



Tome v Bungoma County Assembly Service Board(Casb & 2 others (Cause E011 of 2022) [2024] KEELRC 627 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 627 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E011 OF 2022
JW KELI, J
MARCH 14, 2024**

BETWEEN

FRANCIS SIMIYU TOME CLAIMANT

AND

**BUNGOMA COUNTY ASSEMBLY SERVICE BOARD(CASB . 1ST RESPONDENT
THE SPEAKER /CHAIRMAN OF CASB 2ND RESPONDENT
THE CLERK/SECRETARY OF THE BUNGOMA CASB 3RD RESPONDENT**

JUDGMENT

1. The Claimant, a former Principal Clerk Assistant with the 1st Respondent, vide a claim dated 10th May 2022 and received in court on 16th May 2022, alleging unfair termination of employment, sought the following reliefs against the Respondents:-
 - i. A declaration that the unilateral interdiction of the Claimant by the Respondents was unfair, unprocedural, and illegal hence null and void.
 - ii. A declaration that the summary dismissal of the Claimant by the Respondent was unprocedural, unfair, and illegal hence null and void.
 - iii. Unconditional reinstatement of the Claimant to the position of the Principal Clerk Assistant.
 - iv. A permanent injunction restraining the Respondents from recruiting another person to take over the claimant's office.
 - v. A permanent injunction barring the Respondents from demoting the Claimant.
 - vi. Notice Pay; 3 months 'pay in lieu of Notice (Kshs. 187,870/-) = Kshs. 563,610/-
 - vii. Unpaid house allowances



- viii. Service Pay of Kshs. $187,870 \times \frac{1}{2} \times 8$ years of work 2013-2021= 751,516.
 - ix. Severance pay Kshs. $187,870 \times \frac{1}{2} \times 8$ years of work 2013-2021= 751,516.
 - x. Gratuity pay Kshs...../-
 - xi. Certificate of Service
 - xii. Costs and interests of this suit
 - xiii. Damages for wrongful dismissal Kshs. $187,870 \times 12$ months = Kshs. 2,254,440/-
 - xiv. Punitive damages.
 - xv. Exemplary damages.
 - xvi. Damages for violation of the claimant's rights.
 - xvii. Anticipatory benefits
2. The Statement of Claim was accompanied by a List and Annexures in support of the Statement of Claim dated 10th May 2022 and his bundle of documents comprising twenty-three documents (pg. 180-324).
 3. Additionally, the Claim was supported by the Verifying Affidavit sworn on 10th May 2022(pg. 325-326); the Claimant's Witness statement dated on even date (pg. 327-332); the List of witnesses dated 10th May 2022(pg. 334), the list and Bundle of Documents dated on even date (Pg. 335-337 and the Index of even date (Pg. 338).

Respondents' Preliminary Objection

4. The Respondents first entered appearance through J.O. Makali & Company Advocates on 5th July 2022 and filed a Preliminary Objection dated 27th June 2022 which was received in court on 5th July 2022. The Court delivered its ruling on the Respondents' Preliminary objection through a Ruling on 1st December 2022.
5. The Respondents dissatisfied with the ruling filed a Notice of Appeal dated 8th December 2022 which was received in court on even date.

The Claimant's Notice to Discontinue The Claim

6. The Claimant filed a Notice to discontinue the claim dated 13th July 2022 and filed on an even date. However, the Claimant, on the 27th July 2022, made an oral application to withdraw the Notice to discontinue the claim. The Court allowed the application.

Claimant's Further Affidavits

7. Thereafter, the Claimant filed the Further Affidavit sworn on 29th August 2022 and filed on 30th August 2022 and subsequently filed the Further Affidavit sworn on 29th August 2022 and received in court on 28th September 2022.

Respondents' Response to Claim

8. The Respondents on 17th October 2022 filed their Response to Claim dated 13th October 2022.



Claimant's Further Affidavit

9. On 2nd November 2022, the Claimant filed a Further affidavit sworn on even date, in response to the Respondents' replying affidavit of 13th October 2022. In addition, he filed a List of Authorities dated 2nd November 2022.

