



**Mogaka v Kenya Power & Lighting Co. Limited (Cause E021 of 2021)
[2024] KEELRC 643 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E021 OF 2021
DN NDERITU, J
MARCH 20, 2024**

BETWEEN

STEPHEN M. MOGAKA CLAIMANT

AND

KENYA POWER & LIGHTING CO. LIMITED RESPONDENT

JUDGMENT

I. INTRODUCTION

1. In a memorandum of claim dated 21st May, 2021 filed on even date through the firm of Oumo & Company Advocates, the claimant prays for:
 - a. A declaration that the termination of employment was unfair, discriminative, unlawful and a violation of the fundamental rights of the claimant.
 - b. A maximum compensation for wrongful termination as per section 49 (c) of the *Employment Act* i.e. gross salary earned X 12 months (Kshs.252,477.82 X 12) = Kshs. 3,029, 733.84/=.
 - c. Costs and interest
 - d. That costs of this claim be borne by the respondent
 - e. That any other relief this Honourable court may deem fit to grant.
2. The memorandum of claim is accompanied with a verifying affidavit, witness statement, a list of documents, and a bundle of copies of the listed documents.
3. The respondent entered appearance through Ochieng J Advocate and filed a statement of response dated 14th June, 2021, on 18th June, 2021. The respondent denies each and every allegation in the claim and prays that the claimant's suit be dismissed with costs.



4. The claimant filed a reply to the respondent's response dated 23rd June, 2021. In the reply, the claimant prays that the respondent's response be dismissed with costs and judgment entered as prayed in the memorandum of claim. Additionally, the claimant filed a further list of documents dated 23rd June, 2021, with a bundle of copies of the listed documents.
5. The respondent changed its representation from Ochieng J Advocate to Kiruki & Kayika Advocates vide a notice of change of advocates dated 25th August, 2021 filed in court on 26th August, 2021.
6. This cause came up for hearing (virtually) on 23rd May, 2022 when the claimant (CW1) testified partially but he was stood down to enable filing and service of properly bound documents. He continued and completed his testimony on 26th July, 2022.
7. The defence was heard on 7th March, 2023, whereby Mr. Kennedy Owiti Omondi (RW1), the respondent's human resource manager, and Argwings Kodhek (RW2), an investigator, testified and the respondent's case was closed.
8. Counsel for both parties summed up their respective client's case in written submissions. Counsel for the claimant, Mr. Oumo, filed his submissions on 28th April, 2023, and counsel for the respondent, Miss Abobo, filed hers on 27th April, 2023.

II. THE CLAIMANT'S CASE

9. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by his counsel, and the same is summed up hereunder.
10. In the memorandum of claim, the claimant avers that he was employed by the respondent on 21st October, 1997 as a technician II and rose through the ranks to, by 2018, hold the position of Feeder Based Business Unit (FFBU) in-charge of Racetrack/Mwariki area earning a monthly gross salary of Kshs.252,477.82/=. He alleges that he served the respondent diligently, dedicatedly, and dutifully, with a good disciplinary record until the date of termination.
11. On 4th March, 2018 the claimant was terminated from his job after serving the respondent for 22 years. He alleges that the termination was unlawful and based on un-procedural disciplinary process. The claimant avers that his termination from employment was premature, before he attained the age of retirement (60 years), lacking in fair hearing, and due process. He pleads that the appeal against the termination was dismissed as a mere formality.
12. The claimant pleads that the respondent violated sections 35, 41, 44, and 45 of the *Employment Act* (the Act) threatening his rights as a worker and his fundamental freedoms, and violating ILO convention no. 158 regarding termination at the respondent's initiative. The claimant pleads that the termination was unfair, demeaning, illegal, embarrassing, discriminative, and punitive.
13. In his testimony in court the claimant adopted his filed witness statement and a further filed statement dated 26th October, 2021 together with a list of documents dated 21st May, 2021 and a further list of documents dated 23rd June, 2021. The documents were produced and marked exhibits 1 to 12.
14. On 26th July, 2022, the hearing proceeded further in open court and the claimant stated that he was unfairly terminated on 4th March, 2019 as he was not accorded a fair hearing. He, however, confirmed that he attended the disciplinary hearing. He stated that he was not furnished with the audit/ investigation report, on which the respondent founded the charges, to enable him prepare and mount



