



**Oseko v Kenya Revenue Authority (Cause 237 of 2020)  
[2024] KEELRC 262 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 262 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 237 OF 2020  
NJ ABUODHA, J  
FEBRUARY 9, 2024**

**BETWEEN**

**THEDDEUS OLUOCH OSEKO ..... CLAIMANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim dated 19<sup>th</sup> November, 2019 and pleaded inter alia as follows: -
  - a. The Claimant is a person with disability and is certified as such.
  - b. On or about 1990 the Claimant was employed by then the Ministry of Finance and deployed as a VAT Inspector and has since worked in diverse locations in the country in different roles. These include field officer, Deputy station Manager, station manager, in charge of revenue collection and reporting, debt manager, taxpayer manager, recruitment manager and TPS manager among the many other roles.
  - c. The Claimant averred that he performed his duties diligently and honestly which saw him rise in ranks.
  - d. That it was on or about May,2017 when he was summoned to go to the CID headquarters along Kiambu Road where he recorded a statement in relation to a tax payer by the name City Printing Works(K) Limited (herein referred to as the tax payer).
  - e. That the Claimant on 4<sup>th</sup> May,2018 while he was stationed at Eldoret he was informed by his manager that he was needed at KRA offices Nairobi. That he did comply and attended the KRA investigations officer to explain his involvement with the tax payer.



- f. The Claimant averred that on or about April, 2013 he dealt with an application by the tax payer for change of pin base from North of Nairobi to East of Nairobi. That this request went through the normal procedure and was allowed.
- g. That the said tax payer made another request to be removed from their obligation to pay VAT on the basis that they were no longer dealing with vatable items. The Tax payer attached a compliance certificate dully issued from North of Nairobi Station. That this request was granted six months later in accordance with procedural requirements.
- h. The Claimant further averred that the pin base of the tax payer as listed in the KRA data base was in North of Nairobi station where the tax payer filed returns. That however inn the legacy system the location was given as East of Nairobi station.
- i. That the Claimant who worked at East of Nairobi was not made aware of the station existence of any assessment as the same did not reflect in the ledger when the Claimant dealt with the case. That since he worked at East of Nairobi station he did not know happenings with the tax payer in North of Nairobi station.
- j. The Claimant averred that he acted diligently with the tax payer herein and followed the procedure as stipulated in the tax procedure manual. That he deregistered the tax payer based on application which was presented to him together with a certificate of compliance which had been issued the previous year by the North of Nairobi station.
- k. The Claimant maintained that he did not deal with any individual agent or director of the Company, did not know its directors he only dealt with the Application as received in its East of Nairobi Station.
- l. The Claimant averred that on 29<sup>th</sup> November,2018 the Respondent wrote to the Claimant on alleged unprocedural removal of the estimated assessment for the year 2003-2009 for the said tax payer from KRA system. The Claimant did respond to the allegations on 4<sup>th</sup> December,2018 and stated that he was not aware of the existence of such assessment since it did not reflect in the ledger when he dealt with the case. He had no way of establishing the existence of such assessment.
- m. The Claimant averred that on 6<sup>th</sup> December,2018 he received an invitation to attend before a disciplinary committee on the 14<sup>th</sup> December,2018 which he attended. He stated that the said meeting was a sham as it seemed the Respondent officers who attended had made up their mind to terminate his services.
- n. He averred that he was not accorded opportunity to properly defend himself as all the answers he gave for the questions asked were rubbished, his written defences ignored and dismissed without any reasons being given. That the committee was hostile to him, he was intimidated and his response derided as lacking substance or unbelievable. The committee chairman displayed open hostility, contempt and bias.
- o. The Claimant further averred that the disciplinary committee was not properly constituted as its membership included persons unqualified to seat therein. Example was the chair of the committee as his commissioner contrary to express provisions of the Rules Governing disciplinary process.
- p. He averred that at the hearing he was not accorded any or any reasonable chance to defend himself at the said committee hearing. That the minutes of the said meeting were not readily



available after the decision was delivered. That the committee did not adhere to the KRA regulations governing discipline and grievances.

