



Nyakongo v Kenya Forestry Research Institute (KEFRI) (Cause E018 of 2024) [2025] KEELRC 653 (KLR) (4 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 653 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E018 OF 2024
JK GAKERI, J
MARCH 4, 2025**

BETWEEN

SETH OTIENO NYAKONGO CLAIMANT

AND

KENYA FORESTRY RESEARCH INSTITUTE (KEFRI) RESPONDENT

JUDGMENT

1. The Claimant filed this suit vide a memorandum of claim on 22nd March, 2024 alleging unlawful termination of employment.
2. The claimant prays for:
 - a. A declaration that his dismissal from employment was wrongful, unilateral, unfair, unconstitutional, illegal and in breach of the [Employment Act](#).
 - b. A declaration that termination of employment having been based on allegations that formed the basis of criminal charges for which he was acquitted should be reinstated back to service will full pay.
 - c. In the alternative he should be paid all dues fill retirement as follows;
 - i. Unpaid half salary 21.08.2020 to 25th March 2022 Kshs.845,802.00.
 - ii. Unpaid salary from 25.3.22 to 4.4.30 Kshs.10,981,592.00.
 - iii. Leave pay allowance from 21.08.2020 to 04.04.2030 Kshs.60,000.00.
 - iv. House allowance from 25th March, 2022 to 4.4.20230 Kshs.1,592,600.00.
 - v. Commuter allowance from 21.8.2020 to 4.4.2030 Kshs.600,000.00.Total Kshs.14,079,994.00.



- vi. Retirement benefits
 - vii. Costs of this suit and interest at court rates.
 - viii. Reasonable damages for unlawful termination.
 - ix. Reasonable amount severance pay.
 - x. Any other relief the court deems fit to grant.
3. The claimants case is that he was employed by the respondent in 1989 as a Senior Assistant Seed Technologist at Kshs.98,000.00 per month. That in 2021 he was falsely accused, arrested and charged for forgery in Kakamega Criminal Case No. E142 of 2021 and while the case was pending, the respondent terminated his employment without justification and was on half salary during the pendency of the criminal case.
 4. It is the claimant's case that the termination of his employment was unfair, unconstitutional and illegal.
 5. The claimant argues that since the dismissal was pegged on the allegations in the criminal case, the acquittal meant that the respondent ought to have reconsidered its decision.

Respondent's case

6. The respondent avers that the claimant was its former employee based at the Kakamega Sub-centre at a gross salary of Kshs.92,396 and the termination was lawful.
7. It is the respondent's case that the claimant was interdicted vide letter dated 21.08.2020 for forging the signature of the Assistant Regional Director (ARD), Mr. Pater Gachie while he was on sick leave and processed payment of Kshs.219,000.00 and was arrested and charged at Kakamega.
8. The respondent avers that claimant was invited for a hearing and dismissed from employment thereafter, appealed to the Board of Directors and the respondent sought an opinion from the Attorney General which affirmed the Boards refusal to allow the appeal.
9. That the claimant's dismissal was based on an internal audit report of the Kakamega Sub-Regional Centre and the claimant declined to provide a sample signature.
10. According to the respondent, the respondent was not bound to await the outcome of the criminal case as its internal proceedings were administrative and the claimant was found guilty of forgery.
11. That the relationship between the parties had irretrievably broken down and reinstatement was not viable.
12. The respondent prays for dismissal of the claimant's suit.

Claimant's evidence

13. On cross-examination, the claimant confirmed that he was interdicted on 20th August, 2020 on account of alleged forgery of a document and was charged for a criminal offence.
14. It is the claimant's evidence that although he did not receive an invitation notice for the disciplinary hearing, he was notified by a colleague, attended and responded to questions asked.
15. He confirmed that he only gave a sample signature to the Directorate of Criminal Investigations (DCI) and was dismissed from employment on 25th March, 2022 after the hearing and during the pendency



- of the criminal case at the Kakamega Law Courts. It is his testimony that the respondent ought to have waited for the criminal case to be concluded.
16. The witness testified that he appealed the decision through his advocate and was acquitted of the criminal charges but the respondent refused to reinstate him.
 17. CWI admitted that an imprest was being recovered from his salary. However, his attempt to explain how it happened could not be verified as it was not part of his witness statement and lacked supportive evidence.
 18. The claimant admitted that his claim covers the duration he was on interdiction and some claims till the date of retirement in 2030.
 19. He admitted that he did not clear with the respondent as he had a case against it.
 20. On re-examination, the claimant testified that he was not given any written invitation to the disciplinary hearing.
 21. The witness contradicted his earlier testimony that he had not refused to provide a specimen signature yet he refused to do so arguing that he had already given a specimen to the D.C.I.
 22. That his advocate wrote to the respondent complaining that he had been dismissed during the pendency of the criminal case.
 23. He admitted that he was claiming monies on account of acquittal by the court as he ought to have been reinstated.