- his defence. He testified that he left employment after the disciplinary hearing on 8th March, 2018. The termination was communicated on 4th March, 2019 and a letter of termination issued to him.
15. The claimant denied any involvement in the loss or theft of respondent's properties stored in Lanet and claimed that the report did not mention or tie him to the alleged loss of conductors. In regard to the issue of conflict of interest, which is the charge in the show-cause letter, the claimant stated that Havannah Company belonged to his brother and was not under investigation. He stated that when he was summoned to explain his association with the said company and the loss of the conductors he explained that he was not responsible for the alleged loss. He stated that the said company had a contract with the respondent from December, 2014 to December, 2016, a period of 2 years and that the company was not contracted from 2018 to 2019 which period was subject of the investigation.
 16. The claimant testified that he appealed against the termination and was summoned for the hearing of the same, which was conducted by the same panel that conducted the disciplinary hearing. He stated that he viewed this as an improper panel and un-procedural.
 17. In cross-examination, the claimant admitted that before the disciplinary hearing a warning and caution had been issued to him in respect of other instances of indiscipline. For example, he conceded that he had another disciplinary hearing in November, 2018. He admitted that he was issued with a show cause letter to which he responded in his letter of 21st October, 2018. He confirmed that he signed the respondent's code of ethics which contains a clause on conflict of interest yet he had not disclosed his brother's directorship in Havannah Company Limited which was trading with the respondent.
 18. He confirmed that he attended the disciplinary hearing and signed the attendance list. He clarified that he did not sign any letter or award to Havannah Company Limited. He admitted that he was informed of the date and time of the disciplinary hearing and he was informed of his right to come along with an employee of his choice as a witness, and he was also informed of his right to present his evidence.
 19. He was subsequently served with a letter of termination. He vehemently denied signing any awards to Havannah Company Limited or any association therewith other than that his brother Justine is a director thereof.
 20. He was categorical that it is after the termination that he was supplied with the audit report which he had allegedly requested for prior to the disciplinary hearing. He denied signing any minutes including those of the disciplinary hearing.
 21. He insisted that Havannah Company Limited was not contracted by the respondent in the year 2017 but was engaged between December 2014 and December, 2016. He stated that he was not issued with a copy of the disciplinary proceedings as had been promised by the chair of the panel during the hearing. The claimant asserts that he had no authority to award tenders as tender awarding was done by a committee of four persons.
 22. It is on the basis of the foregoing that the claimant is seeking for judgment to be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. THE RESPONDENT'S CASE

23. The respondent's case is contained in the statement of response, the oral and documentary evidence adduced by RW1 and RW2, and the written submission by its counsel, as summarized hereunder.



24. In the statement of response, without elaboration, the respondent avers that the suit is premature since the claimant has not exhausted the statutory laid-down procedure for addressing and ventilating such disputes.
25. The respondent denies the claimant's allegations of unlawful termination, his stated gross salary, and his promotion to FFBU in-charge. The respondent denies the claimant's alleged diligent performance, unlawful termination after a disciplinary hearing, premature termination without notice, lack of fair hearing, and the alleged unfair appeal process. The respondent also denies violating the [Employment Act](#), Constitution of Kenya, ILO Convention No. 158, and the alleged respondent's unfair or unlawful conduct, taking the view that the termination was fair, just, and lawful. In other words, the claimant's entire claim is denied by the respondent in toto.
26. It is pleaded that on 17th October, 2018, the respondent issued a show cause letter to the claimant on allegations/charges of conflict of interest and breach of the code of ethics by the claimant due to his association with a contractor who was offering the respondent services in labour and transport. The respondent considered the claimant's response and accordingly notified the claimant inviting him for a disciplinary hearing on 8th November, 2018 via a letter dated 31st October, 2018. In the notification letter, the claimant was advised on his entitlement to a representative and an interpreter or witness of his choice to be present during the hearing.
27. During the hearing, the claimant was informed of the subject matter of the hearing and of his right to a representative of his choice and granted an opportunity to be heard. His services were subsequently terminated and he was accordingly informed via a letter dated 1st March, 2019.
28. The respondent pleads that during the claimant's employment, he had a bad disciplinary record as follows:
 - a. On 12th May, 2003 the claimant was issued with a show cause letter for non-availability for stand-by on 11th May, 2003 which resulted in the respondent losing revenue for delayed restoration of power supply. The respondent then held that the claimant's explanation in his letter dated 14th May, 2003 was unacceptable and he was issued with a caution on 13th June, 2003.
 - b. On 19th February, 2014 the claimant was issued with a show cause letter regarding the issuance of material to a contractor and failure to supervise the said contractor to ensure work was done. The claimant's explanation in his letter dated 15th March, 2014 was deemed unacceptable and he was issued with a warning letter dated 6th June, 2014.
 - c. On 16th March, 2016 the claimant was issued with a show cause letter for failing to supervise the construction of GPBOA SRN5067028. The claimant explained via a letter dated 19th March, 2016 but it was held that his explanation in the disciplinary hearing held on 10th August, 2016 was unacceptable and thereafter issued with a warning letter dated 18th October, 2016.
29. The respondent pleads that the claimant's claim was fraudulent and intended to enrich himself by failing to disclose the alleged conflict of interest and in filing this cause. The alleged particulars of fraud include:
 - a. Seeking to obtain compensation by false pretences
 - b. Forging documents
 - c. Deponing a false and scandalous verifying affidavit



