



**Itabari v Common Wealth War Graves Commission (Cause
E952 of 2023) [2025] KEELRC 847 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 847 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E952 OF 2023
SC RUTTO, J
MARCH 14, 2025**

BETWEEN

FRANCIS AKIBUA ITABARI CLAIMANT

AND

COMMON WEALTH WAR GRAVES COMMISSION RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 20th November 2023, the Claimant avers that he was employed by the Respondent on 23rd November 2020 as a Technical Supervisor (Horticulture).
2. According to the Claimant, he was a diligent and hardworking employee who discharged his duties with utmost dedication and commitment and whose performance was always outstanding.
3. It is the Claimant's case that on or about 8th August 2023, he was unlawfully and without any reasonable or probable cause terminated from employment on the basis of a decision of a disciplinary panel held on 4th August 2023 and on the basis of trumped-up allegations. In the Claimant's view, the reasons given as the basis for his termination from employment, other than being false and malicious, had no basis in fact or in law and were in breach of his employment contract, *the Constitution*, and the *Employment Act*.
4. It is the Claimant's contention that none of the reasons set out in his letter of termination related to his performance of his duties as an employee. On account of the foregoing, the Claimant has asked the court to award him the following reliefs:
 - a. A declaration that the termination of his employment breached all the provisions of *the Constitution*;
 - b. A declaration that the Claimant was wrongfully, unfairly and unlawfully dismissed from his employment;



- c. A declaration that the Claimant is entitled to compensation equivalent to the residual of his employment period from the date of dismissal until lawful determination or end of his employment in accordance with his contract of employment and in breach of his legitimate expectation to serve full contractual term;
 - d. A declaration that the disciplinary panel meetings that resulted in his dismissal from employment were not impartial and/or independent and were therefore unlawful, null and void and the Claimant's employment was unlawfully terminated;
 - e. Consequential to the above declarations, an order for payment of damages for breaches of the Claimant's rights and other benefits under his contract of employment, under the *Employment Act*, and under *the Constitution*;
 - f. Costs and interest incidental to this Claim; and
 - g. Any other relief this Honourable Court may deem fit and just to grant.
5. The Respondent opposed the Claim through its Statement of Response dated 17th January 2024. Putting the Claimant to strict proof, the Respondent has denied that the charges set out in the show cause letter were false, malicious or had no basis in fact or in law as alleged.
 6. The Respondent has further averred that the charges against the Claimant related to inappropriate comments and behaviour, demeaning talk and bullying and harassment by the Claimant against the complainant who was his line manager and not the performance of his duties under the employment contract.
 7. According to the Respondent, the Claimant's actions constituted gross misconduct as provided in Section 44(4)(c) of the *Employment Act* and Clause 4.1 of the Respondent's Discipline Policy. To this end, the Respondent has denied the Claimant's assertions that the grounds for the termination of his employment amounted to breach of his rights under *the Constitution*.
 8. It is the Respondent's assertion that the termination of the Claimant's employment was lawful, fair and procedural. As such, the Respondent has asked the Court to dismiss the claim with costs.
 9. The matter proceeded for hearing on 22nd October 2024 and 12th November 2024 during which both sides called oral evidence.

Claimant's Case

10. The Claimant who testified in support of his case, started by adopting his witness statement as well as the list and bundle of documents filed alongside the Memorandum of Claim to constitute his evidence in chief.
11. It was the Claimant's evidence that the accusations that led to the termination of his employment were without proof and depended solely on the allegations of his supervisor with whom he had severe differences with on account of his cultural background and the hearsay of two employees.
12. The Claimant further stated that the Respondent held a botched disciplinary hearing in which his companion/the employee of his choice who was his witness, was never allowed to speak in his defence. That further, he was never supplied with the witness statements and/or evidence relied upon by the Respondent.
13. The Claimant further stated that the disciplinary hearing was neither independent and/or impartial as it comprised his co-employees.