Claimant's Further Documents

10. On 25th January 2024, the Claimant filed a Further Affidavit sworn by Rachelle Rael Nekesa Khisa on 22nd December 2022; the Witness statement of Rachelle Rael Nekesa Khisa dated 24th January 2023, a list of witnesses dated 23rd January 2023; the Bundle of Documents comprised of Volume 1(pg. 4-290) Volume B (pg. 291-705) and Volume 3(pg. 706-887). On 9th February 2023, the Claimant filed his Further Bundle of Documents dated 8th February 2023, which comprised Volume 4A (Pg. 88-941); Volume 4B (pg. 942- 995); and Volume 4C (Pg. 996- 1075).
11. On 24th February 2023, the Claimant filed an affidavit dated 27th January 2023, on obtaining an uncertified copy of the Budget and Appropriation Committee of the Bungoma County Assembly of FY/2020/2021.
12. On 21st March 2023, the Claimant filed a Further response dated on even date, to the Respondents' Amended Replying affidavit and Counterclaim dated 13th March 2023.

Respondents' Documents

13. On 21st March 2023, the Respondents through a Notice of Motion application dated 13th March 2023, supported by the Affidavit sworn by Emmanuel Situma on even date, sought leave to amend their Response to Claim of 13th October 2022, with the Amended Response to Claim and Counterclaim dated 13th March 2023 annexed thereto.
14. The Counterclaim sought for a prayer against the Claimant for: -
 - a. Payment of Kshs. 5,000,000/-
 - c. Interests on(a) above at commercial rates
15. On 23rd March 2023, the court granted leave to the Respondents to file their replying affidavit and annex their evidence within 14 days, and on 17th April 2023, the Respondents filed the Replying Affidavit sworn by Emmanuel Situma on 13th April 2023.
16. The Respondents' Counterclaim was withdrawn at the defence hearing on 31st October 2023.

Hearing

The Claimant's case

17. The Claimant's case was heard on 24th July 2023 when the Claimant testified on oath (CW1), adopted his statement of Claim of 10th May 2022, and filed on 16th May 2022, his replying affidavit of 2nd November 2022, his replying affidavit of 21st March 2023; Replying Affidavit of 24th April 2023, his written witness statement dated 10th May 2022 all as his evidence in chief. The Claimant further produced his documents under the list of documents dated 24th January 2023 from volumes 1, 1B, 2,2B, 2C, and 3 respectively as exhibits C-1 to 17 and Volumes 4A and 4B. He was cross-examined by the Respondents' counsel, Mr. Musumba.



The Respondents' case

18. The Respondents' case was heard on 31st October 2023, when its witness Emmanuel Situma (DW) testified on oath as the Respondents' witness of fact. He adopted his Replying affidavits filed in the case of 13th April 2023 and the response thereto as his defence evidence in chief and the Defence exhibits (EM1 to EM4). DW was cross-examined by the Claimant.