- d. Falsifying and exaggerating the nature and extent of his claim
30. The respondent avers that the claimant's suit is unclear, *res judicata*, incompetent, misconceived, and an abuse of the court process. The respondent prays that the claimant's suit be dismissed with costs.
31. RW1, Mr. Kennedy Owiti Omondi, the respondent's human resource officer based in Nakuru, adopted his filed statement dated 6th October, 2021 together with the list of documents and he produced the same as exhibits 1 to 22 in his evidence in-chief.
32. RW1 reiterated the contents of the pleadings and his filed statement. He stated that the claimant was informed by the respondent of its intention to take disciplinary action against him via the show-cause letter alluded to above and produced as exhibit 14. He stated that the claimant was informed of the specific charges he was facing, which charges were about conflict of interest and the claimant put in a response in his letter dated 21st October, 2018.
33. RW1 testified that the claimant was invited for a disciplinary hearing as per the letter produced by the claimant dated 8th November, 2018 and informed of his rights before the hearing began. The claimant attended the hearing and minutes were taken as per the respondent's exhibit 16. It is stated that the claimant signed the said minutes.
34. RW1 confirmed that the claimant testified that his brother was a director in Havannah Company Limited and allegedly the claimant was in conflict of interest having signed awards to the said company. He stated that the claimant signed the code of ethics that prohibits conflict of interest.
35. In cross-examination, RW1 stated that the disciplinary action was based on the audit/investigation report alluded to earlier on in this judgment. He stated that he was not part of the investigation team and did not take part in the preparation of the said report. However, he confirmed that he was part of the disciplinary hearing panel but he did not sign any of the letters produced in court. He admitted that there was no letter authorizing the investigation of the allegations in the show-cause letter concerning the claimant's association with Havannah Company Limited. He stated that the said company was contracted by the respondent and its contract expired in December, 2016.
36. He explained that an award of a contract is made by at least four persons through a tendering committee except in exceptional circumstances. He admitted that there was no evidence that the claimant caused or awarded any contract to Havannah Company Limited. He stated that he was uncertain if the claimant was a member of the tender award committee from 2014 to 2018 and that there is no letter to confirm that the claimant had the authority to award tenders.
37. RW1 avers that the claimant's appeal was heard as per the record availed by the claimant and the minutes of the disciplinary hearing are those signed by all the parties including the claimant. RW1 stated that the claimant was not given a copy of the audit/investigation report, and that the maker of the investigation report, Mr. Kaluoch, was one of the panellists in the disciplinary hearing.
38. On the letter of termination, RW1 stated that the claimant was to be paid some of his dues but he was not paid because he did not clear with the respondent. RWI confirmed that the letter shows that the respondent owes the claimant the sum of Kshs.486,108.97. He stated that no terminal dues had been paid to the claimant.
39. RW2, Mr. Argwings Kodhek, a senior investigator, prepared the impugned audit/investigation report. He confirmed that he signed his filed statement dated 6th October, 2021 and adopted it as his evidence in-chief. He stated that the investigation was initially about loss of respondent's materials worth 54