14. That despite his detailed response to the disciplinary panel, the Respondent nevertheless maliciously and without any reasonable or lawful cause terminated his employment on 9th August 2023 and issued him with a termination letter dated 8th August 2023 lending credence to the fact that the decision to terminate his employment was premeditated.
15. That even after pleading before the disciplinary panel to look at his past interaction and the several instances and misuse of office by the "complainant," the same was overlooked and dismissed.
16. It was the Claimant's further testimony that despite raising several instances where his immediate accuser had breached the Respondent's code of conduct during the hearing, the disciplinary panel chose to ignore the averments and proceeded to make an unfair verdict against him.
17. The Claimant further stated that the termination letter spoke of "deliberations, review of evidence, proven on a balance of probabilities" by the Respondent's agents yet there was hardly any tangible evidence produced to show that he was guilty of such accusations as fronted in the Notice to Show Cause.
18. In the Claimant's view, the malicious allegations contained in the termination letter were hurtful and lowered his character and reputation.

Respondent's Case

19. The Respondent called oral evidence through Mr. Gavin Lee Smith and Mr. John Nicholls who testified as RW1 and RW2 respectively. Mr. Nicholls, who was the first to go, identified himself as the Respondent's Head of Horticultural Standards. Equally, he adopted his witness statement to constitute his evidence in chief. In addition, he produced the Investigation Report dated 26th July 2023, which had been filed as part of the Respondent's list and bundle of documents, as an exhibit before Court.
20. In his evidence, RW1 averred that in June 2023, his employer received a complaint from Beatrice Mwenesi (complainant), who was the Claimant's line manager, alleging inappropriate comment and behaviour, demeaning talk, bullying and harassment by the Claimant towards her.
21. The main complaint was that: The Claimant was alleging that the complainant wanted to poison him; and that the Claimant had made statements to the effect that if the complainant was raped in the bushes that she goes looking for graves in, that would serve her right.
22. That the complainant was concerned about her safety with the Claimant considering that they travelled a lot together for field work.
23. RW1 further averred that on 6th July 2023, his employer appointed him to investigate the complaint and to prepare a report.
24. That he (RW1) conducted the investigation and prepared an Investigation Report which revealed that:
 - i. The Claimant states that he respects the complainant's authority, but that is not evidenced by his behaviour.
 - ii. The work relationship between the complainant and the Claimant has deteriorated to a point where the potential for them to work productively together in the future is compromised.
 - iii. The Claimant has made very hurtful and hateful comments to the complainant whilst they have been travelling alone and some of the comments have been reiterated and discussed among staff.



- iv. The complainant does not feel comfortable nor safe to be alone with the Claimant.
25. RW1 added that as part of the investigation, he took the statement of the Claimant on 18th July 2023 and that of Isabel Kimani, his companion at the disciplinary hearing on 19th July 2023.
26. That on the basis of the above findings, he (RW1) concluded that the behaviours complained of by the complainant had occurred and warranted a disciplinary hearing with the Claimant.
27. He is aware that the Claimant was taken through a disciplinary hearing and his employment eventually terminated summarily on account of gross misconduct.
28. Mr. Gavin Lee Smith who testified as RW2 identified himself as Global Head of People Services at the Respondent Commission. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
29. In his testimony, RW2 averred that the provisions of the policy on discrimination and harassment provided that, each employee of the Respondent must maintain an appropriate standard of conduct with their colleagues and would be responsible for ensuring that he or she adheres with the Respondent's standard on discrimination and harassment.
30. That further, Clause 4 of the disciplinary policy provided that offences considered gross misconduct attracted a sanction of summary dismissal. To this end, RW2 cited any acts of unlawful discrimination, or any other form of bullying, harassment, abusive behaviour or victimization directed towards a colleague, as such kind of offences.
31. RW2 further stated that the Respondent's CARE values provided that the Respondent has a positive, open and inclusive culture that is fair, reasonable, appropriate and just. That further, the CARE values on respect provided that respect and dignity are fundamental to everything that the Respondent does.
32. It was RW2's evidence that in June 2023, Catherine O'Sullivan, the then Respondent's Human Resource Manager for Asia and Africa Area, received a complaint from Beatrice Mwenesi, the Claimant's line manager, alleging inappropriate comment and behaviour, demeaning talk, bullying and harassment by the Claimant towards her. The complainant wanted advice on how to deal with the situation.
33. That by a letter dated 17th July 2023, the Respondent sent the Claimant on suspension pending investigation of the complaint.
34. Subsequently, the Respondent tasked John Nicholls (RW1), the Head of Horticultural Standards to investigate the complaint. RW1 conducted the investigation and prepared an Investigation Report signed on 26th July 2023.
35. That on the basis of the findings from the investigation, RW1 concluded that the behaviours complained of by the complainant had occurred and warranted a disciplinary hearing.
36. It was RW2's further evidence that on 25th July 2023, the Claimant was issued with a show cause letter.
37. That on 1st August 2023, the Respondent sent the Claimant a copy of the Investigation Report and informed him that the disciplinary hearing had been adjourned to 4th August 2023. The Respondent also invited the Claimant to make any further response to explain his conduct and any mitigating factors by 2nd August 2023.