- q. The Claimant averred that on 15<sup>th</sup> February, 2019 he was terminated from his employment. He lodged an appeal against the termination which appeal has not been decided to date.
  - r. He stated that he was aged 54 years at the time of termination yet disabled and he had expectations to continue working to the age of 65 years. That he lost 11 years where he could have earned Kshs 36,960,000/=. That the said termination was unlawful and malicious and caused him suffer image, integrity and his social standing.
  - s. The Claimant further claimed that as a senior officer of the Respondent he had secured loan facilities on the basis of his employment where upon termination the financiers have moved in to recover their money as well as the sacco he was contributing they had to recover all his shares.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A declaration that the termination of his employment was unfair, unprocedural, wrongful and unjust.
  - b. A declaration that the disciplinary proceedings and ultimate dismissal of the Claimant were a sham, unfair, unprocedural, wrongful and unjust.
  - c. The Respondent be hereby directed to immediately and unconditionally reinstate the Claimant to his employment.
  - d. In the Alternative, the Respondent be and are hereby directed to pay the Claimant Kshs 36,960,000/= salaries the Claimant would have earned.
  - e. General damages for loss of credit and integrity.
  - f. 12 months salary compensation for unfair termination
  - g. Costs of the suit and interests.
3. The Respondent filed its Amended statement of Response and Counterclaim dated 6<sup>th</sup> December, 2021 and they averred inter alia as follows;
- i. The Respondent denied the contents of the claim and averred that the Claimant was employed as an Inspector II(Value Added Tax) on permanent and pensionable terms of service with effect from 1<sup>st</sup> July, 1996. That his services were terminated on 15<sup>th</sup> February, 2019 on account of gross misconduct arising from the Respondent's investigations findings.
  - ii. The Respondent averred that it received an investigation report dated 30<sup>th</sup> July, 2018 from the Commissioner I & SO on allegation that the Claimant was involved in unprocedural removal of estimated assessments for year 2003 to 2009 for City printing Works(K) Limited from KRA system.
  - iii. The Respondent averred that the Claimant a DTD Compliance Manager at East of Nairobi station, removed VAT obligation for the tax payer without exercising due diligence in that the firm was still qualified for VAT obligations.
  - iv. That the Respondent issued the Claimant with a show cause letter dated 29<sup>th</sup> November, 2018 requiring him to show cause why disciplinary action should not be taken against him on account of negligence of Duty. The Claimant responded to the show cause letter through his letter dated 4<sup>th</sup> December, 2018.



- v. The Respondent averred that the Claimant was invited for oral representations in a disciplinary meeting held on 14<sup>th</sup> December, 2018 in line with section 41(1) (2) of the Employment Act. That his services were terminated through a letter dated 15<sup>th</sup> February, 2019 on account of negligence of duty which is gross misconduct which is a serious offence under Employment Act and KRA code of conduct.
  - vi. The Respondent averred that the Claimant appealed against the termination of his services and his appeal was declined via a letter dated 9<sup>th</sup> April, 2019 on the ground that no new evidence was adduced to warrant a review of the Respondent's earlier decision to terminate him. That the Claimant's averments that the appeal was not heard to date is misleading.
  - vii. It was the Respondent's averment that the above letter was sent to his last known postal address but was later returned from Posta Kenya as unclaimed mail.
  - viii. The Respondent averred that the Claimant was accorded a fair hearing in line with Section 41 of the Employment Act as read with Article 41 and 47 of the Constitution and an opportunity to properly defend himself as evidenced by his written and oral submissions which informed its decision.
  - ix. The Respondent further stated that the disciplinary panel was properly constituted in line with the provisions of the KRA Code of Conduct. That the law does not provide for recording of the proceedings of the Disciplinary panel meeting by the employer and therefore the Claimant's assertions that the minutes of the meeting were not readily available are unfounded and lack legal basis.
  - x. The Respondent maintained that the reasons for the Claimant's termination were well stipulated in its termination letter which suffices. That the Disciplinary Panel adhered to KRA rules and regulations governing discipline and grievance contrary to the Claimant's averments. That the Claimant's termination was neither preconceived nor was there any earlier decision arrived at with regards to his case
  - xi. It was the Respondent's averment that it was established through internal process that the Claimant violated the provisions of KRA Code of Conduct while working as a DTD Compliance Manager at East of Nairobi station. That his termination was procedural as he was terminated in line with relevant statutes.
  - xii. The Respondent further averred that the Claimant's separation with it are line with contract of employment where either party may terminate the contract by providing payment in lieu of notice which was catered for in his termination letter That the Claimant will be paid salary and allowances up to the date of his termination upon clearance with the Respondent less any liability to the Respondent.
  - xiii. The Respondent prayed that the Claimant was terminated lawfully and fairly and that there was no special or general damages due to the Claimant. That the Claimant's claim be dismissed with costs.
4. The Respondent raised a counterclaim and averred as follows;
- i. The Respondent averred that the Claimant was involved in unprocedural removal of estimated assessments for a tax payer from the KRA system which occasioned the Authority loss of revenue amounting to Kshs 47,446,878.



