



REPUBLIC OF KENYA



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**Wairioko v Mwalimu National Savings and Credit Co-Operative Society Limited
(Cause E940 of 2021) [2025] KEELRC 1608 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1608 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E940 OF 2021
MA ONYANGO, J
APRIL 25, 2025**

BETWEEN

RHODA GACHAMBI WAIRIOKO CLAIMANT

AND

**MWALIMU NATIONAL SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

JUDGMENT

1. The Claimant herein sued the Respondent, her employer, vide the Memorandum of Claim dated 15th November 2021 seeking the following orders:
 - a. Declarative orders declaring that the suspension of the Claimant from employment as conveyed by the letter dated 25th October 2021 is unfair, unlawful, lacks merit and is void ab initio.
 - b. An Order directing the Respondent to unconditionally lift the suspension of the Claimant from employment and Order for her immediate resumption of duties.
 - c. An Order for the payment by the Respondent the Claimant's withheld emoluments during this period of her suspension.
 - d. An order of injunction restraining the Respondents either by themselves, employees, servants and/or agents from terminating the employment of the Claimant, interfering with her employment or harassing her in any way
 - e. Costs of this suit.
2. Contemporaneously with the Memorandum of Claim, the Claimant filed a Notice of Motion dated 15th November 2021.



3. The Claimant's case is that by a letter of appointment dated 30th June 2017, she was appointed by the Respondent as its Head of Human Resource and Administration following a successful interview; that the appointment was on permanent and pensionable terms after completion of probation of six months; that she reported directly to the Chief Executive Officer (CEO) who was her supervisor.
4. That on 28th December 2020, a new grading structure was approved by the Board and the Claimant's position was renamed "Chief Manager Human Resource" reporting to the Deputy Chief Executive Officer (DCEO). That her gross salary was Kshs 499,129 per month.
5. The Claimant avers that she rendered her services to the Respondent with zeal and precision and as a result of the said performance, her relationship with her immediate supervisor and the Respondent was good until sometime in June 2021.
6. The Claimant avers that on 25th October 2021, the Board of the Respondent sent the Claimant on suspension for six (6) months backdated to 5th October 2021 without any pay as an outcome of a disciplinary process contrary to the express provisions of the Human Resource Management Policy of the Respondent.
7. It is the Claimant's case that prior to being sent on suspension, the Claimant had been placed on interdiction vide a letter dated 28th June 2021 for more than three (3) months contrary to the express provisions of the HR Policy of the Respondent.
8. According to the Claimant, Clause 9.2.7 of the Respondent's HR Policy provided that the Respondent was to conclude all cases of interdiction within 3 months. That her case was conducted way beyond this time limit.
9. It is further the Claimant's case that Clause 9.3.2 of the HR Policy provided for suspension pending investigation and not suspension as an outcome of a disciplinary hearing.
10. The Claimant further avers that neither the Human Resource Committee nor the Board of the Respondent had the jurisdiction to suspend the Claimant under the HR Policy as this was the function of the Chief Executive Officer (CEO).

The Respondent's Case

11. The Respondent filed a Replying Affidavit sworn by Robinson C. Otieno on 14th January 2022 in opposition to the Notice of Motion dated 15th November 2021 and a Statement of Response dated 18th January 2022 in response to the Claim.
12. It is the Respondent's case that the Claimant was on 2nd June 2021, issued with a notice to show cause letter requiring her to show cause why disciplinary action should not be taken against her.
13. The Respondent avers that in the Notice to show cause dated 2nd June 2021, the Claimant was given time to prepare her response by 11th June 2021, which time according to the Respondent was adequate for her to prepare her defense.
14. It is averred that the Claimant presented her written explanations to the show cause letter which the Respondent found to be unsatisfactory.
15. According to the Respondent, its Disciplinary Committee reviewed the disciplinary issues facing the Claimant and prepared a report dated 22nd September 2021 recommending that the Claimant be taken through a disciplinary hearing.



