



**Kenya National Union of Private School Teachers (Suing on behalf of Booker Otieno) v Shree Oshwal Community of Nakuru t/a Shah Lalji Nangpar Academy (Cause 87 of 2018) [2024] KEELRC 109 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 109 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE 87 OF 2018**  
**DN NDERITU, J**  
**FEBRUARY 1, 2024**

**BETWEEN**

**KENYA NATIONAL UNION OF PRIVATE SCHOOL TEACHERS (SUING ON BEHALF OF BOOKER OTIENO) ..... CLAIMANT**

**AND**

**SHREE OSHWAL COMMUNITY OF NAKURU T/A SHAH LALJI NANGPAR ACADEMY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant commenced this cause for and on behalf of the grievant by way of a memorandum of claim filed in court on 3<sup>rd</sup> April, 2018 through Nancy W. Njoroge, Kairu & Co Advocates. As expected, the memorandum of claim is accompanied with a verifying affidavit sworn by the grievant (Booker Otieno) on even date, grievant's written statement, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following –
  1. One month gross wages in lieu of Notice - Kshs.43,600.00
  2. Gratuity at the rate of 50% - Kshs.280,800.00
  3. Leave for 19 years 6 months - Kshs.482,089.65
  4. Payment of the withheld illegal Deduction - Kshs.3,150.00
  5. Compensation for unfair Termination - Kshs.384,800.00Totals - Kshs.1,156,289.65



6. Certificate of Service based on Section 51 of the *Employment Act*.
  7. Costs of the suit to be borne by the Respondent.
3. On 25<sup>th</sup> April, 2018 the respondent appointed Sheth & Wathigo, Advocates to act for it and filed a response to the claim on 17<sup>th</sup> May, 2018, praying that the claimant's cause be dismissed with costs for want of merits.
  4. The respondent filed a list of documents and a bundle of copies of the listed documents on 5<sup>th</sup> July, 2019, and a further list and bundle on 2<sup>nd</sup> March, 2023. A witness statement by Andrew K. Thuku (RW1) was filed on 26<sup>th</sup> August, 2019.
  5. The claimant filed a reply to the response to the claim on 24<sup>th</sup> June, 2021 reiterating the contents of the memorandum of claim.
  6. On 18<sup>th</sup> July, 2022 this cause was dismissed for non-attendance on the part of the claimant but the same was reinstated by consent on 27<sup>th</sup> September, 2022 following an application by the claimant.
  7. The cause came up for hearing in open court on 1<sup>st</sup> February, 2023 when the grievant testified and closed his case. The defence was heard on 13<sup>th</sup> March, 2023 when RW1 testified and the defence was closed.
  8. Counsel for both parties addressed the court through their respective written submissions. Mr. Kairu for the claimant filed his submissions on 30<sup>th</sup> March, 2023, while Miss Oteyo for the respondent filed on 2<sup>nd</sup> May, 2023.

## II. The Claimant's Case

9. The claimant's case is expressed in the statement of claim, the oral and documentary evidence by the grievant (CW1), and the written submissions by counsel. The same is summed up as hereunder.
10. In the statement of claim it is pleaded that the claimant is a registered trade union whereof the grievant is a member while the respondent is the owner of the academy wherein the grievant was a teacher. It is further alleged that the claimant has signed a recognition agreement with the respondent.
11. It is pleaded that the grievant was employed as a regular full-time teacher on 9<sup>th</sup> December, 1997 at an agreed starting monthly salary of Kshs.14,500/= which was reviewed from time to time to reach Kshs.43,600/= as at the time of his termination on 30<sup>th</sup> May, 2016.
12. It is stated that on or about 17<sup>th</sup> May, 2016 the grievant was served with a show-cause letter of even date on alleged charges of refusing and or failing to obey lawful orders and he responded thereto on the same date. On 20<sup>th</sup> May, 2016 the grievant was served with a letter of suspension and a letter of termination on 3<sup>rd</sup> June, 2016.
13. In his testimony in court the grievant produced all the documents filed in his cause as exhibits 1 to 20. He alleged that he never took annual leave during his entire period of engagement with the respondent. He stated that as per the policy in force at the material time he is entitled to gratuity at 50% of the monthly salary for each year completed. He stated that a sum of Kshs.3,150/= was unlawfully deducted from his salary as per the pay-slip for November, 2011. He testified that all the allegations against him in the show-cause letter were false and unfounded as stated in his response thereto dated 17<sup>th</sup> May, 2016. This response was not produced as an exhibit by either party in court.