Respondent's evidence

24. RWI, Mr. Phillip Kichana confirmed that the claimant was charged at the Kakamega Criminal Court on 10 counts and the respondent was the complainant though the charge sheet identified individuals as the complainants, and Mr. Peter Gachie's name appeared severally.
25. The witness admitted that the charges in the criminal case and the allegations the claimant faced at the disciplinary were similar but his employment was terminated before the court acquitted him.
26. The witness further confirmed that the letter dated 23rd February, 2020 inviting the claimant for the disciplinary hearing had no acknowledgment and the claimant was on interdiction at the time.
27. On re-examination RWI testified that the charges the claimant faced at the hearing involved forgery of the signature of the ARD and others.
28. RWI testified that the invitation letter to the hearing was delivered to the claimant's house.
29. Parties were accorded 14 days to file and exchange submissions. The respondent filed on 25th February, 2025 while the claimant filed on 1st March, 2025.
30. The claimant's submissions were filed late.

Respondent's submissions

31. As to whether termination of the claimant's employment was unfair or illegal, counsel for the respondent submitted that the provisions of Section 41 of the *Employment Act* were complied with as the claimant was notified of the hearing, attended and gave responses and admitted having received a termination letter on 25th March, 2022, sought a review after the prescribed 14 days and sought reinstatement after acquittal vide letter dated 10.08.2023.



32. Reliance was made on the decision in *James Mugeru Igati V Public Service Commission* [2014] eKLR, for the proposition that internal disciplinary proceedings and criminal prosecution were distinct processes with different attendant processes.
33. Counsel urged that the respondent had reasonable justification to dismiss the claimant.
34. On the reliefs sought, counsel submitted that taking into account the parameters set out in Section 49(4) of the *Employment Act*, the remedy of reinstatement was unavailable to the claimant as it would be impracticable owing to his nefarious character.
35. On compensation, reliance was made on the sentiments of the court in *Josiah Magena V Wakenya Pamoja Sacco Society Ltd* [2017] eKLR to urge that the claimant was not owed any due to his record.
36. Counsel further submitted that the claimant was not entitled to leave allowance as he was not in service at the time and part of the claim is anticipatory. Decisions in *Paul Ngeno V Pyrethrum Board of Kenya Ltd* [2013] eKLR and *David Wekesa Nambafu V Bob Morgan Services Ltd* [2020] eKLR were relied upon to buttress the submission.
37. Counsel submitted that the claimant was not entitled to the unpaid half salary, commuter allowance, which is facilitative as held in *Kenya Ports Authority V Silas Obengele*, Civil Appeal No. 38 of 2005.
38. That the severance pay claimed was not payable as the claimant was not declared redundant. Counsel urged the court to dismiss the claimant's case with costs.

Analysis and determination

39. It is common ground that the claimant was an employee of the respondent, was interdicted on 20th August, 2020 and charged with the offence of forgery for allegedly forging the signature of Mr. Peter Gachie, the Assistant Regional Director on payment voucher FO 22 (revised No. 104) on 26th August, 2021.
40. However, and although the letter inviting the claimant for the disciplinary hearing had two other charges the disciplinary panel considered only one charge, the alleged forgery of signature.
41. The claimant is challenging his dismissal from employment during the pendency of criminal proceedings which were grounded on similar allegations.
42. It is the claimant's case that since he was acquitted by the criminal court vide its judgment delivered on 26th July, 2023, he was cleared and ought to have been reinstated to his former position.
43. Instructively, the claimant was acquitted under Section 214 of the *Criminal Procedure Code* which provides –

The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an Order against him according to law, or shall acquit him.

44. The learned trial Magistrate held that

“Consequently, I find that count 3 and 4 were not proved beyond reasonable doubt. I find the accused not guilty and acquit him under Section 215 of the CPC.

