in wilful and deliberate misconduct and that your actions violated provisions of the University's Human Resources policies and procedures manual section 6.0."

13. Section 43 places the burden to prove reasons for termination on the employer o wit:- '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."

14. The respondent relied on the witness statement of Peter Kuta Omusula the Chief Manager Security who stated that in December 2017 he was informed of two police officers who were at the gate wanted to meet the claimant. The claimant was on leave so he went to meet them. That one of the police officers" Tabitha Kanyi , the complainant , told him they wanted to confirm whether the claimant was not at work. That a week later the said complainant called him called to check whether the claimant was at work of which he was not. On 5th January 2018 the complainant went to see him at the university . He met the complainant who informed him the claimant had obtained money from her on promise that she could get employment at the respondent at the security department following advertisement posted by the respondent of vacancies. That the claimant had resumed duty so he took the complainant to see him in the office.

15. That later, while on RW was leave, the complainant called him on the 8th January 2018 and requested for his email address to share critical information on her complaint. He gave her his personal email, as he could not access his official email while on leave. On 31st January 2018, the complaint was sent by email to the respondent's human resources department. That the claimant's response was unsatisfactory and extraneous to the charges. That the claimant avoided the charge of soliciting money from a member of public.

16. During the hearing the claimant admitted to receipt of show cause letter dated 14th February 2018. He admitted the letter accused him of corruption. The claimant denied the charge of bribery in his written response but mentioned the name of Tabitha W. Kanyi. The claimant stated the show cause mentioned the said Tabitha W. Kanyi and the court confirmed that as true. The claimant stated that he referred to the issue of unprocedural recruitment as that was the root cause of the issue. The claimant confirmed that his advocate of choice , Maosa, was denied entry at the gate and referred to the letter by the advocate produced at page 38 of the bundle where the advocate stated so. The letter was written as date of hearing of 10th may 2018. The claimant admitted he appeared before the panel . The claimant told the court at the panel hearing he raised issue of his advocate being denied entry and of lack of supporting documents and the hearing was postponed. The claimant stated that he asked for minutes of the shortlisting to show the said complainant had not been shortlisted and further asked for the letter of the successful candidate, Osano, to show he had not been shortlisted hence the reason he rejected him. The claimant stated that such documents which he had requested for would have demonstrated that the recruitment had its own challenges and not corruption.

17. The claimant told the court that he saw the email alleged of Tabitha W. Kanyi in court. He stated that he denied the allegation in his statement but had not responded to the email specifically. He knew Yusuf Saleh as a worker at the university. And Omusula. During re-examination, the claimant told the court that on invite to the disciplinary hearing he was not given the email by Tabitha W, Kanyi nor was it mentioned in the show cause. It was not mentioned how he was bribed even on the email, and how

much, he asked for documents and they were not given. He had delegated the shortlisting process. He denied having taken bribe.

18. RW was Peter Omusula. He denied having been the origin of the complaint against the claimant, He could not recall the lady who had accompanied Tabitha. He had not filed pass gate of the complainant who he alleged to have visited the university premises. The bribe money was not disclosed. He had not seen the claimant receive the bribe. The bribe was from Tabitha. He relied on the email by Tabitha. He could not recall how much was the bribe. RW stated that the email mentioned Kshs. 30000. He said the complainant sent the claimant Kshs. 30000 via MPESA. When asked about the evidence of MPESA the claimant told the court he was not the one doing investigations. RW stated that an investigation was done on the alleged bribe. The investigation report was not produced. He did not know whether the said Tabitha appeared at the disciplinary hearing. RW told the court he testified against the claimant but could not recall whether the claimant was present. He stated he received the email by Tabitha W. Kanyi. The Legal Manager was present at the hearing.

19. On representation, RW1 relied on their employment policy which he told the court referred to employee of choice. RW could not recall whether the claimant was given the documents , whether Osano was one of the applicants or even did the interview and admitted Osano served in his department. RW was employed in Security department. He denied having been part of the shortlisting. He had no evidence of the email having been written by a person called Kanyi.

20. On re- examination RW told the court that Tabitha stated he gave the claimant Kshs. 30000. That the claimant confirmed that Tabitha exists. That the legal manager attended as a member of the committee. That he claimant did not deny Tabitha came to the premises as stated in the email.