- ii. The Respondent averred that in the termination letter the Claimant was issued with notice to surrender any property that belongs to the Respondent including vacating its staff house LCA 13 located in Langata. The rent was recovered from his salary and the Claimant was supposed to leave after his termination.
  - iii. The Respondent averred that despite notice the Claimant continued living in the said property from the date of termination 15<sup>th</sup> February,2019 to 31<sup>st</sup> October,2020 (21 months) when the court ruled that there being no relationship between the parties the Respondent was not entitled to house the Claimant.
  - iv. The Respondent averred that it has an outstanding rent arrears of Kshs 609,000/= owed to the Claimant for the 21 months.
  - v. That once the Claimant vacated the house the Respondent's officers inspected the house and prepared a schedule cost of repairs amounting to Kshs 92,432.93/= including the water bill. That the Claimant was responsible for the repairs as per the lease agreement.
  - vi. The Respondent prayed for the following against the Claimant: -
    - a. The Sum of 609,000/= for rent arrears
    - b. The sum of Kshs 92,432,93 for repairs
    - c. costs of the suit.
5. The Claimant by a response to the counterclaim dated 11<sup>th</sup> January,2021 averred as follows: -
- i. The Claimant denies the contents of the counterclaim and most specifically the involvement in any unprocedural removal of estimated assessment for any tax payer from KRA system.
  - ii. The Claimant averred that his stay in the premises was subject to the interim order of the court which restrained the Respondent from evicting him. That when the same court issued an order for him to vacate the premises he instantaneously vacated.
  - iii. The Claimant averred that the rent was to be recovered from his salary which salary the Respondent irregularly stopped. That the lease was to cease upon termination but if the termination was legal which was not the case in this case.
  - iv. The Claimant averred that the Respondent having irregularly terminated his employment it cannot be heard to allege that he ought to pay it money when clearly, he is not in any employment. He prayed that the same be dismissed with costs.

### **Summary of Evidence**

- 6. The Claimant's case was heard on 27<sup>th</sup> May,2021 where the Claimant testified that he was employed by the respondent and rose through the ranks and became Assistant Commissioner.
- 7. The Claimant testified that his duties at the Respondent were, a tax officer and audit and compliance manager to monitor staff on compliance, recruitment and tax payer training. It was further his testimony that he knew City printing company. That he came across it when they made application to change station to East of Nairobi from North of Nairobi. Tax payers are identified per geographical number. The said tax payer was located at Industrial Area and the PIN was at North Nairobi - This was to correct from North to East Nairobi.