14. He stated that although he was invited to and attended a disciplinary hearing, the termination as communicated in the letter of 6<sup>th</sup> June, 2016 was unfair and unlawful. He stated that he was engaged as a swimming coach and that after what he considered to be unfair and unlawful termination his union, the claimant, referred the matter to the Swimming Federation of Kenya which referred the matter to the cabinet secretary for culture and sports for reconciliation but the respondent disagreed with the outcome thereof rendering his filing of this cause in court absolutely necessary.
15. He stated that all the allegations against him were false and unfounded as at no time did he abandon the children/students placed under his care and that no parent made any such allegations against him.
16. In cross-examination by counsel for the respondent, the grievant stated that he was employed on full-time basis as a sports teacher instructing pupils in physical education (PE), swimming, and other sports. He admitted that he took holidays when the school closed in April, August, and December for a total of about eight weeks each year and he admitted that that constituted his annual leave. He stated that he did not apply for annual leave but that as a sports teacher he worked even on holidays coaching students for various competitions.
17. He stated that at the time of the termination his monthly salary was Kshs.43,600/=. He was terminated with effect from 30<sup>th</sup> May, 2016 and that his last day at work was 30<sup>th</sup> April, 2016.
18. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in its favour as prayed in the memorandum of claim. The submissions by its counsel shall be considered in the succeeding parts of this judgment.

### **III. The Respondent's Case**

19. The respondent's case is contained in the reply to the memorandum of claim, the oral and documentary evidence adduced through RW1, the manager, and the written submissions by its Counsel, as summarized hereunder.
20. The respondent pleaded that while the grievant was its employee as alleged, it did not terminate him unfairly or unlawfully as claimed but rather he was fairly and lawfully terminated due to failure on his part to follow lawful instructions and to perform his duties as required.
21. It is stated that the grievant was subjected to due process before, during, and after the termination, including and not limited to issuance of show-cause letter, disciplinary hearing on 26<sup>th</sup> May, 2016 wherein he was given a hearing, and issuance of the letter of termination. It is alleged that the grievant, prior to the disciplinary action and termination, had a wanting disciplinary record dotted with warnings.
22. It is pleaded that the grievant took all his annual leaves and that his terminal dues were tabulated and paid upon termination and that he was issued with a certificate of service.
23. It is denied that the respondent was issued with a demand notice before action and it is vehemently denied that the grievant is entitled to any of the reliefs sought or at all and the respondent prays that the cause be dismissed with costs.
24. In his testimony in court RW1, the school manager, relied on his filed statement. He stated that the gratuity scheme upon which the grievant has based his claim ended in 2000 and that a pension scheme began in 2001 and as such the grievant is not entitled to any benefits under the gratuity scheme as claimed.