21. The claimant submitted that the emails were inadmissiable for non –compliance with electronic evidence requirements. The claimant submitted that the Respondent had the latitude to file and produce fictitious emails one of the 31st day of January 2018 which the Respondent refers to as the complaint and the other one of the 31st day of October, 2019 which the Respondent refers to as the complainant's email. The email of 31st day of January 2018 allegedly sent to YUSUF cannot be ascertained who sent it or who was the recipient of the contents therein. Both the sender and the recipient were not availed in this court as witnesses by the Respondent to support the said emails. This court cannot ascertain who Yusuf is and also who is Tabitha Kanyi in the said fictitious emails. Turning on the email dated the 31st day of October, 2019 on the face of it one cannot ascertain who is the sender and the recipient. On the other fold, the said emails filed by the Respondent are not admissible before this court as the Respondent did not file an electronic certificate to support the said emails hence the said emails violate the provisions of Section 106(B) of the *Evidence Act* Cap 80 Laws of Kenya. An electronic certificate is a mandatory document that the Respondent ought to have filed to ascertain the contents of the said email. The Claimant relied on case of John Lokitare Lodinyo - vs- I.E.B.C and 2 Others [2018] eKLR which addressed the question of admissibility of electronic records under Section 106B and stated; "54: Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information....."55. It is at this juncture that the provisions of Section 106B of the *Evidence Act* come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do.''The emails filed before this court with the contents therein are not based on facts and the authors and recipients were not availed by the Respondent. The fictitious emails produced by the Respondent needed to have the authors in court for examinations who were never availed in court

during the physical hearing. The Claimant did not oppose the production of the said emails in court as the Respondent's evidence in chief because the same could have denied this Honourable Court an opportunity to see bad faith firsthand and to what extent the Respondent was determined to falsely manufacture evidence to aid it to terminate the services of the Claimant. The Respondent having failed to comply with Section 106B of the *Evidence Act*, she cannot be allowed to rely on the said emails of the 31st day of January, 2018 and the other one of the 31st day of October, 2019 as a result this court should not put a lot of reliance on the said emails.

22. Section 106B of the *Evidence Act* reads:- '(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

> (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-
>
> (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
>
> (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;"

23. The respondent on the issue submitted:- 1. Contrary to the Claimant's submissions, the lack of production of a Certificate under Section 106 (B) of the *Evidence Act* Cap 80 does not render the emails produced by the Respondent, inadmissible. Indeed, Courts have rendered employment matters as sui generis and failure to annex the certificate in a case, cannot be basis for the expunging a party's document. In any event, the issue of admissibility of evidence should be raised at the Pre-Trial or at hearing and not at the Submissions stage. No objection of the production of the Page 5 of 8 6 subject emails herein had been raised by the Claimant either at the pre-trial stage or at the hearing and the objection at this Submissions stage can only be termed as an afterthought and unprocedural. In that regard, the Respondent urged the Court to be persuaded by this Court's decisions in Berhe *v Canaan Developers Limited (Cause E587 of 2022*) [2023] KEELRC 1878 (KLR) (31 July 2023) (Ruling) and also Choru v Camusat Kenya Limited (Employment and Labour Relations Cause E665 of 2021) [2024] KEELRC 1928 (KLR) (26 July 2024) (Ruling).

24. The court perused the decisions relied on by the respondent and found that in the said case the court held that they emails had come to possession of the party in the course of employment and the contents were not impugned. The court noted that the claimant did not object to the production of the email and was cross-examined on the same at the hearing. In Mable Muruli v Wycliffe Oparanya & 3 others [2013] eKLR, the High Court applied Article 159 of *the Constitution* of Kenya (2010) to admit evidence contained in CDs, citing the absence of a certificate as a mere technicality that ought not get in the way of justice. Article 159 urges courts to dispense with undue regard for procedural technicalities. The judge in the matter cautioned against equating admission of evidence with the court's being convinced by the evidence. The court found that the evidence ought to be admitted in its totality, and the probative value decided after the fact. I uphold the said decision to apply in the instant case. The court in the instant case found that the respondent did not complete the investigation process which RW stated was done. There was no investigation report before the court. The claimant was not

given the said emails during the process of the show cause or at the disciplinary panel. There was no evidence of the alleged MPesa evidence of the any money having been sent to the claimant by the alleged Tabitha. The said Tabitha did not record a statement on the issue nor was she shortlisted as a candidate. Indeed the said Tabitha's complaint was only known to the RW, who told the court he received the email in private email while on leave. RW did not explain why he did not give the Complainant the Human Resources email. The recruitment process appeared to the court to have been marred with irregularities as the said Osano who was the successful candidate was not even shortlisted and RW had no evidence of his application for the job. The claimant was denied an opportunity to be accompanied by his advocate to the process. The said employment policy relied on to deny his the representation was not produced in court.