38. The Claimant responded to the show cause letter in writing on 2nd August 2023 and attended the disciplinary hearing on 4th August 2023.
39. He (RW2) was present at the disciplinary hearing on 4th August 2023 and the Claimant was given an opportunity to defend himself on the allegations as set out in the Notice to Show Cause.
40. It was RW2's assertion that during the disciplinary hearing, the Claimant:
 - i. Denied that he had said that the complainant wanted to poison him.
 - ii. Denied that he had said that if the complainant was to be raped in the bushes that she goes looking for graves in, that would serve her right and any evidence in support of the allegations is from witnesses who had been coached by the complainant.
 - iii. Stated that when he joined the Respondent, the complainant showed him around and that he takes instructions from the complainant without a problem.
 - iv. Alleged that the complainant never wanted him, was sidelining him and had never taken him through orientation.
41. According to RW2, the disciplinary panel considered the complaint and the representations made by the Claimant at the disciplinary hearing held on 4th August 2023 and concluded that:
 - i. It had reviewed the evidence before it and found nothing to suggest that any coaching had taken place and that the statements that had been provided were a true representation of what other employees had heard the claimant say.
 - ii. The allegations of gross misconduct had been proved, in particular, it had been proven on a balance of probability that the Claimant made the statement that, "if she (Beatrice Mwenesi) was to be raped in the bushes that she goes looking for graves in, that would serve her right" and that this is inexcusable and in direct contravention of the Commission's CARE Values.
42. RW2 further averred that the Respondent considered the findings and recommendations of the disciplinary panel and in line with Clause 4.2 of the Respondent's disciplinary policy, on 8th August 2023, made the decision to terminate the Claimant's employment with effect from 9th August 2023.
43. On 9th August 2023, the disciplinary panel held a meeting with the Claimant to communicate the outcome of the disciplinary hearing. That at the meeting, the disciplinary panel informed the Claimant of the findings that it had made and the decision by the Respondent to terminate his employment. He was then issued with a termination letter dated 8th August 2023.
44. RW2 further stated that the Claimant's terminal dues, inclusive of one (1) month's salary on an ex-gratia basis, were remitted to his bank account in August 2023.
45. For good measure, RW2 stated that as part of the investigation, the statement of the Claimant and that of Isabel Kimani, his companion at the disciplinary hearing, was considered alongside the representations made by the Claimant at the disciplinary hearing.