25. He stated that in any given year the grievant took his annual leave in the three months of school holidays, usually in April, August, and December. He confirmed that while the grievant was a sports teacher, mainly coaching the students in swimming, he was for all intents and purposes a teacher like any other with all rights and privileges appurtenant thereto. He stated that like all the other teachers the grievant went on leave when the school closed and he exhibited leave forms purportedly filled and submitted by the grievant. He stated that the grievant was even allowed a paternity leave in accordance with the law and good practice in human resources management.
26. RW1 stated that the grievant was terminated for abandoning children and that the termination was fairly and lawfully executed. He stated that the grievant was issued with a show-cause letter, invited for a hearing whereby he allegedly came along with a union representative and a co-worker.
27. He stated that upon termination which took effect on 31<sup>st</sup> May, 2016 the grievant was paid one month's salary in lieu of notice and he exhibited payment documents in that regard wherein the grievant was allegedly paid Kshs.47,658.41 through his bank account at UNITAS purportedly in settlement of his final dues. The stated final dues were paid in June, 2016 as the grievant was terminated in May, 2016 and did not work or earn a salary for June, 2016.
28. While RW1 alleged that the gratuity scheme ended in 2006 or thereabouts and that a pension scheme allegedly started, he admitted that he had no records or documents in support of that position. However, he stated that gratuity was paid at 15 days for each year worked. He stated that the grievant worked for the respondent between December, 1997 and May, 2016 and fell in the category of those between 15 – 20 years. He alleged that the grievant was paid gratuity but there was a genuine and honest mistake in the calculation thereof resulting in underpayment of Kshs.14,121.51. He stated that as at the time of termination the grievant's gross pay per month was Kshs.43,600/=.
29. He stated that the grievant took all his annual leaves and there is no way that the grievant would have worked for 365 days a year as that is completely illegal and, in any event, it was not practical as students always went home for the three holiday breaks alluded to above. He was categorical that at no time was the grievant allocated any duties during holidays.
30. Further, he stated that in November, 2011 the grievant was late and also absent from work and hence Kshs.3,150/= was deducted from his salary and the same was not an illegal deduction as claimed.
31. RW1 further stated that while on a swimming trip to Nairobi the grievant abandoned students and that is what led to the disciplinary action and termination. He stated that the respondent as the employer had no business reporting the grievant to the Swimming Federation of Kenya as the grievant was an employee like any other and had not been seconded to the school by the said federation. He produced all the respondent's filed documents as exhibits 1 to 19.
32. In cross-examination, RW1 admitted that there is no evidence that the respondent paid the terminal dues to the grievant and confirmed that a lump sum payable to several workers was deposited with UNITAS which was the grievant's pay-point. The cheque and the list of the intended payees, including the grievant, were produced as exhibits in the bundle of 2<sup>nd</sup> March, 2023.
33. He admitted that there is no evidence from any parent or a child/student of the alleged abandonment that resulted in the termination of the grievant. It is admitted that the junior school headteacher, Miss Jayne Gathuri, who allegedly reported the purported abandonment of the students was neither called as a witness during the disciplinary hearing nor during the hearing in court. Nonetheless, RW1 insisted that the respondent relied on the information from the said headteacher in instituting the disciplinary action against the grievant culminating in his termination.



34. RW1 admitted that under the gratuity scheme the grievant was entitled to 50% of his monthly salary for each of the 19 years that he served the respondent. In regard to the deduction of Kshs.3,150/= from the monthly salary of the grievant he admitted that there was no muster roll to demonstrate that indeed the grievant was either absent from work or late in reporting thereat. He admitted that all the alleged warning letters had no supporting evidence that they were indeed served upon the grievant. He also admitted that there were no records of leave taken by the grievant for the period 2008 to 2016 but insisted that like all teachers the grievant took his annual leave during the school holidays which aggregated to more than six weeks of rest. He stated that the respondent did not agree with the recommendations of the conciliator and as such it did not act on the same.
35. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

#### IV. Submissions By Counsel

36. On the one hand, the claimant's counsel identified two major issues for determination – Was the termination of the grievant by the respondent lawful? And, Is the grievant entitled to the reliefs sought?
37. It is submitted that the evidence on record is that the respondent relied on alleged report from a former headteacher of the respondent to the effect that the grievant had abandoned students during a swimming gala or championship trip in Nairobi. It is submitted that the alleged report by the former headteacher, Miss Jayne Gathuri, that was produced in court is unsigned and undated. Further, it is submitted that the said headteacher did not testify in court or during the disciplinary hearing. It is also submitted that no student or parent testified in support of the abandonment of students allegations against the grievant during the disciplinary hearing, or the hearing in court, and RW1 confirmed as much in his testimony in court.
38. It is submitted that a conciliator appointed after the matter was referred to the ministry of labour found in favour of the grievant but the respondents failed and or refused to cooperate and comply.
39. In furtherance of alleged breach of the rights of the grievant, it is submitted that the respondents invited and conducted the disciplinary hearing in the premises of Federation of Kenya Employers (FKE) with the sole intention of intimidating the grievant. It is submitted that the termination was unfair and unlawful both in substance and procedure and in violation of Sections 41 and 45 of the *Employment Act* (the Act). Counsel has cited *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR and *Florence Wambui Gitau v Eclipse International* (2019) eKLR in support of that position.
40. The submission on the reliefs by counsel shall be considered in a succeeding part of this judgment that is dedicated to reliefs.
41. On the other hand, counsel for the respondent identified the same issues for determination as counsel for the grievant – Was the grievant's termination unfair (and unlawful)? And, Is the grievant deserving of the reliefs sought?
42. It is submitted that on the facts and evidence availed in court the grievant was fairly and lawfully terminated based on substantive and procedural fairness. It is submitted that the respondents acted on a report by Miss Jayne Gathuri, a former headteacher, which was based on a complaint from an agitated parent who claimed that students had been abandoned. It is stated that the venue of the disciplinary hearing, FKE office, was not chosen to intimidate the grievant and in any event, the grievant ought to have objected to the venue before the hearing commenced.