- million in total. He testified that he received information from the supply chain manager, and the report was sent to the audit department, who came up with the strategy for investigating the matter.
40. He stated that he was in charge of the investigation team and led the investigation from April, 2018 and came up with the report dated 14th September, 2018. It is while investigation the initial case of loss of materials that the investigation team discovered that the claimant had breached the code of conduct and ethics for awarding or participating in awarding of contracts to the said company wherein his brother was a director without declaring a conflict of interest. He stated that the contract for Havannah Company Limited expired in December, 2016 but was extended to December, 2017.
 41. In cross-examination, he confirmed that he was in-charge of the investigation team but he did not have a letter of appointment for that specific assignment as such. However, he stated that that was routine work and so there was no need for him and the team to be issued with special letters for carrying out such an investigation. The review/investigation covered 2015 to 2018 and RW2 confirmed that the claimant was not involved in the theft of the materials as it is the people who worked in the stores who were implicated in the theft.
 42. Further, RW2 stated that in the course of the investigation, it was discovered that the claimant is a brother to one of the directors of Havannah Company Limited. RW2 stated that the claimant is not a director or a signatory to the accounts of the said company. He stated that he did not attend the disciplinary hearing. He stated that he was not summoned to testify, and he did not know if the audit/investigation report was presented or availed to the claimant.
 43. RW2 testified that the claimant asked for the audit/investigation report after the disciplinary hearing had been concluded. He stated that the claimant sent money via Mpesa to his brother who is a director of Havannah Company Limited and that the said company was contracted by the respondent from December, 2014 to December, 2016.
 44. RW2 conceded that he did not come across any letter(s) signed by the claimant awarding any contract to Havannah Company Limited and that he had interviewed the directors of Havannah during the investigations. He admitted that the investigation on conflict of interest was a by-the-way when he and his team was investigating the loss of the impugned materials.

IV. SUBMISSIONS BY THE CLAIMANT’S COUNSEL

45. The claimant’s counsel identified four issues for determination- Whether the claimant is entitled to a certificate of service unconditionally and whether the failure to issue the same has deprived the claimant’s right to work and earn a living; Whether the claimant was unfairly and unjustly terminated by the respondent; Whether the claimant is entitled to the remedies sought; and, costs.
46. On the issue of certificate of service, counsel cited section 51(1) of the *Employment Act* which provides as follows:

“An employer shall issue to an employee a certificate of service upon the termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.”
47. Counsel submits that the above-mentioned section is mandatory and not conditioned on any event other than termination. In the case of *Naumy Jemutai Kirui vs Unilever Tea Kenya Ltd (2020) eKLR* the court held that a certificate of service is a statutory entitlement and an employer has a duty to issue the claimant with one regardless of the nature and circumstances of separation with the employer.