25. The Respondent submitted that, 'during cross-examination, the claimant admitted to receiving the amount from Tabitha Kanyi, which was alleged to have been for a yellow fever jab but further that he, after the complaint had been raised, refunded the same. The Claimant, cannot, therefore, turn around and Claim that he does not know Tabitha Kanyi and the refund itself does not negate the charge.' On perusal of the proceedings the court found that it was RW who on cross-examination stated the email by Tabitha stated she gave Kshs. 30000 for vaccination jab and the money was sent to the claimant vide MPESA. The court on perusal of the record did not find admission during cross-examination by claimant of having received and refunded the money. The court found that the emails had no probative value to the case as the allegations were unsubstantiated and the audit trail of the emails was suspicious. In paragraph 9 of his statement RW stated that on 8th January 2018 he gave the complainant his private email for purpose of the complaint. There was no email of the said Tabitha of 8th January 2018. In paragraph *10* RW stated that on the 31st January 2018 the complaint was sent by email to the respondent's then human resources manager and the matter was taken up. The question is, who sent the human resources the email of the complainant? R-exh 1 was a document titled original message from Tabitah Kanyi sent on Wednesday January 31 2018 12.30 pm to Yusuf Saleh (ysaleh@usiu.ac.ke) subject complain against your employee. Interestingly, the email was signed like a letter on both pages. If it was a continuous email it would not have signatures in between. The court concluded there was manipulation of the said emails. The said emails were not admissible on account of manipulation. The need to authenticate electronic evidence by provision of an audit trail was the reason for compliance with section 106B of the *Evidence Act*. In Abdul Rahaman Kunji Vs. The State of West Bengal-The High Court of Calcutta, India while deciding the admissibility of email held that an email downloaded and printed from an individual's email record can be proved under Section 65B of *Evidence Act*. The witnesses' declaration to carry out such a strategy to download and print the same is adequate to prove the electronic communication. The Supreme Court of India in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors,(July 14 2020). The Supreme Court of India held that the certificate needed under Section 65B of the Indian *Evidence Act* is a condition precedent for any electronic proof's admissibility. The Court explained that the certificate under Section 65B (4) is unnecessary if the original document itself is produced. ''Assume the proprietor demonstrates a laptop, computer, tablet, or a cell phone possessed or operated by him brings the same in the witness box, on which the original information is first stored. Hence, the certificates' requirement under Section 65B (4) is unnecessary.'' It was further held that Oral Evidence in the place of such certificate couldn't in any way, suffice as Section 65B (4) is an obligatory necessity of the law. Thus, the Court held that Section 65B(4) of the *Evidence Act* obviously expresses that secondary evidence is admissible only if followed in the way expressed and not something else. Section 65B of The Indian *Evidence Act*, 1872 Last updated:-13-3-2020 is equivalent of Kenyan's 106 B of the Evidence and states:- ''(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, –– (a) identifying the electronic record containing the statement and describing the manner in which it was produced;''

26. The court did not agree with the Respondent that this is a sui generis court where the *Evidence Act* does not apply. The *Employment and Labour Relations Court Act* does not exclude the application of the *Evidence Act*. The court does not agree that the issue of admissibility of electronic evidence can be treated as mere technicality to defeat section 106B of the *Evidence Act*.

27. Taking the foregoing into account, the court found that the respondent did not discharge its burden to prove the existence of the reason of bribe before the termination of employment. The respondent stated through RW, there was an investigation but the report was not availed on court. The Court found that the word of email of Tabitha (who did not record her statement anywhere and without investigation) was unsafe to be relied on for the termination of the Claimant's employment. The court found the manipulation of the emails and thus not admissible and of no probative value. RW took over the position of the claimant. So many conclusions can be drawn of the unfairness of the process. The said emails were never availed to the claimant to respond to. The court found that the reason for the termination was not proved to exist at time of summary dismissal for lack of investigation report on the serious crime of bribery which if true would have been a gross-misconduct. The court adopted a similar finding in Walter Anuro v Teachers Service Commission (supra) thus :- '23.It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of due procedure." The court based on the forgoing analysis found that the claimant had proved on balance of probabilities that that the termination was unlawful and unfair.

Whether the claimant was entitled to the reliefs sought.

28. The claimant admitted he was paid salary for days worked. He produced his payslips which indicated he was paid Pension and was on NSSF.

29. The claimant sought the following:-

    a) A declaration that the Claimant's dismissal by the Respondent was illegal;

    b) A declaration that the refusal by the Respondent to grant the Claimant information before dismissal was an infringement of the Claimant's right under Section 4(1), (3)a, b, f and g and 4(a) and (c) of the Fair Administrative Actions *Act No. 4 of 2015*;

    c) A declaration that the Respondent's action to bar the Claimant to Counsel was illegal;

    d) The Honourable Court do award terminal dues to the Claimant;

    e) A declaration that the Claimant be paid 10 years monthly salary of Kshs. 25,692,000/= at a rate of Kshs. 224,805/= per month as provided in the letter dated the 1st day of November, 2016 and received on the 4th day of November, 2016;

    f) General damages;

    g) A declaration be made that the Claimant be compensated for loss of expectation;

    h) An order directing the Respondent to issue the Claimant a certificate of good service for the period served;

30. On finding unfair termination like in the instant case, the court is required under section 50 of the *Employment Act* to apply section 49 of the Act on remedies. The court having held the termination of employment as unlawful and unfair awards notice pay under section 35 of the *Employment Act* for one month.