43. It is submitted that the grievant was afforded due process both in substance and procedure. It is submitted that the grievant was invited to the hearing after a show-cause letter was served upon him and responded to; he attended the hearing with a co-worker and a union representative; and that he was accorded an opportunity to defend himself in accordance with the law. Counsel has cited *Kenya Power & Lighting Company Limited v Aggrey Lokorito Wasike* (2017) in support of his submission in this regard.
44. The submission on reliefs shall be considered in a succeeding part of this judgment alongside the submission on the same by counsel for the claimant.

## V. Issues for Determination

45. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The court identifies the following three issues for determination –
- a. Was the grievant unfairly and unlawfully terminated by the respondent?
  - b. If (a) above is in the affirmative is the grievant entitled to the reliefs prayed for?
  - c. What orders are appropriate on costs?

## VI. Termination

46. The fact of the employment of the grievant by the respondent and the terms and conditions thereof are not contested. At all material times the grievant was an employee of the respondent as a teacher majorly in physical education and in coaching of various sports notably swimming. He was engaged as such teacher on 9<sup>th</sup> December, 1997 and remained in the employment until 30<sup>th</sup> May, 2016 when he was terminated in the circumstances that have been analyzed in the foregoing paragraphs of this judgment. His last gross monthly salary was Kshs.43,600/=.
47. It is not in dispute that the grievant was terminated on charges and allegations that he had abandoned students while on a trip for swimming competition in Nairobi. The allegations/charges against the grievant are based on a letter/report by Miss Jayne Gathuri, a former junior school headteacher of the respondent, and the same is dated 14<sup>th</sup> May, 2016. For ease of reference, the said report is in the following wording –

14<sup>th</sup> May, 2016

Report On Mr. Booker

Mr. Booker is one of the sports teachers in Junior school. He is one teacher who does not like following instructions but instead does what he wants to do. The instructions by the management are that if there is a sports trip, the two sports teachers should accompany the students.

This however, Mr. Booker does not follow.

On Thursday, 5<sup>th</sup> May, 2016 the Junior school students went to Potter House School, Nairobi for a soccer match. Mr. Booker did not go with the other sports teacher, Ms. Margaret but instead went with Mr. Francis citing that it was an all boys' team. I informed him that in future only the sports teachers will be allowed to accompany the student for sporting activities.



Preparations for the swimming championships held at Makini school were done and once again the same problem of Mr. Booker not wanting to have Ms. Margaret accompany the students arose.

This time I instructed that Ms. Margaret must accompany the students but Mr. Booker threatened to cancel the school's participation. I was firm that only the two sports teachers would go.

Come Friday 13<sup>th</sup> May, 2016 they left for Nairobi some minutes before ten O'clock.

On Saturday, 14<sup>th</sup> May 2016, I received a call from a very upset parent who said that her daughter, Quincy together with others whom she did not mention had missed out on their events on Friday, 13<sup>th</sup> May 2016. I tried to call Mr. Booker but he did not pick.

I called Ms. Margaret who picked and she confirmed that some students had missed their event. I asked her of the whereabouts of Mr. Booker and she informed me that he was busy since he was an official.

The driver is the one who took care of the rest of the students while Ms. Margaret marshalled the participants. This was not right since when Mr. Booker left with the students, he was supposed to go and attend to them and not do other duties.

Report compiled by

Miss Jayne Gathuri

Junior school headteacher.

48. Following the above report, the grievant was issued with a show-cause letter dated 17<sup>th</sup> May, 2016 which stated as follows –

17<sup>th</sup> May, 2016

Mr. Booker Otieno

Box 55 – 20100

Nakuru

Dear Mr. Booker Otieno

RE: Show Cause Letter

Shah Lalji Nangpar Academy Junior School Swimming Team was scheduled to travel to Nairobi for a National Junior Swimming Championship that was to take place between 13<sup>th</sup> and 15<sup>th</sup> May 2016. You have organized the same and obtained the necessary approval for participation. You were instructed by the Headteacher that you were to be accompanied by the other sports teacher. You vehemently refused to take these instructions and you even threatened to boycott the trip and even cancelled the school participation on the same. You refused to heed to instructions from the Manager as well on the same. Your reluctance to follow instructions led to a delayed departure to Nairobi the next morning. On arrival in Nairobi you abandoned our students and this confusion led to some of our students missing out on some events which did not go down well with our parents. This behaviour is not acceptable. You are therefore required to show cause why disciplinary action including dismissal should not be taken against you.