From the above analysis it is my conclusion that all counts were not proved beyond reasonable doubt. The accused person is acquitted under Section 215 of the CPC”.



45. The foregoing sentiments of the learned trial magistrate are critical as they lay bare the extent to which a court of law must be satisfied that an accused person committed the offence he/she is charged with.
46. The issues that commend themselves for determination are:
- i. Whether the respondent could undertake disciplinary proceedings against the claimant during the pendency of the criminal case.
 - ii. Whether termination of the claimant's employment by the respondent was unfair.
 - iii. Whether the claimant is entitled to the reliefs sought.
47. On the 1st issue the law is clear that nothing prevents an employer from instituting disciplinary proceedings against an employee during the pendency of a criminal case based on similar charges.
48. This position is fortified by the rendition of courts in several decisions.
49. In *Attorney General & Another V Andrew Maina Githinji & Another* [2016] eKLR Waki JA stated:
- “In other cases where a plea was made that there was an intervening criminal process, it was held that the institution of criminal proceedings is not a bar to civil proceedings based on similar facts”.
50. In *James Mugeru Igati V Public Service Commission* [2015] eKLR Rika J. held as follows:
- “The claim rests on the question whether the respondent was bound by the outcome of the criminal proceedings in the Nairobi Chief Magistrates Criminal Case Number 1602 of 2005 R V James Igati Mageria. There is nothing in the repeated *Employment Act* Cap 226, the Laws of Kenya and the Public Service Commission Regulations 2005 which applied to the dismissal of the claimant from service, that suggest the disciplinary process, is tied to the criminal process, that may arise from the same facts. Section 17 of the repealed *Employment Act* did not make disciplinary proceedings at the work place subject to any criminal investigations, trial or convictions.
51. The claimant appears to confuse the disciplinary process, which is properly a private process between an employer and its employee, whose aim is to ensure the employer's business is not harmed by delinquent employee behaviour with a criminal trial which is a public process where prosecution is carried out by the state and is purposed on securing the safety of the general population and on maintenance of a stable social order.
52. This court has expressed the view in the past that the two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. There is no provision in the old or the new *Employment Act* or the Public Service Commission Regulations, which make it necessary for employers to follow police investigations or findings or indeed criminal court decision, in resolving employment disputes based on cross-cutting facts... the claimant misconceived his criminal trial to be the same process as the disciplinary process”.
53. These sentiments were upheld by the Court of Appeal in *Geoffrey Kiragu Njogu V Public Service Commission & 2 Others* [2015] KECA 661 KLR.



54. These sentiments apply on all fours to the facts of the instant suit. In *David O. Owino v Kenya Institute of Special Education* [2013] KEELRC 409 (KLR) Linnet Ndolo J. cited the sentiments of the Court of Appeal in *Kibe V Attorney General* (Civil Appeal N0. 164 of 2000) as follows:

“In the case of *Kibe V Attorney General*, the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer.

The reason for this is straight forward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employers decision wrongful or unfair”.

55. Finally, in *Judicial Service Commission V Gladys Boss Shollei & Another* [2014] Okwengu JA stated as follows:

“The disciplinary process undertaken by the appellant was a quasi-judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent’s legal rights in accordance with *the constitution* and the *Judicial Service Act*, both of which provided for fair hearing. The disciplinary proceedings were anchored on contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings...”

56. In sum, the fact that the claimant was charged in criminal court for alleged forgery of signature of the Assistant Regional Director was not a bar to the institution and conclusion of internal disciplinary processes by the employer on the same issue and no provision of law or policy required the employer to await the outcome of the criminal case nor did the outcome matter to the employer’s processes.

57. In the instant case, it is evident that the respondent’s processes begun earlier than the criminal case as an internal audit trial conducted in December 2019 implicated the claimant in wrong doing in relation to motor vehicle work tickets as he was not an AIE holder and was consequently interdicted effective 21st August, 2020 for the alleged more than one (1) year before he was charged on 26th August, 2021.

58. Unchallenged evidence reveals that the claimant’s conduct and relationship with other employees, and in particular Mr. Peter Gachie the Assistant Regional Director, Willies Alie, Nabangala and Japheth Orodo was the subject of the respondent’s Senior Staff Advisory Sub-Committee (SSASC) meeting held on 16th April, 2021 and 21st May, 2021.

59. The committee had heard testimonies from five employees including the claimant on the alleged forgery of signature.

60. Clearly only the disciplinary hearing by the Human Resource Management Advisory Committee took place after the claimant had been charged in court.