8. CW 1 testified that KRA has a procedure for such a change which he followed. Once he got tax payer application he made formal request to North Nairobi station to the Data office to East of Nairobi and they agreed on the need for the change.
9. On the issue of tax payer's VAT CW1 testified that it was registered with VAT as an obligation. This followed the same process when he got a request to remove the VAT because the company was not dealing with vatable items. That he checked if the company was within his jurisdiction through the data base and he placed the company on dormant call.
10. CW1 testified that the company stopped communicating any VAT pending and he started a monitoring of 6 months to establish the facts of the tax payer and that they had no vatable goods. That as the manager he had the password to remove the VAT and he proceeded to remove the VAT.
11. CW 1 testified that he removed the VAT obligations and did VAT 12 to details of company and obligations. That register documents was generated automatically. Officers from the field gave him the information as he could check what the company was doing by sending officers on the ground.
12. CW 1 gave the chronology of events as stipulated in his statement until his termination. That the tax payer was engaged in printing works and closed in 2012 and text books were not vatable. That the Respondent alleged he was negligent yet he did everything on procedure. That procedure for de-registration of a tax payer was as per procedures manual which had the guidelines which he followed.
13. CW1 testified that when he met the CID officers in 2014 he was told that there was an allegation by a tax payer that tax element of 102.40 million had been removed from the system and that the details had been given by the Respondent. That later in 2019 the officer called him and told him he would be a witness in court but he was not feeling well and unable to attend.
14. CW1 testified that he never met the officer and no other engagement. No criminal charges were preferred against him on this case. That the Respondent wrote a letter alleging he was negligent on 29/11/18 but did not show how he was negligent save to state that he irregularly removed VAT obligation of City Works Printing Ltd. That he failed in the performance of his duties and he was not diligent and company was eligible for VAT.
15. CW 1 stated that the alleged irregular removal of the company on VAT was deleted in the termination letter. That he procedurally removed the VAT obligation and it was not irregular.
16. CW1 further stated that the letter inviting him for Disciplinary Committee hearing dated 6/12/18 had no information for the hearing. No reason for the Disciplinary Committee hearing. The details of the case was not provided but he attended as directed.
17. He stated that he discovered a vital document from a colleague which he did not have. The document was not served. He got a copy alleged to have been sent by email and he was told to sit and read the document which was about the size of a ream. approximately 200 pages. He had an hour so read it in a hurry. He realized these were statements by all employees accused of the same matter. He did not read all the 200 pages as it was not possible within the time given. At the Disciplinary Committee he was asked over things in the documents. That the disciplinary committee had officers from Human Resource Department, technical staff and investigating officer and were all about 8 to 10 persons.
18. CW 1 testified that as per human resource manual he was not aware of who should sit in the disciplinary committee. He was not satisfied. He was made to fill a conflict of interest form and the officer who took his statement was the one presenting his case and he thought he ought not to be in attendance. He knew he was a police officer and led investigation on the matter.



19. It was his evidence that the accusation initially per the letter he got was over fraudulent removal of Printing Works Ltd and 2<sup>nd</sup> was negligent performance of duty. The Respondent said he removed KShs.40 Million as a manager without following the procedure. The alleged Kshs.40 million was said to have been removed, related to an estimated assessment.
20. CW 1 testified that he filed the suit since Respondent did not respond to his appeal. His salary was stopped, statutory payments and loans could not be paid. According to him, his dismissal was not necessary. No warning letter was issued.
21. In cross examination, CW1 confirmed that he was an employee of the Respondent and worked in different roles. That his last rank was Assistant Manager with duties being to oversee officers under him especially tax payers he was monitoring. CW1 maintained that he knew of the City Printing Works Ltd when they made an application for PIN change to be moved from Nairobi North to Nairobi East. That he got the letter and not the person; he dealt with an agent. That there was no confirmation that the agent had been instructed by City Printing Works. This was not necessary as confirmation is not needed anywhere. CW 1 could not conclude if was a KRA licensed agent.
22. CW 1 confirmed that he processed the application for de-registration of the tax payer and at the time he did not de-register the company. He removed the VAT obligation on the company but at the time he did not know of the tax liability. This was not known to him.
23. That he did verification of the working of the company. He checked in the system and said there was no liability. That he did not have the physical file. It was not mandatory to have the principal file. The history of a tax payer is captured in the Respondent's system. That when Respondent computerized a physical file was not necessary unless required. That he sent his officers for a physical verification on the company premises. There was no report by the verification officer showing there were vatable goods. He confirmed that he was not aware of the happenings or history of the company at Nairobi North office.
24. CW 1 confirmed that it was the Nairobi North to inform him if there were any pending issues. He confirmed that he made an apology for his termination if he may have overlooked some issues.
25. CW 1 stated that he never got any notice to show cause save for letter on alleged negligence of duty 29/11/2018 and that he did respond and understood the allegations. He was invited to Disciplinary Committee Headquarters. The reasons for hearing invitation were not stated. He did not know what the hearing was about. The invitation was general and no particulars. Notice to show cause stated he irregularly removed a company from VAT obligation while on the invitation for hearing no reasons were given.
26. At the disciplinary committee he was able to address his issues and later he was issued termination letter. He lodged an appeal and no response on his appeal.
27. CW 1 confirmed the address referenced by the Respondent was his.
28. CW 1 confirmed that the Respondent had paid all his terminal dues and that he got his certificate of service.
29. In re-examination CW1 clarified that he did not check the authenticity of the Agent since Respondent had agents who were recognized. That there was no process of verification and that he did as necessary. Further that at the time of deregistration the Respondent had gone digital hence there was no need for physical file. The contents of the physical file were all in the system. He got all he needed from the