16. The Respondent avers that by a letter dated 27th September 2021, the Claimant was invited to a disciplinary hearing on 5th October 2021 before the committee where the Claimant adopted her written explanations as her response to the charges during the oral hearing.
17. According to the Respondent, the Claimant was found to be culpable of all charges and the Committee made a recommendation to the Full Board to consider and adopt the suspension of the Claimant for a period of six months on the following charges;
 - a. Insubordination by failing to take lawful instructions from her supervisor contrary to HR Policy Clause 9.6.4 (e) and section 44(4)(e) of the *Employment Act*
 - b. Negligence of duty contrary to HR Policy Clause 9.6.4(c) and section 44(4)(c) of the *Employment Act*
 - c. Gross misconduct by bringing her office to disrepute through allegations that cannot be substantiated on behavior of the Board, her immediate supervisor, and the members of investigation committee contrary to HR policy clause 9.6.4(m) and section 44(4)(d) of the *Employment Act*.
18. The Respondent avers that its Board held a special conference meeting on 16th October 2021 during which it considered the report of the Committee and adopted the recommendation to suspend the Claimant for 6 months without pay in accordance with the Manual and Management terms and Conditions of service.
19. It is the Respondent's case that contrary to the Claimant's allegations in the Claim, both the Human Resources Committee and the Board have jurisdiction to deal with the disciplinary cases under Clause 1.4 of the HR Policy and Clause 13.6 of the Board Charter. Further, that the Respondent's Manual at Clause 9.1.4 provides for disciplinary action ranging from a warning, cost recovery, interdiction without pay, suspension without pay, termination, dismissal to a combination of these or any other approach as may be determined by the management from time to time.
20. The Respondent further contends that its Management Staff Terms and Conditions of Service at Clause 10 provides for penal suspension without pay and that the Claimant as the Head of Human Resources was aware of this and had implemented it on other employees.
21. It is averred that the Claimant's interdiction and disciplinary process was dealt with without undue delay and that there was no violation of the Respondent's manual as alleged by the Claimant.
22. The Respondent avers that its Board is overall in the organization structure and the various roles in prosecuting the Claimant's charges were divided amongst the CEO and the Human Resources Committee of the Board. It is the Respondent's position that contrary to the Claimant's allegations, the Board did not in any way usurp the disciplinary powers of the Committee. It denied that the Claimant had lost her right of appeal and averred that had she lodged an appeal, the same would have been effectively handled within the provisions of Clause 9.11 of the Respondent's Manual.
23. The Respondent maintained that the Claimant was found culpable of the charges of insubordination and neglect of duty which are fundamental breaches of her contract of employment and the due process of the law and rules of natural justice applied in the Claimant's disciplinary process leading to the less severe penalty of suspension as opposed to dismissal.
24. The Respondent avers that the Claimant is therefore not entitled to any reliefs and prayers sought. The Court was urged to dismiss the Claimant's suit with costs.



25. The application and the claim were consolidated and heard together.
26. On 10th February 2022, parties consented to disposing of the suit by way of written submissions. Both parties filed submissions dated 7th February 2022.