Claimant's case in summary

19. The Claimant states that he was employed by the County Assembly of Bungoma on 20th August 2014 until he was dismissed on the 8th February 2022.
20. That on the 29th June 2020, the Public Administration and ICT Committee of the Assembly was interrogating the proposed Annual Budget for 2020/2021 in the presence of two Chief officers, who were asked to provide further documents. That the Chief officers provided further documents on 6th July 2020(C-Exh- 1 Volume 1 Pg. 4- 5 par.3).
21. That on the 7th of July 2020, the 3rd Respondent caused him to append his signature on the register of documents in the office of the Clerk to obtain the File documents that were to be availed before the Committee (C-Exh-2 Vol. 1 Pg.9).
22. That the File was on 7th July 2020 tabled before the Committee, recommendations were made, and the actioned report was adopted by a majority of the Committee, signed by the Chairman and the Claimant, and the Report was transmitted to the Budget Appropriation Committee as evidenced by the report and its transmission proof (C-Exh- 3 and 4 Volume 1 Pg. 10-18).
23. That the other documents availed to the Committee had information relevant to two public interest petitions which were being considered by the Committee on the Removal of the Governor of the day and an advert inviting the public for a hearing of the petitions was availed (C-Exh-7 Vol 1B pg. 251).
24. The Claimant states that as the clerk, he was tasked with procedural issues on the Petitions and states that the Governor had tried to seek information on the Petitions, but the Claimant had refused to provide any information.
25. The Claimant states that, on 13th August 2020, while he was on duty in a meeting of the Committee, awaiting the prosecution of the Two Petitions, officers from DCI Nairobi arrested him and he was taken to Nairobi, where he was arraigned at Kibera court and charged with Stealing and handling a stolen file, a file he states was transmitted to the Assembly (C-Exh -8 Vol. 1B pg. 252- 253).
26. The Claimant states that he was interdicted on 18th August 2020 by the 3rd Respondent (C-Exh-11. Vol. 1B pg. 256) premised on the criminal allegations at Kibera and stated that the Interdiction letter was unlawful and unfair as Regulation 51(1) of the County Assembly Regulations 2020 vests authority to interdict on the 1st respondent only.
27. That there was no minutes' evidence that the interdiction was sanctioned by the 1st respondent; that no internal complaint record was availed under Regulation 50(6) of the Bungoma County Assembly Service Act(BCASA), 2020, and that his interdiction was based on a letter from DCI and a Reference Number that was given (C-Exh- 11). That his interdiction was based on a non-existent letter allegedly received from the DCI, as the same was never produced in the internal Complaint investigated.
28. The Claimant states that his Interdiction was unfair since the 3rd Respondent who authored the same, confirmed to the claimant's advocate in his letter of 27th August 2020, that he had not made, or



- authored any theft report nor authorised any recording of stealing complaint at any police station (C-Exh- 10 – Volume 1B – pg. 255).
29. The claimant states that he filed a Judicial Review (JR) application to stay the criminal proceedings and interdiction pending the hearing and determination of the substantive JR motion (C-Exh-19 Volume 3 pg. 749-751 Para. 5), only for him to be re-arrested in Bungoma and arraigned at Bungoma law court and the interdiction subsisted.
 30. That the Criminal charges were quashed on 21st January 2022 (C-Exh- 17 Volume 2. Pg. 293- 309 & 319-321) and no appeal or review was preferred by the Respondents; only for the 3rd Respondent ten days later to issue him with a Show Cause Letter (C-Exh-12. Volume 1B Pg. 257).
 31. The Claimant states that the show cause letter stated that the management had noted that the Claimant had stolen a file, the property of the county, and disclosed confidential information to the public without the authority of the authorized officer(C-Exh-13) and he responded to the Show Cause letter (Vol. 1B Pg. 257)
 32. The Claimant states that he pointed out that the show cause did not adhere to regulation 50(6) of BCASA, which requires investigations, and no investigation report was given as the evidence of the theft. He states that no one called him to return the file and he was served with a summary dismissal letter on 8th February 2022(C-Exh-14- Volume 1B pg. 286) giving three grounds that ‘a). he stole a public office file (b) Disclosed confidential information to the public c); and had discipline issues.’
 33. The Claimant states that there was no investigation report based on any administrative action against him, and no complaint had been lodged under regulation 50(6)of BCASA. The allegations had no evidential evidence to show he had stolen and no evidence of which confidential information had been disclosed was availed.
 34. The Claimant states that despite what is stated in Paragraphs 10 (a) and (b) of the replying affidavit of 13th April 2023, there was no invitation letter produced and the show cause letter had no specific date, time, or venue for the Claimant to appear before the 1st respondent for Hearing.
 35. The Claimant states that the Affidavit of 13th April 2023 by the respondents showed that there had been a dissenting vote due to a lack of investigations and that allegations of being abusive were new. He states that he was interdicted and dismissed on a non-existent Employment Act, 2023, and prayed that his claim be allowed, and the Counterclaim be independently prosecuted.