- Counsel submits that the claimant be issued with the certificate of service as stipulated in section 51(1) of the Act.
48. On the issue of whether the claimant was unfairly and unjustly terminated, counsel cited section 45 of the Act and urged that an employer must prove the validity and fairness of the reason for dismissing or terminating an employee. He further urges that a fair hearing is not only a statutory requirement but also a constitutional imperative of substantive justification that an employer may have for dismissing or terminating an employee. Further counsel has cited *Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR* where the court held that to establish that the termination was fair, there must be both substantive justification and procedural fairness.
 49. Counsel cited section 41 of the Act stating that the employer needs to give an employee a fair hearing before termination while section 45 of the Act provides for proof of valid reason and fair procedure, and that the employer shoulders the burden of proof. Counsel urges that from the oral and documentary evidence on record the respondent appointed an internal audit department team to investigate the loss of materials at Lanet stores, Central Rift region. A report was made and a recommendation was made for a disciplinary action to be taken against the culprits.
 50. On procedural fairness, counsel cited sections 41 and 45 of the Act which provide for the procedural steps that shall be followed by an employer before dismissing or terminating an employee. Fair hearing, which is otherwise referred to as procedural fairness or due process, is also a constitutional requirement as per Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act* in accord with the rules of natural justice. Counsel urges that courts and the law have provided for a sample checklist of the ingredients of fair hearing or procedural fairness which is not necessarily exhaustive and submits that the alleged hearing failed the test of procedural fairness as the claimant was not in earnest supplied with the evidence used against him. Further, it is submitted that no witness testified and tendered evidence against the claimant and therefore the claimant was not accorded the opportunity to cross-examine and confirm the allegations against him. It is submitted that in the minutes of the disciplinary hearing, the appeal, and the audit report, there is no evidence establishing that the alleged Havannah Company Limited was contracted by the respondent at the material time, 2018, and that indeed the claimant was connected to the said company. It is submitted that the claimant was neither a director, an employee, an agent, an officer, or in any other manner linked to the said company.
 51. Further, it is submitted that no Mpesa statement was produced during the hearing to confirm that there were any transactions between the claimant and the said company. Counsel submits that the respondent failed the test of procedural fairness which led to unfair termination.
 52. On substantive justification, counsel cited section 43 of the Act which deals with reasons for termination. It is submitted that not only must the reason be genuine but also reasonable. Counsel urges that as per the termination letter issued on 1st March, 2019, the reason for the claimant's termination is that his explanation on his alleged association with the said company was found to be unacceptable or unsatisfactory. The reason for the termination was that the claimant was directly associated with a L&T firm Havannah Company Limited contrary to the Public Officers Ethics Act 2003 yet the said company was not providing services to the respondent during the period under investigation. Counsel submits that the termination had no legal or factual basis and was not reasonable, valid, and or sound.
 53. On the issue of remedies sought, counsel submits that the claimant be compensated as per section 49 of the Act and be granted the other orders sought for in the memorandum of claim.
 54. On costs, counsel submits that costs follow the event and prays that the respondent be condemned to pay the costs of the cause.



V. SUBMISSIONS BY THE RESPONDENT'S COUNSEL

55. The respondent's counsel identified two issues for determination- Whether the claimant's termination was fair and lawful; and, Whether the claimant is entitled to the reliefs sought.
56. On the issue of whether the claimant's termination was fair and lawful, counsel cited section 43 of the Act which obligates an employer to give reasons for terminating an employee, and where the employer fails to comply the termination or dismissal is deemed to be unfair within the meaning of section 45 of the Act.
57. Counsel urges that during the defence hearing RW2 testified that he had received information from the respondent that one of its staff in the supply chain and logistics department had reported that materials had been stolen from the Lanet stores. This prompted the respondent to carry out investigations on the stock for the period from January, 2015 to April, 2018, and that the claimant was part of the inspection and acceptance committee that inspected the consignments and confirmed that the conductors were delivered contrary to what was confirmed and ascertained during verification.
58. It is submitted that upon verifying the ownership of the two L & T firms, Havannah Company Limited and Stimaline Enterprises Ltd, it was found that the two firms had direct link with the respondent's staff contrary to the respondent's code of ethics. One of the L& T firms, Havannah Company Limited, was allegedly directly linked to the claimant as one of its directors, Mr. Justin Mironga, was the claimant's brother. Counsel further urges that the claimant in the course of his employment signed a code of ethics that was provided by the respondent. When the claimant left the respondent's employment, he was in charge of the Racetrack/Mwariki Feeder Based Business Unit (FFBU), Central Rift region, Nakuru town, which was a managerial position in the respondent's company.
59. It is submitted that in his response to the show-cause letter dated 17th October, 2018, the claimant acknowledged that Havannah Limited had four directors and one of them was his brother, Justin Mironga. The claimant also acknowledged that while in charge of O & M, his brother was allocated jobs but requested his brother to stop bidding for the respondent's jobs due to the conflict of interest. The claimant also admitted signing award letters for Havannah Company Limited. However, the claimant never disclosed this information to the respondent during his employment.
60. Counsel urges that the reason for the termination of the claimant's employment contract was a valid and fair reason related to the claimant's conduct. The claimant was, therefore, accorded substantive fairness in accordance with section 43 of the *Employment Act*. Counsel cited Charles Njagi Nyaga vs Air Connection Limited (2016) eKLR in affirming the argument that where an employee is involved in misconduct he/she is bound to be dismissed under section 43 of the Act. Counsel also cited Tom Mboya Ochieng vs Programme for Appropriate Technology in Health Path Kenya (2016) eKLR where the court while considering a case of termination from employment on the basis of conflict of interest held that the dismissal of the claimant therein was fair and he was not entitled to damages for unfair or wrongful dismissal. Further, it is submitted that the court considered conflict of interest as a valid reason leading to the termination of the claimant.
61. On procedural fairness, counsel cited sections 41 and 45 of the Act providing for the steps and procedures that an employer ought to take before dismissing or terminating an employee. Before the disciplinary hearing the respondent invited the claimant and he was informed of his right to bring another employee of his choice to the hearing and also any evidence or witnesses he had in support of his case.