- system. He further clarified that when he was terminated in 2019 he did not leave with any document save for his ID which he surrendered upon clearance.
30. The Respondent's case was heard on 21<sup>st</sup> June, 2023. The first witness was Vincent Kirui who informed the Court that he was attached to the Internal Affairs, Investigations at the Respondent. He adopted his witness statement and documents as his evidence in chief. RW1 further stated that they investigated the alleged malpractices by the KRA staff and that the case before the Court was investigated by Mr. Nduma as lead investigator. He informed the Court that Mr. Nduma had since who has since retired and he took over the case from him. That the claimant was terminated because he was found culpable for negligence in performance of his duties.
  31. RW 1 stated that from investigations they established that the Claimant negligently removed VAT obligations of a Tax Payer, one City Printing Works Ltd. That the Claimant requested for change of PIN base of the Tax Payer. It was changed from North to East of Nairobi. The Claimant was based in the East. This was approved. RW 1 stated that later the Claimant approved removal of VAT for the Tax Payer. The removal was unprocedural. There was no application by the Tax Payer. That once application is made, compliance officers do due diligence to verify if the tax payer qualifies for removal. The claimant failed to do due diligence. He failed to conduct verification.
  32. RW 1 testified that the implication was that the Respondent lost revenue since the Tax Payer had been deregistered. The Respondent lost 41 million shillings. That they found the claimant negligent and they recommended disciplinary action. They also recommended recovery and updating of KRA system to avoid future deletion.
  33. On cross examination RW 1 confirmed that the investigations were conducted by Nduma and he took over after he retired. Nduma was the lead investigator. The report was signed by Nduma and Nyaga. The report lists the entire investigation team. The Claimant did not verify if the Tax Payer qualified for removal and that the Tax Payer applied for removal. Money was lost due to Claimant's negligence. That the loss was part of submissions in the report. Point No. 6.5 of the investigations report – page 23 and that there were letters not a financial report.
  34. RW1 confirmed that he was familiar with the disciplinary process of the respondent which was Part 7 of the Respondent's Rules and Regulations Governing Disciplinary Procedures.
  35. On re-examination RW1 confirmed that he did not sign the Report. That the whole team does not need to sign reports. Only the lead investigator signs. He confirmed there were demand notices and that they were sufficient to show loss.
  36. The second witness was the Manager Human Resource – Division who was currently in charge of information management. Previously she dealt with staff disciplinary cases. RW 2 relied on her statement and documents filed as her evidence in chief. She testified that the Claimant was terminated on account of negligence of duty. That when they received the investigation report, they went through it and were satisfied that there was cause to discipline the Claimant. He was issued with NTSC dated 29/11/2018. The Claimant responded and was thereafter invited for disciplinary hearing. The letter informed him of his rights. After the hearing, the panel found him culpable and recommended the termination of Claimant's service through the termination letter dated 15/2/2018. RW 2 further testified that they informed him of the reasons for termination. The letter further informed the claimant of his entitlement to terminal benefits stated in the letter. The benefits were provided upon clearance with the Respondent. The Claimant was further informed of his right of appeal. The outcome of the appeal was sent to Claimant's last known address but was returned unclaimed. RW 2 stated that the claim for unfair termination was unfounded because due process was followed.