61. It is also noteworthy that the respondent’s Board of Directors, sought an opinion from the Office of the Attorney General vide letter dated 6/9/23 and was advised that the claimant’s acquittal of criminal charges was not binding on the respondent and the claimant could appeal to the board, sue or appeal to the Public Service Commission.



62. Concerning termination of the claimant's employment, it is trite that for a termination of employment to pass the fairness test under Section 45 of the Employment Act, it must be proved that the employer had a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the employer and the termination was conducted in accordance with a fair procedure.
63. Put in the alternative, there must have been a substantive justification and procedural fairness as held in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR and *Walter Ogal Anuro V Teachers Service Commission* [2013].

Reasons for termination

64. The hearing notice dated 23rd February, 2002, which the claimant denied having received, and the respondent provided no evidence of how it was served on the claimant identified several charges namely; forgery of the signature of the Assistant Regional Director, manipulation of work tickets for purposes of payment of Daily Subsistence Allowances (DSA), maintaining two 2 work tickets for one of the respondent's motor vehicles and being the custodian of the fuel card contrary to the Director's directive.
65. The summary dismissal letter dated 25th March, 2022 identified three (3) reasons:
 - i. forgery of the signature of the Assistant Regional Director;
 - ii. irregularly paid DSA of KSHS.219,000.00; and
 - iii. dishonesty during the hearing.
66. As regards the forgery, an Audit Report dated 19th February, 2020 prepare by the Chief Internal Auditor lays bare how the claimant prepared payment vouchers for seed collection on his own and would then have them signed by the ARD and the same would be surrendered to the Head Office without the input of the Accounts Assistant, Mr. Dennis Ambani.
67. The Audit found that all the vouchers were prepared in January, 2019 and there was no evidence as to when the ARD who was on sick leave they signed them.
68. More significantly, the ARD did not sign the payment voucher register to signify approval as he was on sick leave, which suggested that someone else signed the vouchers.
69. Secondly, the Audit implicated the claimant in irregular payment of DSA by the use of two (2) work tickets for motor vehicle Registration No. KAY 647 V, all paid for seed collection under the claimant.
70. The Audit found that voucher No.3 and 58 of Kshs.12,600 each were for the same journey and were surrendered under the office standing imprest as well as under seed collection imprest.
71. The Audit further found that the claimant kept the fuel card for motor vehicle Registration No. KAY 647 W and made fuel entries at the end of the month and did the fuelling contrary to the respondent's policy that the card be maintained by the ARD or the Administrator.
72. In a nutshell, the Internal Audit report implicated the claimant in gross misconduct for the alleged forgery of the ARD's signature, manipulation of motor vehicle work tickets and irregular payment of DSA.
73. Non-compliance with the provisions of the Public Procurement and Asset Disposal Act and the Public Finance Management Regulations were not part of the charges against the claimant.



74. It is unclear to the court whether a copy of the Internal Audit Report by Karen – Muka was forwarded to the claimant for a response.
75. Evidence further revealed that Mr. Willies Atie and Japheth Orondo confessed that they were acting at the behest of the claimant. Mr. Japheth Orondo implicated other employees at the Kakamega Office as being part of the forgery cartel.

Would a reasonable employer dismiss the claimant in light of the foregoing findings by the Chief Internal Auditor and the committees?

76. The answer to this questions is provided by the provisions of Section 43 of the *Employment Act* and relevant judicial authorities.

77. Section 43 of the Act provides:-

1. ...
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 employee.

78. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 3 Others* [2017] eKLR the Court of Appeal held as follows:

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

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

79. The court further relied on the guidelines in *Halsbury's Laws of England*, 4th Edition, Vol. 16(1B) para 642 on range of reasonableness responses test as follows: -

...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

See also *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR and *British Leyland (UK) Ltd V Swift* [1981] ILRLR 91.



80. In the instant case, the court is satisfied that the respondent has demonstrated on a balance of probabilities that it genuinely believed that there were reasonable grounds and sufficient to believe that the claimant was guilty of gross misconduct and was justified in invoking the provision of Section 44(4) of the *Employment Act*.

Procedure

81. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR, the process set out in Section 41 of the *Employment Act* is mandatory and any termination of employment without compliance with this procedure is flawed and unfair within the meaning of Section 45 of the *Employment Act*.