62. Upon conclusion of the disciplinary hearing, the respondent informed the claimant vide a letter of termination dated 1st March, 2019 of the outcome of the disciplinary hearing and the options that were available to him including the right of appeal.
63. The claimant lodged an appeal against the decision of the respondent's disciplinary committee. Before the hearing of the appeal, the claimant also requested for the audit/investigation report that formed the basis for the termination of his employment and the respondent furnished him with an extract of the audit investigation report that was relevant to his case. The claimant was invited to attend the appeal hearing which he attended and minutes were taken. The respondent communicated the decision of the appeal committee to the claimant in writing.
64. Counsel urges that the respondent accorded the claimant procedural fairness in accord with the rules of natural justice and submits that the termination of the claimant by the respondent was fair and lawful as the claimant was granted both substantive and procedural fairness. Counsel cited the case of *Godfrey Meso Komba vs Inter Beauty Products Limited (2021) eKLR* where it was held that an employer must undertake a further step to demonstrate that in the context of the happenings, the conduct of the employee was a natural fundamental breach of his obligations under the contract of service, obviating the trust between him and employer. It is submitted that the conduct of the claimant was a fundamental breach of his obligation under the contract of his employment.
65. On reliefs, counsel submits that since the claimant's termination was based and founded on substantive and procedural fairness, the claimant is not entitled to the pleaded sum of Kshs.3,029,733.84 as maximum compensation for wrongful termination or any other amount or at all.
66. In conclusion, counsel urges and submits to the court to strike out and dismiss the claimant's memorandum of claim with costs to the respondent.

VI. ISSUES FOR DETERMINATION

67. The court has carefully and dutifully gone through the pleadings filed, oral and documentary evidence presented from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to this court for determination -
 - a. Whether the claimant's termination was unfair, unjust, and unlawful;
 - b. Whether the claimant is entitled to the reliefs sought, And;
 - c. Who meets the costs of the cause?

VII. TERMINATION

68. Section 45 of the Act provides as follows:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and



- (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (f) the existence of any previous warning letters issued to the employee.

69. Further, Section 47 (5) of the Act provides as follows:

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

70. The claimant was terminated vide a letter dated 1st March, 2019 which was couched in the following wording -

Our Ref: KP1/5A/2A/2/MOGAKA/14506/DOM/aa

1st March, 2019

Stephen Mobisa Mogaka S/N No. 14506

Thro’



Regional Manager, Central Rift

Dear Stephen,

TERMINATION OF SERVICE

Further to our explanation letter to you dated 17th October, 2018, your response dated 21st October, 2018 and invitation to a disciplinary hearing dated 8th November, 2018 this is to advise you that your explanation has been found unacceptable. You are therefore terminated from the company service with effect from 4th March, 2018 for:

Being directly associated with L&T firm Havannah Company Limited contrary to Public Officer Ethics 2003 and the provisions of KPLC Code of Conduct and Ethics part II and this resulted in a conflict of interest.

As you will not be required to work the notice period, the paymaster is hereby requested to pay you salary up to and including 4th March, 2019 your last working day.

Please note that you owe the Company the following liabilities:

1. Car loan Kshs.538, 984.30
2. Insurance Premium-staff cars Kshs. 48,939.24
3. Staff salary advance loans Kshs. 42,134.24
4. Medical excess Kshs. 19,734.40
5. Employee sales Kshs. 500.00

Total Kshs.650,292.18

Less one month's salary in lieu Kshs.139, 245.54

Less 5 accumulates leave days Kshs. 24,937.67

Total Kshs.486,108.97

Please let us know how you intend to settle the total liabilities of Kshs.486,108.97 within 14 days from the date of this letter failure to which the paymaster is advised to recover the total amount from your final dues.