Your written response should reach the undersigned on or before Thursday 19<sup>th</sup> May 2016 at 12:00 noon.

Yours faithfully

Daniel O. Arasa

Manager

Cc: School Management Committee

General Secretary – KNUPST

49. Both sides pleaded and alluded that the grievant responded to the show-cause letter but neither side availed the said reponse in court.
50. The grievant was suspended from duty vide a letter dated 20<sup>th</sup> May, 2016 through which he was also invited to a disciplinary hearing on 26<sup>th</sup> May, 2016 in the offices of FKE, Nakuru. He was informed of his right to come along with a co-worker but he was not informed that he had a right to bring along his union representative.
51. The court has studied the minutes of the disciplinary meeting held on 26<sup>th</sup> August, 2016 which were produced as an exhibit by the respondent and there is no evidence that the grievant brought along with him any witness, a co-worker, or a union representative. There is no minute or comment on why the grievant did not bring along the above persons or whether he was given an opportunity to do so. The minutes indicate that the meeting took place in the offices of FKE and no explanation or reason was given during the hearing as to why that was the case. There is also no evidence that the grievant was given a chance to cross-examine or put across questions to those who testified in the hearing. In fact, Miss Jayne Gathuri who prepared and presented the accusatory report took the minutes of the meeting and so the grievant never had a chance of questioning her. No parent or witness was called or presented to confirm that indeed any of the students had been abandoned during the trip to Nairobi or at any other time.
52. Subsequently, the grievant was terminated vide a letter dated 30<sup>th</sup> May, 2016, with effect from that date, which letter was worded as follows –

30<sup>th</sup> May, 2016

Mr. Booker Otieno

Box 55

Nakuru

RE: Termination Of Employment

Reference is made to the disciplinary hearing involving you that took place on Thursday 26<sup>th</sup> may 2016. We regret to inform you that the management is not convinced with your reasons given following your earlier resistance to instructions from your superiors and your subsequent negligence to your duties during the National Junior Swimming Championship in Nairobi that took place between 13<sup>th</sup> and 15<sup>th</sup> May 2016.

Consequently, your services are terminated with effect from 30 May 2016. Accounts has been instructed to compute your final dues if any which should be settled as soon as possible. You are therefore requested to hand over any school property that could be in your possession to the head teacher Junior school or her appointee.



Wishing you the best of luck in your future endeavours

Yours faithfully

School Convenor

Cc Cc: General Secretary – KNUPST

School Management Committee

53. From the foregoing letter of termination, the grievant was terminated on the grounds that “We regret to inform you that the management is not convinced with the reasons given following your earlier resistance to instructions from your superiors and your subsequent negligence to your duties during the National Swimming Championship in Nairobi that took place between 13<sup>th</sup> and 15<sup>th</sup> May 2016” (emphasis added).
54. Several warning letters were exhibited by the respondent alleging misconduct on the part of the grievant dating as far back as 2006 but no evidence was availed to confirm that indeed the said letters were served upon the grievant and or that any further action was taken.
55. The jurisprudence on what constitutes (or does not) fair and lawful termination or dismissal is now somehow settled. It has two critical components – substantive and procedural fairness. Numerous decisions have been rendered in firming the two aspects of fair hearing – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
56. Sections 35, 40 (in case of redundancy), 41, 43, 44, 45, 46, & 47 of the Act, Article 47 of the *Constitution*, and various provisions in the *Fair Administrative Action Act* provide for various aspects of due process and natural justice.
57. Obviously, employers should be free to manage their workforce and the court should not interfere with that function unless and until it is demonstrated that there is a violation, breach, or threat to the rights enshrined in the above provisions of the law as read alongside Article 41 of the *Constitution*.
58. It is against the foregoing background that the facts and evidence in this cause has to be tested. In terms of substance, it is the respondent’s case that the grievant failed to adhere to directions from his superiors. The main charge/allegation is that the grievant abandoned students on a trip to Nairobi. No evidence was submitted either by Miss Jayne Gathuri, who prepared the report, the allegedly agitated parent, or the allegedly abandoned student.
59. Section 43(2) of the *Act* is clear that “The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.” (emphasis added). Was the report from the said junior school headteacher adequate ground or reason for the respondent to genuinely believe that the grievant was guilty of misconduct?
60. The said headteacher was not in attendance during the material trip and relied on an alleged verbal report from an allegedly agitated parent. The alleged parent neither recorded a statement nor attended the disciplinary hearing. There is no evidence that the concerned student was ever interviewed, even in camera, by the school’s administration in order to confirm that the concerned student or indeed any other student was abandoned during the trip.
61. The respondent in the letter of suspension stated that it was not satisfied with the explanation offered by the grievant in the response to the show-cause or the evidence by the grievant during the disciplinary