82. In the instant case neither the claimant nor the respondent testified about a notice to show cause, although the respondents witness mentioned it as a by the way, or the respond availed.

83. A notice to show cause is essential as it notifies the employee the charges against him or her and accords the employee time and facilities to prepare a response.

84. This is a crucial stage in any disciplinary process as it is the stage at which the employer determines whether the employee's explanation and documentation, if any, are sufficient or satisfactory to exculpate the employee or whether there is need for a hearing to interrogate the matter further.

85. In this case, it is the stage during which the respondent should have availed to the claimant the Internal Audit report by the Chief Internal Auditor dated 19th February, 2020 and other relevant documentation for a rebuttal.

86. Secondly, although it is common ground that the claimant attended the hearing on 15th October, 2021 and participated in the proceedings, the minutes of the meeting lack essential details, including whether the claimant was accompanied by a colleague or adduced any evidence what questions were asked and what was the claimant's response.

87. More importantly, however it is unclear as to how the claimant was invited for the meeting. While the claimant testified that he learnt about the meeting from another employee and did not receive the alleged letter of invitation, the respondent's witness written statement makes no reference to any invitation and as adverted to elsewhere in this judgment, his explanation that the letter was hand delivered to the claimant at home lacked supportive evidence and in any case, the copy on record has no acknowledgment by the claimant or any other person.

88. Actual service of the disciplinary hearing notice is essential as it is determinative whether the employee was accorded sufficient notice to prepare and was notified of the charges and more significantly, the right to be accompanied by a colleague of his choice and to cross-examine witnesses and avail evidence in support of his case.

89. These are indispensable rights of an employee facing disciplinary action and the court must satisfy itself they were brought to the employee's attention prior to the hearing.

90. Similarly, from the record it is unclear as to whether the grounds of termination were explained to the claimant in a language he understood.

91. The only reference to what transpired on that day was paragraph 4 that:

“During the hearing, the officer did not seem remorseful for his actions, instead, he denied all accusations instituted against him”.



92. In sum, the minutes of the respondent's Human Resource Management Advisory Committee meeting held on 15th October, 2021 did not capture the claimant's disciplinary proceedings and there is no evidence of the meeting held on 3rd March, 2021.
93. Although the claimant testified that he appealed through his advocate on record he did not indicate when he did so and the grounds he relied upon.
94. Deliberations of the respondent's Board meeting held on 28th September, 2023, which, according to the Respondent's List of Documents dated 29th April, 2024 "handled Mr. Seth Nyakango's appeal" had no such agenda item and the only matter captured in the half page availed by the respondent is the claimant's request for reinstatement.
95. Equally, the respondent did not avail a copy of the claimant's appeal against dismissal or communication of its outcome to the claimant.
96. The Board merely upheld the earlier decision without any deliberation of the appeal other than the prayer for reinstatement, which the claimant made after acquittal by the Magistrates court on 26th July, 2023.
97. Having been dismissed in March 2022, the appeal could not have been filed more than one (1) year later to be dealt with on 28th September, 2023.
98. Under Section 45(4) of the [Employment Act](#), a termination of employment shall be unfair for purposes of this part where-
 - a. the termination is for one of the reasons specified in Section 46; or
 - b. it is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
 Under Section 45(5)
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a Labour Officer, or the Industrial Court shall consider-

The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision.

If the claimant appealed through his advocate on record as he alleged and the respondent appears to agree, when was the appeal considered by the Board?

99. MIN/BM/1602/2023 of the Board meeting held on 28th September, 2023 meeting considered the "Request for Reinstatement of Seth Nyakangi as opposed to an appeal against dismissal which had taken place more than one (1) and 6 months earlier.
100. Finally, the respondent availed no evidence of how it dealt and/or communicated the outcome of the alleged appeal to the claimant.
101. In sum, it is the finding of the court that the respondent has failed to prove on a preponderance of probabilities that the termination of the claimant's employment was procedurally fair.
102. The court further finds that the respondent failed to act in accordance with principles of justice and equity as enjoined by the provisions of Section 45(4) and (5) of the [Employment Act](#).