As regards your interest in the Retirement Benefits Scheme, separate communication will be sent to you and for this purpose, you are requested to leave a forwarding address at the Kenya Power Pension Fund office.

However, please note that payment of your final dues will be subject to you completing this clearance certificate form enclosed herewith.

Yours Faithfully

For: The Kenya Power & Lighting Co. Ltd

David Mwaniki



Ag. General Manager, Network Management.

71. As at the time of his termination, the claimant held the rank of Feeder Based Business Unit (FFBU) in-charge of Racetrack/Mwariki Nakuru town to which he was appointed on 18th June, 2018. He had started out as a technician II in 1997.
72. During the disciplinary hearing and based on an audit/investigation report it was discovered that one of the directors of Havannah Company Limited, a company that was trading with the respondent, Mr. Justin, is a brother to the claimant and the claimant had not disclosed that fact as per the respondent's code of conduct.
73. Conflict of interest is defined in the Black's Law Dictionary 9th Edition as follows -
- “A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.”
74. This court has perused the respondent's code of conduct wherein conflict of interest is defined as when or where an employee has competing interests between public duty and private interest which could improperly influence the performance of official duties and responsibilities. The code further provides for situations or circumstances whereby conflict of interest will arise, including, but not limited to, awarding of contracts to family members or a company controlled by an association or other proxy. Where there is a conflict of interest or as soon as the employee recognises, perceives, assumes, or acquires the same, the employee is required to disclose and declare so by completing a conflict of interest declaration at the inception of the employment and thereafter once a year and also whenever an actual or potential conflict arises in individual circumstances. If there is the existence of a conflict of interest, the same is to be reported to the integrity & ethics department.
76. The evidence on record is that a tender was awarded to Havannah Company Limited for delivery of conductors - AA bare. The claimant was part of the inspection and acceptance committee which approved the tender to Havannah Company Limited. The tender contract ran from 2014 to 2016 which was extended to December 2017. The claimant during the disciplinary hearing confirmed that his brother, Justin Mirona, was a director in Havannah Company Limited. He even admitted signing letters for the said company during the disciplinary hearing and the hearing of the appeal. The claimant readily admitted of his knowledge that his brother was a director in the said company.
77. The claimant faced specific charges as per the show-cause letter as follows –
- Our Ref: KPY/5/7/1/14506/DLR/ENM
- 16th March, 2016
- Mr. Stephen Mobisa Mogaka S/No 14506
- Thro'
- O &M Engineer, Nakuru County
- Dear Stephen,
- RE: EXPLANATION
- It has been noted with concern that you supervised a Construction Scheme GPOBA SRN 5067028 which is a 350-400M LV line from a TX 1KM away after Mauche. The line is sub-standard, lacks terminal stays and line taps. There are five (5) poles used targeting 4 customers who are metered.



Note that involvement in fraudulent activities involving Company interests and negligence of duty is tantamount to gross misconduct and could lead to summary dismissal. However, before any action is taken, you are hereby given a chance to show cause why disciplinary action should not be taken against you for the aforementioned offence.

Your explanation should be received within 72 hours from the date of this letter failure to which it will be assumed that you have none and Management will institute appropriate disciplinary measures without further reference to you.

Yours faithfully,

For: THE KENYA POWER & LIGHTING CO. LTD.,

SIGNED

Eng.GEOFFREY MULLI

REGIONAL MANAGER, CENTRAL RIFT

78. I entertain no doubts in my mind that the claimant refused, failed, and or neglected to declare a clear conflict of interest which he admitted during the disciplinary hearing. The claimant had signed and understood the code of conduct and ethics and he ought to have complied with the same as noted above. It does not matter that there is no evidence that the claimant benefited from the business awarded to the said company.
79. For the foregoing reasons, it is the finding and holding of the court that the respondent had genuine and reasonable grounds upon which to found the disciplinary proceedings and to proceed to take action against the claimant as it did.