Claimant's Submissions

27. In her submissions, the Claimant identified the issues for determination as follows:
 - a. Did the Respondent's Human Resource procedures permit suspension and if so, were they followed?
 - b. Was the suspension of the Claimant justified?
 - c. Can the Respondent suspend the Claimant without pay?
 - d. Can the Claimant's suspension be backdated?
 - e. Is the Claimant entitled to the orders sought?
28. On the first issue, it is the Claimant's submission that the Respondent relied on its Human Resource Policy of 2018 in conducting the disciplinary process against her. The Claimant submits that the Respondent's disciplinary procedure is outlined in the said Policy under clause 9. According to the Claimant, the Respondent in its Replying Affidavit referred to paragraph 10 of the Management Staff Terms and Conditions of Service. The Claimant avers that all through her disciplinary process, the Respondent relied on the provisions of the Policy and not the Management Terms and Conditions.
29. The Claimant argues that the Respondent cannot after realizing that the procedure in the Policy does not favour it, chose another document which was not applied in her case to legitimize its unlawful actions. It is submitted that even if Clause 10.1 of the Management Terms and Conditions was applicable, the said Clause would still not legitimize the Respondent's actions as it does not provide for hearing by the HR Committee but the Board which never happened in the Claimant's case. It is further submitted that Clause 10.5 of the Management Terms and Conditions provides that suspension from duty shall only be ordered by the Board on determination of the case. The Claimant avers that her case was determined by the Board on 16th October 2021 but she was suspended with effect from 5th October 2021 way before the Board had determined her case.
30. The court was thus urged to hold that due procedure was not followed.
31. On the second issue, the Claimant submitted that the charges against her kept mutating and new charges were introduced at every stage of the disciplinary process. That the Claimant's explanations to all the charges were ignored by the Respondent.
32. On the third issue, the Claimant submits that any provision in the Respondent's Human Resource Procedures for suspension without pay contravene the Claimant's constitutional rights under Article 41(1) of *the Constitution* as well as section 41 of the *Employment Act*. It is therefore submitted that clause 9.3.4 of the Policy is unconstitutional and illegal in as far as it provides that "a staff on suspension shall not be entitled to pay". Reliance was placed on the cases of Donald C Avude vs Kenya Forest Service(2015)eKLR and Sabina Mutua vs Amedo Centre Kenya Ltd(2017)eKLR.
33. On the fourth issue, it is the Claimant's submission that the letter of suspension dated 25th October 2021 backdated the suspension to 5th October 2021 on which date according to the Claimant, the Board had not sat to deliberate on her issue. That the Respondent in its Replying Affidavit stated that the Board held a meeting on 16th October 2021.



34. Lastly, as to whether the Claimant is entitled to the orders sought, the Claimant submitted that she had proved that her discipline and suspension lacked procedural and substantive justice. The court was urged to grant the orders sought.

Respondent's Submissions

35. The Respondent on its part framed the issues for determination as follows:
- a. Whether on evidence and material placed before the court, the Claimant has satisfied the conditions upon which a substantive order of injunction ought to be granted
 - b. Whether the Respondent had valid reasons for disciplining the Claimant
 - c. Whether the Respondent followed fair process in disciplining the Claimant
 - d. Whether Exhibit 5 of the Claimant's bundle of documents is illegally obtained evidence and is for expulsion from the Court record
 - e. Costs
36. On the issue whether the Claimant met the test for grant of substantive order of injunction, the Respondent submitted that it did not in any way express the intention to terminate the Claimant's services under the existing circumstance. It is the Respondent's case that it had sufficient grounds to commence disciplinary procedures against the Claimant and a decision was taken to suspend the Claimant as prescribed under the Human Resource Manual and the Management Terms and Conditions of Service. That as such the issue of termination did not arise.
37. On the second issue, the Respondent submitted that it had demonstrated that there were valid reasons to commence the disciplinary process against the Claimant. The Respondent submitted that it clearly set out the charges for which the Claimant was supposed to show cause why her employment should not be terminated which charges were refusal to take lawful instructions from her supervisor contrary to the Human Resource Policy at clause 9.6.4(e) and section 44(4)(e) of the [Employment Act](#) and negligence contrary to Human Resources Policy at Clause 9.6.4(c) and section 44(4)(c) of the [Employment Act](#).
38. It is the Respondent's case that there was a fundamental breach of policies and conditions of employment by the Claimant and the Respondent had justifiable reasons to conduct disciplinary hearing and to take the most appropriate course of action to deter the Claimant from continuous and intentional breach of the policies which she authored and structured in her capacity as the Chief Manager, Human Resources of the Respondent.
39. The Respondent submitted that the sanction of penal suspension is well entrenched in the Human Resources Manual as well as in the Management Terms and Conditions of Service. The Respondent maintained that the Claimant's suspension was lawful and grounded in the Respondent's manual at Clause 9.1.4 and Clause 10 of the Management Staff Terms and Conditions of Service. It is the Respondent's submission that penal suspension without pay has been applied to other employees on a case by case basis as provided in the Manual and Management Terms and Collective Bargaining Agreement where applicable.
40. The Respondent maintains that the Board is overall in the organizational structure and the various roles in prosecuting the Claimant's charges were divided amongst the CEO and the Human Resources Committee of the Board.