Submissions

46. It was the Claimant's submission that he was never supplied with any piece of evidence, including the statements prepared by his coworkers and an incomplete investigation report that the Respondent had relied upon in terminating his employment. To this end, the Claimant termed his disciplinary



- process as un-procedural and unfair. In the same vein, the Claimant contended that the outcome of the proceedings was unlawful and in breach of his rights under Article 41 of *the Constitution*.
47. The Claimant further submitted that the allegations were never connected directly to him as there was no evidence to show that he indeed spoke the alleged words to any person. It was the Claimant's view that all the witness statements relied upon were hearsay.
 48. In further submission, the Claimant stated that his termination was premeditated. He further argued that the Investigative Report was one-sided and unreliable.
 49. It was further submitted by the Claimant that his termination was unfair as against the requirements of Section 45 of the *Employment Act* and that in all the circumstances of his case, the Respondent did not act in accordance with justice and equity in terminating his employment. In support of the Claimant's submissions, reliance was placed on a number of cases including *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* [2017] eKLR, *Beatrice Nyambune Mosiria v Judicial Service Commission* [2019] eKLR and *Robert Chaka Ndupha v Crown Bus Services* [2017] eKLR.
 50. Referencing the case of *Moses Ochieng v Unilever Kenya Limited* [2018] eKLR, the Claimant posited that his case outweighs the Respondent's case and as such, he urged the Court to hold that his termination was unfair, unlawful and unprocedural.
 51. The Claimant further submitted that he was not given enough and/or reasonable time and resources to prepare adequately for the hearing. It was his further contention that there was new testimony produced during the hearing that was never advanced before then. In support of this argument, the Claimant placed reliance on the case of *Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR.
 52. On its part, the Respondent submitted that the Claimant's employment was terminated for a valid reason, as established by the evidence gathered during the investigation, the responses provided by the Claimant and his representation during the disciplinary hearing.
 53. Referencing the cases of *Robert Kenga & another v Ocean Sports Resort* [2015] eKLR and *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR, the Respondent submitted that it was not required to prove beyond reasonable doubt that the Claimant is guilty. According to the Respondent, it was required to prove that there were reasonable grounds to believe that the Claimant made general derogatory and insulting comments against the complainant.
 54. The Respondent further urged the Court to be guided by the principles established by the Court of Appeal in the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] eKLR. On the same score, the Respondent submitted that any reasonable employer faced with similar circumstances, would have arrived at the decision to dismiss the Claimant. It was the Respondent's position that its actions were grounded on a fair and objective evaluation of the evidence, ensuring procedural fairness and adherence to the principles of natural justice, as required under Section 41 and 45 of the *Employment Act*, 2007.
 55. In further submission, the Respondent stated that the procedure undertaken was fair and fully compliant with the law. On this issue, the Respondent proceeded to submit that the Investigation Report provided to the Claimant contained adequate details to apprise him of the charges and enable him to respond effectively to the allegations. To this end, the Respondent termed the Claimant's assertion that he was furnished with an incomplete report to be unfounded and lacking in merit.



56. Still on procedure, the Respondent submitted that the Claimant was given reasonable time and resources to prepare adequately for the hearing. That the Claimant did not lodge any objections or seek an extension of time to prepare for the disciplinary hearing, which he was at liberty to do if he deemed it necessary.
57. The Respondent further urged that Isabel Kimani submitted her written statement, which was duly considered and was expressly informed that she was not permitted to respond on behalf of the Claimant. In the Respondent's view, this directive did not, in any way, prejudice the Claimant or the integrity of the disciplinary process. To buttress its position, the Respondent invited the Court to consider the case of *Joseph Onyango Asere v Brookside Dairy Limited* [2016] eKLR.

Analysis and determination

58. The Court has considered the pleadings by both parties, the evidentiary material on record as well as the rival submissions, and isolated the following issues for determination:
- i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

59. It is discernible from the Claimant's letter of termination that he was terminated from employment on grounds categorized by the Respondent as gross misconduct. These grounds related to allegations that the Claimant had made general derogatory and insulting remarks and malicious accusations against his line manager. For context purposes, I find it imperative to reproduce in part, the Claimant's letter of termination thus;

“However, we found the allegations of gross misconduct against you to be made out. In particular, it was proven on the balance of probabilities that you made the comment “if she was to be raped in the bushes that she goes looking for graves in, point in case Zimbabwe that would serve her right”. I find this inexcusable and in direct contravention of the Commission's CARE values. Therefore, it is with regret I write to confirm that this letter gives formal notification of the termination of your employment for gross misconduct.”