VIII. PROCEDURAL FAIRNESS

71. Before terminating an employee, an employer should be mindful of both substantive and procedural fairness and comply therewith. The court has already found and held in the foregoing part of this judgment that the respondent had genuine and reasonable substantive grounds in proceeding against the claimant as it did.
72. In regard to procedural fairness, the claimant was issued with a show-cause letter dated 17th October, 2018 which has been reproduced elsewhere in this judgment. On 5th November, 2018, he was served with a letter of invitation to the disciplinary hearing which was to be conducted on 6th November, 2018. As per the show-cause letter the preferred charge was that of conflict of interest for being familiarly related to the director of Havannah Company Limited, a company that was trading with the respondent. The said invitation informed the claimant that he had the right to interpretation and representation by a fellow employee during the said hearing.
73. The claimant put in a response dated 21st October, 2018, to the show-cause letter but in a letter of termination dated 17th October, 2018 the respondent stated that the explanation that the claimant gave was unacceptable thus leading to termination as communicated in the letter of 1st March, 2019.
74. In the response alluded to above, the claimant admitted and conceded to the fact that his brother Justin was a director in the said company but in the same breath he admitted that he had not reported or declared a conflict of interest.
75. Vide a letter of 28th April, 2021 the claimant appealed the said decision and he requested to be furnished with minutes alongside the audit/investigation report. Logically, therefore, as at the time of the



disciplinary hearing the claimant had not been supplied with the audit/investigation report. Natural justice, as per the constitutional and statutory provisions cited elsewhere in this judgment, demand that an employee facing any charges/allegations shall be supplied with all evidence and particulars of charges facing him or her in advance. The claimant maintained that he was not supplied with the said report to prepare for his defence. To that extent, the court finds and holds that he was denied an opportunity to prepare and mount his defence. It does not matter or get cured by the allegation that he was served with the same before or during the hearing of the appeal.

76. For the foregoing reason, it is the finding and holding of this court that to the extent identified in the foregoing paragraph, the respondent denied the claimant procedural fairness. This finding effectively means and concludes that the claimant was unfairly terminated.

IX. RELIEFS

77. As can be deciphered from the foregoing, the respondent had good grounds for taking disciplinary action against the claimant for his failure to disclose conflict of interest and, in fact, to terminate him bar the procedural hitch or failure that the respondent committed. With that background, the court shall consider each relief as hereunder.
78. Prayer 1 is for a declaration that the termination was unfair, discriminative, unlawful, and a violation of the fundamental rights of the claimant. As noted above, the termination was unlawful only to the extent that the respondent failed to provide and supply the claimant with the evidence of the charges/allegations that faced him, and in particular the audit/investigation report. There is absolutely no evidence that the claimant was discriminated against or mistreated or mishandled in and during his employment. A declaration shall issue to the effect that the termination was unfair for lack of procedural fairness.
79. Prayer 2 is for compensation for wrongful termination. The claimant is seeking maximum compensation for an award equivalent to 12 months gross salary under section 49(c) of the Act. Were it not for the procedural misstep that the respondent committed as above, the claimant was bound for termination or dismissal. The claimant's disciplinary record, contrary to his allegations, is littered with cases of indiscipline with several warnings and disciplinary hearings prior to the one that led to the termination. The claimant, from the evidence adduced by the respondent, was not the most admirable and or disciplined employee.
80. It is no surprise, therefore, that the misconduct by the claimant presented to the respondent the perfect opportunity to act against him. The claimant, having knowledge of his poor disciplinary record, ought to have been more careful in his conduct. To state the obvious, the claimant was the author of his own misfortune.
81. In the circumstances, the court finds and holds that an award of three months' gross salary is fair and adequate compensation to the claimant. As per the pay-slip for February, 2019 the claimant earned a gross salary of Kshs.252,477.82 as at the time of termination which translates to Kshs.757,433.46 for three months.
82. The claimant is awarded costs of the cause.

X. ORDERS

83. This cause partially succeeds in favour of the claimant against the respondent as follows:
- a. A declaration be and is hereby issued that the termination of the claimant by the respondent was wrongful and unlawful for breach of procedural fairness.



- b. The claimant is awarded Kshs.757,433.46 in compensation for wrongful and unfair termination.
- c. Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 20TH DAY OF MARCH, 2024.

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DAVID NDERITU

JUDGE