41. The Respondent further submitted that the Claimant was a standing member of the Disciplinary Committee and considering that she was the subject in this particular instance, sending her case to the very same disciplinary committee where she sat would mean that there would be no objectivity in the Committee. That as such an alternative route was taken to process her case through the Human Resource Committee of the Board.
42. It is submitted that given the Claimant's position at work, she would have interfered with any investigations or inquiry into her conduct and it was necessary for her to be interdicted to allow for the disciplinary process to proceed without interference from her.
43. As to the issue whether the Respondent followed due process in disciplining the Claimant, the Respondent submitted that it carried out the Claimant's disciplinary process by employing the rules of natural justice. It is submitted that the Claimant had a fair hearing and an opportunity to be heard and all her written and oral explanations were taken into consideration before the decision to send her on penal suspension was taken. It was submitted that the Claimant was given adequate time to respond to the charges during the hearing on 5th October 2021.
44. The Respondent denied the allegations made by the Claimant that new charges were introduced at the various stages of the disciplinary process as alleged.
45. According to the Respondent, the Board did not in any way usurp the disciplinary powers and the Claimant did not in any way lose her right to appeal. It is the Respondent's case that the Claimant did not lodge any appeal. That if she did, it would have been effectively handled within the provisions of the Respondent's manual.
46. On the fourth issue, the Respondent submitted that the Claimant used unorthodox means to obtain the transcript of the Board's meeting of 29th May 2021 instead of following the laid down procedures to access this information. It is the Respondent's case that the Claimant's action of secretly recording the Board meeting and producing the minutes which discloses to the public a myriad of internal issues discussed by the Board is a direct breach of the privacy of the members of the Respondent's Board and is a fundamental breach of the Respondent's rights.
47. The Respondent urged the court to expunge the said documents from the court records as they were illegally obtained by the Claimant.
48. In the end, the court was urged to dismiss the claim with costs as it has no basis.

Determination

49. From the pleadings and the submissions on record, the issues that fall for the court's determination are:
 - a. Whether the Respondent's Human Resource procedures permit suspension and if so, were they followed;
 - b. Whether the suspension of the Claimant justified;
 - c. Whether the Respondent can suspend the Claimant without pay;
 - d. Whether the Claimant's suspension was backdated and if the backdating of the suspension was valid;
 - e. Whether the Claimant is entitled to the orders sought in her claim.



50. On the first issue whether the Respondent's Human Resource procedures permit suspension and if the Claimant's suspension was in compliance with the policy, the Claimant submitted that her suspension was based on the HR policy which provides for suspension after investigations. That in her case there were no investigations. She further submitted that the reference to Management Staff Terms and Conditions of Service by the Respondent in the replying affidavit was unjustified.
51. For the Respondent it was submitted that clause 1.3.2 of the Policy provides that the policy shall derive its legal framework from *the Constitution*, Labour Laws, Collective Bargaining Agreement, Management Terms and Conditions of Service and any other relevant legislation, policy documents and guidelines released from time to time.
52. Clause 1.1.1 of the Policy provides as follows:
- This policy shall serve as a reference guide to the Society's Board of Directors and employees on the HR policies as well as the rationale and principles of how they should be implemented and enforced. It include, terms and conditions of employment besides entitled benefits for the employees and should therefore be read in conjunction with the management terms and conditions, collective bargaining agreement and Letters/contracts of employment which Stipulate the general terms and conditions of employment including entitled benefits.
53. Further, Clause 1.3 of the policy provides:
- 1.3.1 This Policy applies to all members of staff and contain Society rules and regulations and general information which affect employment with the Society and as such these reflect official Society practice. They are by no means exhaustive and are to be supplemented instructions issued by way of circulars from time to time.
1. 3.2 The Policy shall derive its Legal framework from *the Constitution* of Kenya, Labour Laws, Collective Bargaining Agreement (CBA), Management Terms and Conditions of Service, and other relevant legislation, policy documents and guidelines released from time to time.
54. The Preamble to the Management Staff Terms and Conditions of Service provides that it shall cover all management staff in Job Groups MW6 to MW1.
55. My understanding of the foregoing is that the Policy was the main guiding document but when dealing with management staff which no doubt the Claimant was, the Respondent is expected to apply both the Policy and the Management Terms as appropriate. It would also mean that when dealing, say, with a unionisable staff the Respondent would use both the Policy and the Collective Bargaining Agreement as appropriate.
56. Further, as pointed out by the Respondent the disciplinary process in the Policy would not have been applicable to the Claimant or any management staff as the membership of the Disciplinary Committee established under Clause 9.8 of the Policy was composed of members of Management, one of whom was the Claimant. That must have been the reason why the Respondent had a separate disciplinary process for management staff in the Management Staff Terms and Conditions of Service.
57. Clause 9.8 of the Policy provides:
- There will be a standing Management Staff Disciplinary Committee comprising of at least an independent Chairperson at the Level of MW2, the Company Secretary (HOL), the Head of HR & Administration, the staffs immediate Manager or HOD and any Other