37. In cross examination RW2 confirmed that invitation to disciplinary hearing was supposed to be signed by Senior Deputy Commissioner HR. She confirmed that the letter was signed under delegated authority.
38. On Part 7(5) COR, she stated that copies of necessary documents were to be provided to the accused employee. She confirmed that exception was the investigation report. That they issued NTSC and letter of invitation on account of the investigation report. RW 2 stated that she was part of the disciplinary committee. The claimant was shown the report at the hearing. The claimant cleared with KRA. The Respondent has so far, no claim against the Claimant. The decision on appeal was sent through last known address but was returned unclaimed.
39. On re-examination RW2 clarified that the Claimant was informed of his offence in the NTSC. The offence was also stated in investigation report. The investigation report was attached to the NTSC.

### **Claimants' Submissions**

40. The Claimant filed written submissions dated 24<sup>th</sup> October, 2023. On the issue of whether the disciplinary process was in conformity with the law he submitted that he was entitled to a fair hearing while relying on Article 25(c) of *the Constitution* and the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others. (2018) eKLR that there must be an opportunity of hearing given and the opportunity ought be reasonable.
41. On the issue of whether there was unfair termination the Claimant submitted there must be both procedural and substantive aspect of the disciplinary proceedings. He relied on section 43 on the reason for termination, section 45 on unfair termination where there is no valid and fair reason. He relied on the case of Duncan Mbathi Mulevi v Wanandegge Cooperative Savings & Credit Society Limited(2018) eKLR.
42. On the issue of procedural fairness the Claimant relied on Rules and Regulations Governing Discipline & Grievances (the Disciplinary Manual) which lays down the procedure to be followed by the Respondent. Counsel submitted that part 7 of the manual stipulates that for misconduct and gross misconduct the regional heads, heads or department and station managers forward the allegations, complaints to senior Deputy Commissioner Human Resource for necessary action.
43. That the Senior Commissioner Human Resource on receipt of report, allegations and complaint seeks approval from the Commissioner General and charge the employee with the offence committed with the penalty of the offence. That the employee would be required to defend himself within fourteen to twenty-one days upon receipt of the letter. That copies of necessary documents relating to the offence shall be provided to the employee upon request except the investigations report.
44. It was his submissions that the above provisions were not strictly adhered to. The Notice to show cause, the invitation letter and termination letter were all issued and signed by G.N Mwangi on behalf the Deputy Commissioner-Human Resource yet the manual reserved this role to the Deputy Commissioner and none other hence Respondent went against its own manual.
45. It was further the Claimant's submission that he was not supplied with documents informing his indictment within reasonable time to allow him properly mount a defense. The investigation report was also supplied on the day of hearing which was voluminous and the Claimant could not read it within the short time which was an hour given before his hearing kicked off.



46. He relied on the case of Sabina Mutua v Amedo Centre Kenya Limited (2017) eKLR to submit on failure to supply documents to employee before hearing as being a procedural flaw. One hour was not reasonable time by all means.
47. On the composition of the disciplinary hearing, the claimant faulted the attendance of the investigation officer who had already accused him hence conflict of interest. Further that the Chairman also forced him to sign a conflict of interest document which he had no chance to examine. That bulk of questions asked at the hearing related to the investigation report that was not made available to him before hearing.
48. On the issue of whether the termination was fair and lawful the Claimant submitted that there ought to have been both procedural and substantive fairness before termination. He relied on the cases of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited(2013) eKLR and Walter Ogal Anuro vs Teachers Service Commission(2013) eKLR. He also relied on section 41 of the Employment Act on the procedure and section 47(5) on the standard of proof.
49. It was his submissions that the employer has the onus of proving the misconduct leading to termination of employee's service. He relied on the case of Gibson D. Mwanjala v Kenya Revenue Authority ELRC case No. 74 of 2015.
50. On the issue of whether the Claimant was entitled to reliefs sought the Claimant relied on section 49 of the Employment Act on remedies for wrongful termination. He submitted that he was entitled to 12 months compensation taking in to account considerations under section 49(4) and that he had worked with the Respondent for long and he was unfairly terminated. He relied on the case of Paul Muli Katuta V Nakumatt Holdings Limited (2018) eKLR. The Claimant also sought for compensation from the time of his termination to the time he would have retired at 65 years as well as notice pay.
51. On the issue of who bears the costs the Claimant submitted that costs follow event and prayed that his claim be allowed as prayed.