31. The Claimant was earning a monthly salary of Kshs. 224,805/= which was not rebutted by the Respondent at any point during the hearing. He relied on his produced payslips. The Claimant submitted that this court does make a declaration compelling the Respondent herein to pay him 10 years monthly salary because he was permanently employed by the Respondent and expected to retire at the normal age of 60 years. One of the guiding principles for the remedies under Section 49 of the *Employment Act* is that they are awarded to compensate the claimant, not as punishment to the employer. (See Jephtar & Sons Construction & Engineering Works Ltd vs. The Attorney General HCT-00-CV-CS-0699-2006; Mosisili us. Editor Miller Newspapers CIV/T/275/2001)) This is based on the principle of"restitutio in integrum" which means that the injured party has to be restored as nearly as possible to a position he or she would have been in had the injury not occurred. It was the evidence in chief of the Claimant that ever since he was unfairly terminated by the Respondent herein he has been jobless and has not since secured a vacancy of any kind of a job. Additionally, the Claimant cannot secure any job from any institution as the Respondent infringed on his right to be issued with a certificate of service for the period he worked at the Respondent thus this Honourable Court should compel the Respondent to issue the Claimant with a good certificate of service having worked diligently with integrity and the same can be exhibited that during the Claimant's employment with the Respondent he never received any warning, reprimand or any disciplinary before the illegal termination of Claimant's service.

32. The respondent submitted that as it may but without prejudice to the foregoing, even if the Court was inclined to find that the Claimant's employment was unfairly or unlawfully terminated, the Court's hands would still be tied in granting the reliefs sought under paragraph iv, v, vi, vii and ix of the Claim since: a) Reliefs must be pleaded with particularity, specificity and reasonable precision. The Claimant has, however, sought those without precision or specificity. Thus the Court of Appeal in The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023), e KLR, stated as follows on the issue: 'This omission to plead the claim with specificity raises pertinent questions as to whether the said award was anchored on the statement of claim and if it was not pleaded, whether it could be sustained. The other pertinent question is whether the said question could be cured by the oral evidence tendered in court. To our mind, no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did not arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court. A court cannot make out a case not pleaded. The court should confine its decision to the questions raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint. No party should be permitted to travel beyond its pleadings. All necessary and material facts should be pleaded by the party in support of the case set up by him.'

33. The Respondent submitted that damages must be particularised and pleaded with the requisite specificity if those are to be granted. The Claimant had not demonstrated how he arrived at those figures in the reliefs being sought at paragraph *26* (v), which, in any event, he seeks compensation of his monthly salary multiplied by 10 years which is ten times more than the maximum allowable of 12 months. On the issue of General damages and compensation urged at paragraph *26*(vi and Vii) of the Claim, those are not awardable for wrongful termination and the Claimant can only claim salary in lieu of notice. Indeed, this was the finding of the Court of Appeal in Civil Appeal No.

352 of 2017: Kenya Broadcasting Corporation v Geoffrey Wakio [2019] e KLR. In relation to the issue of Loss of Expectations, an employment relationship is inherently dynamic, based on mutuality of trust and confidence. The Respondent did not give any express or implied assurance that the employment relationship would be maintained indefinitely until the Claimant retires. On the contrary, it is understood by the Claimant, in accordance with the Respondent's Human Resource Policies and even the 'reasonable man's standard' that such relationship may be severed if the employee (the Claimant in this case) goes against the stipulated policies and, therefore, no legitimate expectation was ever created so as to warrant the Claim herein.

34. The court having found unfair dismissal, taking into account the period of employment 2014 to 2018, the senior position of which RW admitted was not easy to get elsewhere , the age of the claimant at exit of 44 years hence employability challenge, the lack of prove of reasons, the fact of pension existence finds award of the equivalent of 6 months salary as a fair compensation.

35. All the other claims are dismissed as they are outside section 49 of the *Employment Act*. In Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR this Court explained the applicability of the provisions of Section 49 as hereunder;

> " .....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court findsthat a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies...."

36. In the upshot the claim is allowed. The termination of the employment of the claimant is held as unlawful and unfair. Judgment is entered for the claimant against the respondent as follows:-

    a. The claimant is awarded notice pay at gross pay of Kshs. 259,805(September 2018 payslip)

    b. Compensation for the unfair termination of Kshs. 1,558,830/- equivalent of 6 months gross salary

    c. Costs and interest at court rate from date of judgment.

37. Stay 30 days granted.

38. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : -Ayora

Respondent: Ms Otukho