- hearing. The respondent, as the employer, is the custodian of employment records yet it did not avail the said response to the show-cause in court for examination and evaluation by the court.
62. The court has combed through the minutes of the disciplinary hearing and noted that one Margaret who travelled with the grievant on the said trip did not offer any evidence to the effect that the grievant abandoned the students at any point. The question then becomes – On what basis did the respondent take the disciplinary action against the grievant culminating in the termination?
  63. The view and holding of the court is that the respondent had no genuine and reasonable grounds upon which to found the disciplinary action that culminated in the termination of the grievant. The respondent ought to have carried out investigation and gathered adequate evidence on what exactly the grievant did as to amount to neglect of duty, careless, or inadequate performance thereof or disregard of lawful instructions.
  64. While it is not expected that an employer has to prove misconduct beyond reasonable doubt, it is expected that the grounds upon which the disciplinary action and the termination or dismissal is based should be reasonable and genuine and based on due diligence. The respondent did not meet that threshold in this cause. What appears to be the basis for the disciplinary action and the termination is that the grievant allegedly had a history of misconduct or indiscipline and it seems the respondent had had enough of it. It is therefore no surprise that the respondent cited previous instances of alleged misconduct in the letter of termination. In my considered view the respondent acted with haste, fiat, caprice, and bad faith which this court cannot countenance.
  65. In terms of procedure, there is no explanation whatsoever why the disciplinary hearing was held in the offices of FKE which is the umbrella body for employers, including the respondent. One may as well ask, why was the hearing not held in the offices of the claimant, the union of the grievant? It is commonsense that disciplinary hearing should either be held at the place of work or, in any other case, and for good reasons, in such neutral ground as to avoid a situation whereby there is perception of bias, intimidation, ill will, unfairness, or injustice to the employee who is always in a disadvantaged financial and authoritative standing compared to the employer.
  66. It is the finding and holding of the court that the procedure adopted by the respondent did not substantially adhere to rules of natural justice as expressed in the afore-cited decisions and constitutional and statutory provisions for the following reasons. The grievant was not informed of his right to come along with a union representative of his choice; he was not allowed to question those who had evidence against him; and the hearing was conducted in the offices of the respondent's organization and no explanation has been offered for that obvious breach on the venue of disciplinary hearing. Clearly and evidently, the evidence availed did not prove, prima facie, that the grievant was guilty of the alleged misconduct.
  67. The court agrees with counsel for the grievant that he was denied both substantive and procedural fairness rendering the entire process that culminated in his termination unfair and unlawful. It is so declared.

## **VII. Reliefs**

68. Having found and held as above, that the termination of the grievant was unfair and unlawful both in substance and procedure, the court shall now consider each of the reliefs sought by the claimant as hereunder. The reliefs sought are also set out in the introductory part of this judgment.
69. Prayer (i) is for one month's gross pay in lieu of notice in the sum of Kshs.43,600/=. However, the respondent alleged that in the month of June, 2016 a sum of Kshs.47,658/= was deposited in the