### **Respondent's Submissions**

52. On the other hand the Respondent filed its submissions dated 12<sup>th</sup> October, 2023 and on the issue of whether the Claimant's actions amounted to neglect of duty it submitted that for the tax payer's VAT obligation to be removed from their KRA PIN the officer of the Respondent such as the Claimant herein must have final verification form (VAT12) , Audit Report confirming the tax payer stopped filing VAT and tax payer's physical or online file/profile to confirm there are no tax arrears.
53. The Respondent submitted that the Claimant only used a compliance certificate provided by the tax payer in absence of the requisite documents resulting into loss of taxes.
54. The Respondent submitted that this was an omission which was provided for under section 44 of the Employment Act and amounted to gross misconduct as he failed to exercise care, diligence, skill and competence expected of an officer of his rank and experience. The Respondent submitted that the Claimant admitted that he omitted to carry out his duty as required. It relied on the case of Kenya Revenue Authority v Reuvel Waithaa Gitahi & 2 others(2019) eKLR on the issue of the employer proving the reasons he genuinely believed to exist before termination of employees service.
55. On the issue of whether the disciplinary proceedings was proper the Respondent relied on section 41 of the Employment Act. It submitted that all the letters to the Claimant outlined the particulars of negligence of duty. That the said letters were signed by the Deputy Commissioner Human Resource



- under delegated authority. That the letters were served upon the Claimant who had opportunity to respond and that the signing did not affect the content of the letter which was in English language.
56. The Respondent submitted that the Claimant responded vide his letter dated 4<sup>th</sup> December, 2018 over the said allegations of negligence. That the employer was obligated to hear and consider but not necessarily accept or adopt representations made by the employee before terminating their employment. The respondent did consider both written and oral representations made by the Claimant before terminating him.
57. It was the Respondent's submissions that the Claimant exercised his right of appeal in his letter dated 1<sup>st</sup> March, 2019 which the letter of appeal was considered and response communicated in a letter dated 9<sup>th</sup> April, 2019 sent to his last known address which the Claimant admitted was his. The Letter was returned to the Respondent as unclaimed.
58. The Respondent relied on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR and submitted that the Claimant was terminated for a valid reason of neglect of duty. He was issued with a Notice to show cause and a notice to appear for disciplinary hearing. The Respondent therefore submitted that it complied with section 41 of the *Employment Act* and that the termination was procedurally fair.
59. On the issue of whether the termination was unfair the Respondent relied on section 45 of the *Employment Act* and case of *Five Forty Aviation Limited v Erwan Lanoe* (2019) eKLR among others on what amounts to unfair termination. The respondent did not contravene the Claimant's rights or breach the contract between the parties. On the contrary, it the Claimant who breached the contract.
60. On the Counterclaim the Respondent submitted that the counterclaim has since been settled.

### **Determination and Disposition**

61. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case and the authorities relied on by Counsels in the matter.
62. I have The Court comes up with two main issues;
- a. Whether the termination of claimant's employment was unfair and unlawful and;
  - b. Whether the Claimant was entitled to the reliefs sought.

### **Whether the Claimant's termination of employment was unfair and unlawful**

63. In this instant case, the Respondent alleged that they terminated the Claimant on grounds neglect of duty. The was accused of removing VAT obligation for a tax payer namely City Printing Works (K) Limited leading to loss of revenue by the respondent. The Respondent claimed that the Claimant did not conduct due diligence that is to say, asking to see final Verification Form (VAT 12), Audit Report confirming the tax payer had stopped filing VAT and the tax payer's physical or online file to confirm there are no tax arrears before removing the said obligation. The tax payer, according to the respondent was still liable to pay the VAT.
64. Whereas the Claimant has maintained that he was based at East of Nairobi while the tax payer had changed from North of Nairobi to East of Nairobi. That the Physical file was at North of Nairobi hence he could not tell if the tax payer had any arrears.