60. The record bears that the disciplinary process leading to the termination of the Claimant from employment stemmed from a complaint lodged by Beatrice Mwenesi who was at the time, the Claimant's line manager.
61. According to the Respondent, Beatrice wrote to Catherine O'Sullivan, the then Human Resource Manager Africa, Asia Area, sometime in June 2023, requesting advice on how to manage a difficult personnel situation she was experiencing at work. That on review of the nature of the difficult situation by area management, it was deemed that some of the alleged behavior of the Claimant was sufficiently serious in nature to warrant formal investigation.
62. It is clear from the Respondent's case that the complaint made by Beatrice to O'Sullivan triggered an investigation which was conducted by RW1 and compiled in his report dated 26th July 2023, which he exhibited before Court.



63. From the Investigation Report, RW1 interviewed nine (9) of the Respondent's employees, including the Claimant and Beatrice. Each employee gave their personal account and perspective of the allegations raised by Beatrice against the Claimant. To this end, RW1 recorded the statements from the interviewees and annexed the same to his Investigation Report. It is worth pointing out that none of the statements recorded bear signatures. I will revisit this issue at a later point in this judgment.
64. The thread running through the Investigation Report and the statements of the employees who were interviewed, was the nature of the relationship that existed between the Claimant and Beatrice within the office and the comments he (Claimant) had made concerning her. Evidently, the relationship between the two was not rosy.
65. As per the Investigation Report, Beatrice detailed many instances in which she felt undermined, patronized, discriminated against based on gender, verbally abused for being a single mother, isolated, fearful for her personal safety and anxious because of the behaviours directed at her by the Claimant. Beatrice further added that she felt that she had been made a target of malicious gossip and hateful behavior by some members of the Respondent's Kenya office team because of the Claimant's behaviour.
66. Beatrice went ahead to highlight instances in which the Claimant had made her feel anxious and unsafe and to demonstrate that his behavior towards her was aggressive, vulgar, inappropriate, patronizing and self-righteous.
67. Considering that Beatrice was at the heart of the investigation, it was reasonably expected that she would be the star witness during the disciplinary hearing. Oddly enough, this was not the case.
68. What's more, none of the Respondent's employees, whose statements had been recorded in the course of the investigation, were called to testify during the disciplinary hearing. This is bearing in mind that the disciplinary panel attached a lot of weight to the said statements and ultimately, informed the Respondent's decision to terminate the Claimant from employment.
69. Case in point, Tabitha is recorded as having stated that the Claimant told Isabel in her presence that Beatrice is trying to poison him. That in turn, she (Tabitha) told the Claimant to stop spreading rumours. That further, on one occasion during the allegations, the Claimant was boasting that if he was looking for an isolated grave with Beatrice, "it would be a good thing if she were raped in the bush" and "if she was raped, she would deserve it".
70. Indeed, Tabitha's statement during the investigation constituted the very same allegations levelled against the Claimant and what would turn out to be the grounds for his termination from employment.
71. In light of the foregoing, I cannot help but question why Beatrice and Tabitha were not called to appear before the disciplinary hearing to corroborate their assertions against the Claimant. Why were the two, in particular Beatrice, absent from the disciplinary hearing? This was a serious omission on the part of the Respondent.
72. I say so bearing in mind some of the key findings during the investigation. For instance, RW1 found in his investigation report that there were two competing cohorts, one pro Beatrice and one pro Francis (Claimant), amongst some of the staff at the Nairobi office. It was further found by RW1 that the behaviors and gossip of this wider group of people have led to an office culture characterized by some interviewees as toxic.
73. In addition, RW1 observed that Beatrice can at times be uncompromising and inflexible in her management style.