Appropriate reliefs

103. Having found that termination of the Claimants employment was unfair for want of procedural propriety, the court proceeds as follows;

i. Declaration that the dismissal was unfair

104. Having found as above the declaration sought is merited and is decreed.

ii. Reinstatement

105. As held in *Kenya Airways Ltd V Aviation & Allied Workers Union (K) and others* [2014] eKLR the remedy of reinstatement under Section 12(3)(vii) of the Employment and Labour Relations Court read with Section 49(3)(a) of the *Employment Act* is discretionary and although the claimant's employment was terminated less than 3 years ago, he has not made a sustainable case for reinstatement notwithstanding the fact that he sought reinstatement after acquittal in the criminal case. First, the claimant substantially contributed to the separation by his alleged conduct. There were too many complaints against him over and above the alleged forgery of the ARD's signature.

106. Second, the claimant declined to provide a specimen signature contending that he had already given the same to the police, having failed to distinguish that there were two parallel process being undertaken against him.

107. Third, the court is not persuaded that reinstatement is practicable in the circumstances. The claimant adduced no evidence to prove that the position he held exists and is vacant.

108. Fourth, the claimant has not demonstrated any unique or exceptional circumstance to qualify the common law rule against specific performance in contracts of personal service.

109. Fifth, the claimant had been an employee of the respondent for many years and ought to have conducted himself honourably.

110. In the upshot, the prayer for reinstatement is declined.

iii. Unpaid salary till retirement

111. This is a claim for unearned salary and which has not become payable under Section 17(1) of the *Employment Act*.

112. It is a claim for anticipatory earnings which the Court of Appeal rejected in *DK Njagi Marete V Teachers Service Commission* [202] eKLR on the premise that it had no anchorage in law. A similar holding was made in *Elizabeth Wakanyi Kibe V Telkom Kenya Ltd* [2014] eKLR.

113. See also the sentiments of Rika J in *Engineer Francis N. Gachuri V Energy Regulation Commission* [2013] eKLR.

114. The claim is declined.

iv. Leave pay allowance from date of interdiction till retirement

115. This claim lacks particulars as to the leave pay claimed. Is it leave travelling allowance, which is paid once annually or outstanding leave days? And if the latter how many days and if the former how many years and at what rate?

116. The claim lacks particulars as the claimant's statement is silent on the issue and is declined.



v. House Allowance from date of dismissal till retirement

117. This claim is patently unsustainable as it comprises anticipatory earnings.
118. The claimant has not laid a legal or factual justification for the claim and it is accordingly declined.

vi. Commuter allowance from date of interdiction till retirement

119. Evidently, this was part of the half pay retained by the employer which the court rejected earlier.
120. Moreover, the claimant was not commuting and the allowance was not payable save for the days he reported to the office during interdiction.

vii. Reasonable damages for unlawful termination

121. It is trite law that no action in damages lie for termination of a contract of employment.
122. However, if the termination of employment or dismissal is adjudged to have been unjustified as the court has found in this case, the claimant is entitled to compensation in accordance with the provisions of Section 49(1) of the Employment Act. Subject to the provisions of Section 49(4) of the Act, up to a maximum of 12 months gross salary.
123. Taking into consideration that the claimant had expressed his wish to be reinstated, and appealed for it prior to filing this case, had served the respondent for about 32 years and expected to serve till retirement in 2030.
124. However, the claimant substantially contributed to his summary dismissal by his conduct and refused to hand over specimen signature to the employer and refused to clear even after being directed to do so by the employer.
125. In the circumstances the equivalent of three (3) months gross salary is fair, Kshs.277,188.00 at Kshs.92,396 per month as admitted by the respondent. The claimant did not disclose his salary in in the witness statement.

viii. Retirement benefits

126. The respondent operated a contributory pension scheme administered separately.
127. The claimant to pursue the administrator of the scheme for the portion of his dues payable.

ix. Reasonable severance pay

128. It is unclear to the court as to what this prayer constitutes as no particulars has been provided on its justification, basis or amount.
129. In employment law severance pay is only payable in cases of redundancy under Section 40(1)(g) of the Employment Act and as the claimant and the respondent separated on account of summary dismissal.
130. The claim is unsustainable and it is declined.
131. In conclusion, judgment is entered in favour of the claimant against the respondent in the following terms:
- a. Declaration that termination of the claimant's employment by the respondent was unfair for want of procedural propriety.



- b. Commuter allowance for the days he reported to the office during interdiction. Respondent shall compute and pay.
- c. Equivalent of three months gross salary, Kshs.277,188.00
- d. In the circumstances the claimant is awarded 50% of the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 4TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 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 has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

DRAFT