member as it may be determined from time to time. The committee shall have a mandate to invite any other representative as it may deem necessary.

58. The Management Staff Terms provide for suspension at clause 10.0 as follows:

10.0 Suspension From Duty

10.1 Definition

This means that an employee has been heard by the Board of Directors and found guilty of an offence which does not warrant termination of service or dismissal.

10.2 Any management staff on suspension shall not attend duty and shall not be paid any salary. The minimum period of suspension shall be one (1) month and the maximum shall be six (6) months.

10.3 On appeal, if the suspension is rescinded, salary withheld during the period of suspension shall be restored. If dismissal is ordered the effective date shall be the date of suspension.

10.4 Where an employee has been found guilty of a serious offence warranting dismissal, the Board of Directors may commute dismissal for suspension.

10.5 Suspension from duty shall only be ordered by the Board of Directors on determination of the case.

59. From the evidence on record it is evident that the Respondent subjected the Claimant to the disciplinary process in the Management Staff terms and conditions of service. I therefore do not find validity in the arguments of the Claimant that the Respondent should have confined itself to the HRM Policy.

60. The second issue is whether the suspension was justified. The grounds for suspension are provided for in both the Policy and the Management Staff Terms and Conditions of Service.

61. Paragraph 9.0 of the HRM Policy provides:

9.0 Disciplinary

9.1 Disciplinary Measures

9.1.1 The Society shall exercise fairness to all matters concerning discipline of staff in line with this policy.

9.1.2 Where misconduct and/or a breach of regulations, policies and procedures has occurred, formal disciplinary procedure will be initiated.

9.1.3 The Chief Executive Officer will call for an explanation and investigation into the matter before convening a disciplinary hearing. The hearing will endeavor to establish all the facts relevant to the case. If disciplinary action is merited, it will be communicated in writing.

9.1.4 The disciplinary action may range from a warning, cost recovery; Interdiction with part pay, suspension Without pay, termination, dismissal to combination of these or any other approach as may be determined by the Management from time to time,

9.15 The following disciplinary measures may be taken against a staff depending on the gravity of the misconduct:



62. The Respondent's Human Resource Management Policy provides for suspension at Clause 9 as follows:

9.3 Suspension

9.3.1 If a staff has been convicted of a serious criminal offence or is found culpable of a gross misconduct which can lead to dismissal, he or she shall be served with a suspension letter

9.3.2 In case of gross misconduct the staff may be suspended without pay pending investigation.

During the suspension period, the staff will be required to be available to the Society and shall also prepare and submit a written statement within two days of suspension

9.3.3 A staff who is suspended shall not leave the duty station without the clearance of the supervisor

9.3.4 A staff who is on suspension shall not be entitled to any salary

9.3.5 A staff whose suspension has been lifted shall promptly be served with a decision letter. Any withheld salary and allowances will be restored with effect from the date it was withheld

9.3.6 Suspension from work shall be done by the Chief Executive Officer after determination of the case in consultations with the Board.