65. It was not in dispute that the Claimant relied on a tax compliance certificate submitted by the tax payer from North of Nairobi. The Claimant ought to have done background check on the tax payer to confirm the authenticity of the clearance certificate from the North of Nairobi base.
66. It is also interesting that the Claimant facilitated the change of the tax payer from North of Nairobi to East of Nairobi. He acknowledged during hearing that the tax payer was situated at North of Nairobi. That he dealt with tax payer as of North of Nairobi. The Claimant therefore ought to have verified the tax payer's information before removing the tax payer's VAT obligation.
67. The Court also wonders why the tax payer had to change its tax base to East of Nairobi where the Claimant was based before removing its VAT obligation. This strikes me as a well calculated scheme by the Claimant in order to claim that he did not know the happenings in the North of Nairobi station. The respondent was therefore right in laying a charge of negligence against the claimant.
68. Under Section 44 (4) (c) of the *Employment Act*, 2007 neglect of duty is one of the grounds listed as amounting to gross misconduct and can lead to summary dismissal. The Claimant admitted during the disciplinary hearing that he may have acted with negligence and begged for forgiveness. It was therefore clear that the reason for the termination was a valid and fair one as provided for under section 43 of the *Employment Act*.
69. In the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:
- “ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
70. In this case the Respondent communicated the reasons for the intended termination on the letter of 29<sup>th</sup> November, 2018. The Claimant responded to the letter on 4<sup>th</sup> December, 2018. He was invited for the Disciplinary hearing vide a letter of 6<sup>th</sup> December, 2018 where the reasons remained the same. That is, neglect of duty.
71. In conclusion the Court finds that the termination of Claimant's employment was substantially justified since there was in existence valid and fair reason for dismissal.
72. Concerning procedural fairness courts have repeatedly emphasized on both substantial and procedural fairness in a number of cases including in the case of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive test for termination but also procedural test.
73. Further Section 41. Provides for Notification and hearing before termination on grounds of misconduct which provides that the employee to be explained the reason for termination in language he understands and consider the representations by such an employee who should have an employee of his choice.
74. The Respondent gave the Claimant a show cause letter dated 29<sup>th</sup> November, 2019. He made his representations by responding to this letter by his letter of 4<sup>th</sup> December, 2018. The Claimant was invited for disciplinary hearing vide a letter dated 6<sup>th</sup> December, 2018. The letter was self-explanatory



- on the charges against him and what was required of him. The Claimant confirmed during hearing that he understood the letter which was written in English.
75. The Claimant admitted attending the disciplinary hearing on 14<sup>th</sup> December 2018. He only faults the composition of the disciplinary meeting that the investigating officer ought not to have attended yet he was the part of the Investigation team present to produce the investigation report.
76. The Claimant also raised the issue of investigation report being given to him one hour before the hearing hence could not read all of it as it was voluminous. Further that most questions he was asked at the hearing related to the investigation report. The Claimant admitted during hearing that clause 7.5 of the Rules and regulations governing discipline and grievances manual provided for documents to be supplied to him except the investigation report.
77. It is clear from the reading of the above clause that the investigation report was not a must to be supplied to him. On the issue of Deputy Commissioner – Human Resource not signing the letters it came out clearly that the same were signed on his behalf. I have looked at the said letters and I confirm that they were signed for the Deputy Commissioner-Human Resource.
78. The Respondent maintained throughout that the reason for termination was negligence of duties by the Claimant. Further, the Respondent in its termination letter of 15<sup>th</sup> February,2019 stated that they considered the Claimant’s written and oral evidence before termination.
79. The Claimant was given leeway of appeal after termination which he did. The appeal was considered by the Respondent and the outcome of the Appeal sent to the Claimant’s last known postal address but returned as unclaimed mail. The Claimant admitted the said postal address to be his hence the rule of postal postage applied herein. In this respect, the Court is of the view that the Claimant’s termination was procedurally fair and lawful hence there was no unfair termination.
80. The Court in the ultimate therefore, finds and holds that the claim herein is without merit and hereby dismisses the same with costs.
81. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY FEBRUARY, 2024**

**DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024**

**Abuodha Nelson Jorum**

**Judge**