74. As a mitigating factor RW1 indicated his belief that there was a cultural element to the conflict between Beatrice and the Claimant as it had been raised during the interview. That both came from different regions of Kenya and different tribes with different cultural experiences and expectations.
75. In view of the above findings, it was prudent for the Respondent to invite Beatrice, who was the complainant, alongside other employees who had been interviewed in the course of the investigation and whose statements were deemed key, in light of the allegations levelled against the Claimant. It is also worth noting that RW1, who was the investigator, did not appear before the disciplinary panel.
76. Under Sections 43(1) and 45 (2) (a) and (b) of the *Employment Act*, an employer is required to prove the reasons for an employee's termination and failure to do so, such termination is deemed to be unfair. In this regard, such reasons ought to be fair, valid and related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
77. Applying the aforesaid statutory provisions to the case herein, it follows that the Respondent was required to prove on a balance of probabilities that the Claimant made general derogatory and insulting comments and malicious accusations against Beatrice.
78. As the Respondent elected not to have Beatrice, RW1 or other employees who had recorded statements during the investigation, appear before the disciplinary panel, it becomes apparent that the panel adopted the investigation report and the recorded statements hook, line and sinker and did not subject the same to further scrutiny before drawing its own conclusion. Simply put, the disciplinary panel missed an opportunity to test the veracity of the allegations at hand.
79. Coupled with that, the statements exhibited before Court, including Beatrice's, who was the complainant, did not bear any signatures. As such, the probative value of the said statements is very low hence unreliable.
80. The Respondent's case would have benefited by having the complainant and the people who recorded the said statements appear before the disciplinary panel to confirm their statements and corroborate their averments.
81. In sum, the evidentiary material on record does not in any way substantiate the allegations levelled against the Claimant.
82. Needless to say, the Respondent failed to discharge its evidential burden under Sections 43(1) read together with Section 45(2)(a) and (b) of the *Employment Act*. As such, the Respondent has not proved to the required standard, that there was a justifiable cause to warrant termination of the Claimant's employment.

Procedural fairness?

83. Section 45 (2) (c) of the *Employment Act* requires an employer to prove that an employee's termination from employment was in accordance with fair procedure. Section 41 of the Act makes specific requirements with regards to the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of his or her choice.
84. From the record, the Claimant was placed on an administrative suspension pending investigation with effect from 17th July 2023.



85. Upon conclusion of the investigation, the Claimant was notified through a letter dated 25th July 2023 that the matter would proceed to a formal disciplinary hearing. Through the same letter, the Claimant was invited to attend a disciplinary hearing which was scheduled for 2nd August 2023. This was later rescheduled to 4th August 2023. It was subsequent to this disciplinary hearing that the Claimant was terminated from employment.
86. The Claimant has impugned the process applied by the Respondent in terminating his employment on two major grounds. First, the Claimant has averred that he was never supplied with the statements and or evidence relied upon by the Respondent during the disciplinary hearing.
87. The record bears that vide an email dated 1st August 2023, O’Sullivan forwarded a copy of the investigation report to the Claimant, notifying him that the same would be discussed in detail at the disciplinary hearing. Indeed, the Claimant exhibited a copy of the Investigation Report shared by O’Sullivan vide email on 1st August 2023. Notably, the said Investigation Report is not similar to the one exhibited by the Respondent. In this regard, the Investigation Report by the Respondent is more comprehensive compared to the one shared with the Claimant.
88. It is also noteworthy that the Investigation Report exhibited by the Respondent contains copies of statements recorded by persons who were interviewed in the course of the investigation. As it is, these statements were not shared with the Claimant ahead of the disciplinary hearing.
89. Indeed, it is not clear why the Respondent did not share with the Claimant, a copy of the comprehensive Investigation Report as well as the statements relied on during the disciplinary hearing.
90. No doubt, the said statements were relevant to the Claimant’s disciplinary case as they informed the investigator’s findings hence his recommendation that there was a justification to warrant a disciplinary hearing.
91. Similarly, the disciplinary panel relied to a full extent on the recorded statements in arriving at its conclusion that the Claimant made the derogatory comments and malicious accusations against Beatrice. Case in point, on 9th August 2023, when the disciplinary panel was convened to communicate the outcome of the hearing, the Chair of the disciplinary panel (Sarah Moore) remarked that she had “reviewed the evidence and that the statements provided are a true representation of what other employees had heard him say.” This further confirms that the said statements were very crucial in determining the Claimant’s culpability.
92. It is also worth noting that the Respondent has not advanced a plausible reason as to why the Claimant was not given the recorded statements ahead of the disciplinary hearing to allow him consider the same and prepare adequately.
93. I concur with the sentiments expressed by the Court in the case of Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR, that the employee is entitled to documents in the possession of the employer which would assist them in preparing their defence.
94. On this issue, the Court finds that the Respondent did not act fairly by withholding crucial evidentiary material from the Claimant.
95. The Claimant has further impugned the disciplinary process in that his companion/employee of his choice as witness was never allowed to speak in his defence.
96. The record of the disciplinary hearing for 4th August 2023, reveals that as the session was drawing to a close, the Claimant requested the Chair of the disciplinary panel to allow his companion Isabel to speak. In turn, the Chair responded as follows: “Thank you, Francis, we are closing the meeting and