63. The HRM Policy further provides as follows at Clause

11.0 Serious Offences

An officer may be summarily dismissed from the services of the Society, or may suffer lesser penalty if he/she inter alia:

11.1 Is guilty of insubordination,

11.2 Absents himself/herself from duty for more than seven days without leave or by reason of ill-health caused by his/her own misconduct.

11.3 Neglects, refuses or becomes unable for any cause other than ill-health, not caused by his/her own misconduct, to comply with any lawful order.

11.4 Uses objectionable or insulting language or misbehaves towards any other member of staff or members of the public.

11.5 Is convicted of a criminal offence other than a misdemeanour.

11.6 Is guilty of gross misconduct bringing his/her office or Society into disrepute,

11.7 Improperly receives or solicits any reward, fee commission or valuable present in the course of his/her duties.

11.8 Improperly discloses any information regarding the affairs of the Society to any unauthorized person or persons.

11.9 Seeks to improperly influence any member of staff or Members of the Board or any person outside the Society with a view to obtaining advancement in the service of the Society or intervention on his/her behalf in any matter affecting his/her service.

11.10 Causes pecuniary loss/embarrassment to the Society.

11.11 Becomes financially embarrassed.



- 11.12 Makes a false statement in any matter on which he/she is required by the Chief Executive Officer or other duly authorised officer to furnish information.
- 11.13 This list is not exhaustive. In all cases when a serious offence has been committed, the Society shall give consideration to dismissal action with loss of all privileges as an appropriate disciplinary action.
64. The Claimant was issued with a Show Cause letter which she responded to. According to the Respondent the Claimant's response to the show cause letter was unsatisfactorily and it decided to subjected her to a disciplinary hearing on 5th October 2021. It is the said disciplinary hearing that culminated in the decision by the Respondent to suspend the Claimant.
65. The show cause letter is reproduced below:

MW/200646 2nd June 2021

Ms Rhoda G. Wairioko

C/o Mwalimu National

Box 62641-00200

Nairobi.

Dear Rhoda,

Re: Show Cause Letter

This is further to my letter Ref: MW/2265/AD/12(199) dated 6th May 2021 on privileged Human Resource records unprocedurally shared to social media and your response dated 12th May 2021 which was unsatisfactory.

In addition, your attention is drawn to the following incidents.

- i. That through an email from my office dated 3rd May 2021, you were instructed to prepare two reports in readiness for presentation to Human Resource Committee (HRC) meeting schedule for 18th May 2021 i.e. i. Organizational structure and ii. in post openings. Despite reminders via email dated 11th May 2021 and a text message from me on 14th May 2021 at 10.14pm, you failed to submit the reports leading to postponement of the committee meeting. Your behavior is considered to be incoordination by failing to take lawful instructions from your supervisor contrary to HR policy clause 9.6.4(e) and section 44(4)(e) of the [Employment Act](#). Your refusal to prepare the papers is also considered to be Negligence of duty contrary to HR Policy Clause 9.6.4(c) and section 44(4)(c) of the [Employment Act](#).
- ii. That on 29th May 2021 during rescheduled HRC meeting after I insisted that the said papers had to be presented, you declined to take the Committee members through the said reports. This occurred when you cited that you were not involved during the recent staff transfers giving an ultimatum that you needed to be guided on how to present reports that you personally prepared much later. Your behaviors is considered to be insubordination by failing to take lawful instructions from your supervisor contrary to HR Policy clause 9.6.4(e) and section 44(4)(c) of the [Employment Act](#). Your behavior is also considered to be disrespectful to your immediate supervisor and the board members by declining to present reports to the Human Resource Committee without any reasonable cause contrary to section 44(4)(d) of the [Employment Act](#).