- account of the grievant at UNAITAS. The grievant denied receiving this amount and the court notes that there is no evidence that indeed the alleged amount was actually paid into his account. This should have been done by way of a bank statement or a confirmation of the payment from the bank. In the circumstances, the grievant is awarded the sum of Kshs.43,600/= under this head.
70. Prayer (ii) is for gratuity at the rate of 50% of the monthly salary for the 19 years served. RW1 alleged that the gratuity scheme was not applicable to the grievant as the same had allegedly been replaced with a pension scheme. However, RW1 admitted in court that he had no evidence of that change. No evidence was availed to confirm that indeed the alleged change had taken place and that the employees had been informed or consulted about the alleged change. The court agrees with counsel for the grievant that he who alleged must prove – See Sections 107, 108, & 109 of the *Evidence Act*.
71. If at all the respondent changed the terms on gratuity, no evidence has been availed to that effect, the change amounted to unilateral change of the terms and conditions of service which is unfair and unlawful. The gratuity scheme which came into force in September, 2000 as contained in the document produced as evidence confirms that the grievant is in the category of those workers who served for a period of 15 to 20 years and the same is payable at 50%. Since the termination has been held to have been unfair and unlawful, there is no reason for denying the grievant this benefit. Accordingly, the grievant is awarded as pleaded in the sum of Kshs.280,800/=.
72. Contrary to the submission by counsel for the respondent that the grievant was in a pension scheme and hence cannot enjoy gratuity twice, there is no evidence that indeed the grievant was paid under the said scheme and in any event, nothing would be unlawful for an employee to enjoy such benefits based on the agreed terms and conditions of employment. It is important to remember that the Act provides for the minimum conditions and terms of employment and as such nothing above the minimum is unlawful.
73. This cause is distinguishable from those cited by counsel for the respondent, *Lilian Mwendu Nzabu v Trustees and Office Bearers of the Diocese of the Anglican Church of Kenya* (2018) eKLR and *Timothy Nderi v Safaricom Limited* (2020), eKLR in that the gratuity is provided for in the contract for the grievant and there is no proof that the respondent indeed put in place an alternative pension scheme after consulting and informing the employees including the grievant. There is no evidence that the gratuity scheme was abolished, suspended, or substituted in 2006 or at any other time.
74. Prayer (iii) is for leave pay. Only school teachers get more than 30 days in annual leave. When students go on holiday in April, August, and December, or any other corresponding times, teachers also proceed on leave. There is no evidence that the grievant indeed worked over holidays. It is unfair and oppressive to challenge the respondent to produce records of grievant's attendance during the holidays as no such records logically exist as there should be none. It is the grievant who alleged that he worked for 365 days each year and it was upon him to prove that indeed he did so. He should have done so by calling evidence in support of that position but no such evidence was adduced. Either way, this claim should be dismissed as it covers a period way beyond the limitation set in Section 90 of the *Act*. Only claims within three years preceding the cause of action may be considered. Therefore, for all the foregoing reasons this claim is denied in its entirety.
75. Prayer (iv) is for release of Kshs.3,150/= unlawfully withheld by the respondent in the month of November, 2011. Without splitting hairs, this claim is time barred as the grievant was terminated on 30<sup>th</sup> May, 2016 without having acted on the said deduction for a period of over five years.
76. Prayer (v) is for compensation for unfair termination. The grievant is asking for eight months' gross pay as had been recommended by the conciliator.



77. The court finds and holds that considering the lengthy period of time that the grievant served the respondent, over 18years, and considering the relevant factors in Section 49(4) of the Act, an amount equivalent to eight months' gross pay as pleaded and as recommended by the conciliator is reasonable and fair compensation under this head. The amount of Kshs.348,800/= is awarded as pleaded. The said award is neither excessive, unreasonable, or unfair considering the entire circumstances of this cause.
78. In regard to certificate of service the respondent is directed to issue and deliver the same to the grievant, through his counsel, within 30 days of this judgment. It has not been explained why the one displayed and produced as an exhibit was not delivered to the grievant.

### **VIII. Costs**

79. Prayer (vii) is for costs of the cause and interest. Costs should ordinarily follow the event and the claimant is thus awarded costs of this cause.

### **IX. Disposal**

67. In disposal of this cause, this court issues the following orders: -
- a. A declaration be and is hereby issued that the respondent unfairly and unlawfully terminated the claimant.
  - b. Consequently, the claimant is awarded a sum of Kshs.673,200/= made up as follows –
    - i. Notice pay .....Kshs.43,600/=
    - ii. Gratuity ..... Kshs.280,800/=
    - iii. Compensation ..... Kshs.348,800/=
    - Total .....Kshs.673,200/=
  - c. The above amount shall earn interest at court rates from the date of this judgment till payment in full.
  - d. The respondent shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.
  - e. Costs of the cause and interest thereon to the claimant.
  - f. All the other reliefs are denied and dismissed.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