won't hear Isabel as again this isn't her place to be speaking. I have her statement. We will come back on Monday."

97. This assertion by the Chair of the disciplinary panel is at variance with the position given to the Claimant by O'Sullivan in the email of 1st August 2023 that his companion will, if he so wished, be able to make representations on his behalf, sum up his case and respond on his behalf to any view expressed at the hearing. The only exception given was that the said companion will not answer questions on his behalf. Indeed, this position was also in consonance with the Respondent's Discipline Policy which was exhibited before Court.
98. This leads me to question why the Respondent would make the Claimant believe that the companion who will accompany him to the disciplinary hearing would, if he so wished, be able to make representations on his behalf, sum up his case and respond on his behalf to any view expressed at the hearing, whereas it did not intend to accord her that opportunity.
99. Further to the foregoing, it is not evident from the record, whether the discipline panel considered the statement by Isabel and if so, the extent to which the said statement informed their findings. Indeed, there is no mention of Isabel's statement in the disciplinary proceedings convened on 9th August 2023. To this end, I am led to conclude that the same was not considered and did not have a bearing on the findings by the disciplinary panel. It is this Court's view that this does not depict a fair process.
100. Coupled with the foregoing, the Respondent failed to have the complainant (Beatrice) appear before the disciplinary panel thus denying the Claimant an opportunity to cross-examine her on the allegations, she had levelled against him.
101. It is for the foregoing reasons that this Court finds that the Respondent did not act in accordance with justice and equity in terminating the Claimant's employment hence did not comply with the spirit of a fair hearing as envisaged under Section 41 of the *Employment Act*.

Reliefs?

102. As the Court has found that the Respondent has not proved that there was a justifiable reason to terminate the Claimant's employment and in effecting the said termination, did not comply with the spirit of a fair hearing as envisaged under Section 41 of the *Employment Act*, the Court awards him compensatory damages equivalent to six (6) months of his salary. This award further takes into account the length of the employment relationship between the parties as well as the circumstances under which the Claimant was terminated from employment.
103. With respect to compensation for breach of the Claimant's constitutional rights, the Court adopts the position taken in the case of *NEC Corporation v Samuel Gitau Njenga* [2018] eKLR, thus; "the court does not think however that violation of every conceivable contractual statutory and constitutional right deserves a separate award of damages." As such, the said relief is declined.
104. The claim for compensation for the residual of the Claimant's employment period is equally declined for being anticipatory in nature. In arriving at this finding, I am guided by the determination of the Court of Appeal in the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR, where it was held while the employee was employed on permanent and pensionable terms, this, of itself, is not an indication that he would have continued to be employed until the age of 60 years.

Orders

105. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent as follows:



- a. A declaration that the termination of the Claimant from employment was unfair and unlawful.
- b. The Claimant is awarded compensatory damages in the sum of Kshs 1,030,494.00 being equivalent to six (6) months of his salary.
- c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
- d. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Nkirote

For the Respondent Ms. Muthiani instructed by Ms. Kirimi

Court Assistant Millicent

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