- iii. That by insisting to be consulted on redeployments and transfers done on 6th May 2021 which within your knowledge you have no mandate as per the job description expressly delegated to you stating that as a reason of not being able to present the board papers amounts to insubordination purporting to undertake duties not delegated to you contrary to HR Policy Clause 9.6.4(e).
- iv. That on 17th April 2020, through an email, you alleged that the Executive Committee of the board was interfering with a sexual harassment case by overreaching its mandate. You further alleged that the Investigation Committee was trying to protect some people whom I want to believe are within your knowledge and one of the staff implicated was bragging to have connection with the Head Office and the Heads of Department which could not be substantiated. When I requested for the details of the previous cases on 29th April 2020 on the same staff, your response was that you were unable to get the information to corroborate your claim. This was even after involving the expertise of our security Manager who is well versed with the threshold of evidence on a matter of this magnitude. Your behavior is considered as gross misconduct by bringing your office into disrepute by making allegations that cannot be substantiated contrary to HR Policy clause 9.6.4(m)

The above matters amounts to gross misconduct and you are hereby directed to show cause why disciplinary action in accordance with the relevant provision of the Human Resource Policy should not be taken against you for;

- i. Insubordination by failing to take lawful instructions from your supervisor contrary to HR Policy clause 9.6.4(e) and section 44(4)(e) of the *Employment Act*.
- ii. Negligence of duty contrary to HR Policy clause 9.6.4(c) and section 44(4)(c) of the *Employment Act*.
- iii. Gross misconduct by bringing your office in to disrepute through allegations that cannot be substantiated on behavior of the board, your immediate supervisor and the members of investigation committee contrary to HR Policy Clause 9.6.4(m) and section 44(4)(d) of the *Employment Act*.

Your written explanation should reach the undersigned on or before 5pm on Friday 11 June 2021.

Yours faithfully,

Signed

Kenneth Odhiambo

For: Chief Executive Officer

66. The letter of suspension is also reproduced below:

25th October, 2021

Rhoda Gachambi Wairioko

Box 64012-00620

Nairobi

Email. Rgachambi@yahoo.com

Dear Rhoda,



Reference is made to our show cause Letters dated 6th May 2021 and 2nd June 2021, your responses on 12th May 2021, 10th June 2021 as well as interdiction letter dated 28th June 2021, your response to the same dated 12th July 2021 and subsequently the Board disciplinary meeting held on 5th October 2021 whose details you are well aware of.

This is to convey the decision of the Board after hearing and determining your case on the following charges.

- i. Insubordination by failing to take lawful instructions from your supervisor contrary to HR Policy clause 9.6.4 (e) and section 44 (4)(e) of the [Employment Act](#) 2007.
- ii. Negligence of duty contrary to HR Policy clause 9.6.4 (c) and section 44 (4) (c) of the [Employment Act](#) 2007. #
- iii. Gross misconduct by bringing your office to disrepute through allegations that cannot be substantiated on behavior of the Board, your immediate supervisor, and the members of investigation committee contrary to HR policy clause 9.6.4 (m) and section 44 (4) (d) of the [Employment Act](#) 2007.

The Board found you guilty of the three charges and consequently resolved vide MIN/BOD/139/2021 that you be suspended from duty with no pay for a period of six (6) months effective 5th October 2021 as per HR policy clause 9.34.

By this letter, you are hereby suspended for a period of six months. Take note of the Board's Leniency as the charges attract summary dismissal as per the provisions of HR policy.

Yours faithfully

Signed

Kenneth Odhiambo

Ag. Chief Executive Officer

cc. Personal File

67. It was further the Claimant's submission that the charges against her kept mutating and that she was not given an opportunity to respond to all the charges put to her in the disciplinary hearing.
68. A reading of the notice to show cause and the letter of suspension clearly indicate that the grounds for suspension were all raised in the notice to show cause and that the Claimant had an opportunity to respond to all the issues. I find no merit on this ground.
69. It is further evident from both the notice to show cause and the letter of suspension that the Respondent had valid reasons to take disciplinary action against the Claimant and the disciplinary process complied with the Human Resource Policy as read with the Management Terms and Conditions of Service.
70. From the foregoing it is my finding that the disciplinary process was justified in terms of the grounds thereof as well as the procedure.
71. The next issue is whether the Respondent can suspend the Claimant without pay. Suspension is not provided for in the [Employment Act](#). For an employer to suspend an employee it must prove that the suspension is provided for in the terms and conditions of service of the employee. The employer will be required to prove further that it complied with the said terms and conditions in the suspension.



72. Suspension can be at two different levels. It can be done as an intermediate measure during the process of discipline where the employee's presence is likely to prejudice or embarrass the process or where the employer is of the opinion that the employee should be stopped from performing the functions of the office until the disciplinary process is concluded.
73. Suspension can also be used as a penalty after an employee has been heard and the employer determines that the appropriate punishment is suspension.
74. In both cases the same must be covered in the terms and conditions of service of the employee.
75. The foregoing is explained in Halsbury's Laws of England, 3rd Edition, Volume 25 at paragraph 989 (page 518) which provides as follows in respect to suspension:

“989. Suspension. Whether or not the master has power to suspend a servant during the duration of the contract of service depends upon the construction of the particular contract. In the absence of any express or implied term to the contrary, the master cannot punish a servant for alleged misconduct by suspending him from employment and stopping his wages for the period of the suspension. Where, however, such a term is included in the contract, it is not rendered void by the statutory provision restricting deductions from workmen's wages for or in respect of fines, for the intention of the parties is taken to have been that for the period of suspension mutual duties and rights, including the right of wages, would be suspended.”

76. In the instant case suspension without pay is provided for in the terms and conditions of service that the Claimant was subject to. The Claimant however submits that the provision in the HRM Policy for suspension without pay contravened the Claimant's rights under Article 41 of *the Constitution* and section 41 of the *Employment Act*. The Claimant cited and relied on the decision of this court in Donald C. Avude v Kenya Forest Service [2015] eKLR in support of the averment that suspending an employee without pay is unconstitutional.

77. In the said decision the Court observed:

“... I find the provisions of the Clause to be in contravention of Article 41(1) of *the Constitution* which provides for the right to fair labour practices as well as Sections 41 and 44 of the *Employment Act* as it provides for suspension in the event of an employee being charged with any offence which would include an offence that does not affect the employer in any way, and minor offences such as traffic offences. My understanding of suspension of an employee is that it is intended to enable an employer carry out investigations where the presence of the employee may jeopardize the investigations, or where an employee has been convicted and is awaiting sentence as provided for in the Public Service Code of Regulations, or where the employee has or is suspected of having committed a criminal offence to the substantial detriment of the employer as provided in Section 44(4)(g) of the *Employment Act*. In all these cases suspension should be for a determinate period where such suspension is without pay. Otherwise it would constitute inhuman treatment especially in the case of the respondent's Manual where the employee is required to be at the place of work without a salary and for an indeterminate period.”

78. In the present case, the Claimant was suspended for a definite period of 6 months. The Claimant did not pray for an order declaring the said provisions unconstitutional or unlawful or for nullification of the said provision. Parties are bound by their pleadings and the court cannot be called upon to



determine an issue not pleaded or urged before it. This prayer must therefore fail. For as long as suspension remains a contractual term of the Claimants employment, the court is expected to respect and enforce it.

79. The Claimant further faulted the backdating of her suspension. It is evident from the letter of suspension which is dated 25th October, 2021 that the suspension was to take effect from 5th October, 2021. The Respondent responded to the same in paragraph 6.12 of the replying affidavit as follows:

6.12 The Claimant's suspension began on 5th October 2021 being the date of the disciplinary hearing although the decision letter was dated 25th October 2021. The Board considered the slight delay that was there before communicating its decision and thus used its discretion to backdate the suspension to 5th October 2021 so as to mitigate the effects of the delay and also to ensure that the Claimant is not prejudiced by the delay due to the Board's busy schedules.

80. It is my finding that this was irregular. However, in view of the fact that the suspension was for a defined period and this period was taken into account in the suspension period, I find that the Claimant did not suffer any prejudice by the said backdating of the suspension letter.

81. In the end, I find the Claimant's Claim to be without merit and hereby dismiss it with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF APRIL, 2024.

MAUREEN ONYANGO

JUDGE