Claimant’s Cross-examination by Respondents

36. The Claimant told the Court that he was supplied with the witness statements of persons named in the charge sheet and documents relating to the charge at the Kibera court, though not all persons whose statements were supplied were named in the Charge sheet such as Hon. Majimbo Okumu.
37. It was his case that he understood the contents in the statement of Hon. Majimbo and stated that it was alleged that the lost file was found in the possession of one Dennis Wasike and confirmed that it is the work of the Police and DPP to arrest and prosecute.
38. The Claimant stated that while Dennis Wasike was arrested by the police in Nairobi there was no evidence that the file was found in his possession nor was the file recovered from him.
39. The Claimant states that he had signed for the file at the County Assembly of Bungoma and the file was in his custody as he was the Procedural Committee Clerk of the PA & ICT Committee, and the file was still being considered by the said committee.



40. That he was never allowed to hand over the file after being arraigned in court as he could not access his office, and the file was still at the Respondents' offices and custody but in his office.
41. The Claimant states that the file was not returned as it was being considered in proceedings before the Public Administration and ICT Committee and there were no timelines on when it was to be returned. He states that there is no evidence that the file was stolen, as no evidence was availed in the show cause letter which was dated 31st December 2019; and his response was filed on time within seven days on 7th January 2020. That the police have a right to arrest a person even in the absence of a report having been made where they think a crime has been committed.
42. The Claimant confirmed having filed a Judicial Review application to quash the proceedings against him but agreed that the Judicial Review application did not bar the institution of disciplinary proceedings against him. He states that he filed an appeal against a ruling that failed to find the Respondents in contempt for having failed to obey the orders ordering the respondents to stay his interdiction pending the determination of the JR application. He stated that his Appeal on Contempt proceedings has no nexus to his claim before this court.
43. The Claimant confirmed that though the Criminal proceedings were stayed, the same had not been quashed. It was his case that the file was returned to the Assembly though he had no evidence that the same had been returned.
44. The Claimant confirmed that he was issued a show cause letter on 31st January 2022 (C-Exh-12 volume 1B-pg. 257) and he filed his response to the same dated 6th February 2022 which was received on 7th February 2022.
45. The Claimant told the Court that he was supplied with the Minutes of the Board upon filing the case, and five Board Members and a secretary were present, and only one dissented. He affirms that the Board was properly constituted during his dismissal. He stated that he appealed against his dismissal on 16th February 2022 and the decision relating to his appeal to the PSC was already determined by the court.
46. The Claimant states that as a member of staff of the County Assembly, he was entitled to a Mortgage and Car Loan, and he only applied for a Car loan of Kshs. Two million. His case is that he has already repaid his car loan in full. He states that the Mortgage form was not processed and the Mortgage Minutes of 13th December 2018 were never confirmed in the subsequent meeting and their confirmation on the same meeting is thus defective.
47. The Claimant told the court that there was no proof that any mortgage funds were dispersed nor any bank statements to that effect. He submits that the minutes on the mortgage ought to be signed by both the Speaker and the clerk who are the Secretary and Chairperson, but only the speaker signed.
48. It was the Claimant's case that his dismissal was not based on any facts, law, or evidence, but confirms that interdiction is a possible action where a person is charged with an offence in court, as the Regulations use the term "may".
49. The Claimant submits that the Clerk of the Assembly confirmed having not reported the case on the missing file, and attached the decree of the High Court, but he did not provide the document showing that he had signed for the file.
50. The Claimant states that as is required before a person is arrested, there was a complaint by the 1st respondent and the proceedings were quashed in Milimani H.C 1093 of 2020(C-Exh- 17 Volume 1).



51. The Claimant testified that he was not aware he had been replaced as a Principal Clerk Assistant and he had not appealed against Petition No. 7 which sought to stay the recruitment in the said office, that he occupied.
52. The Claimant states that the Board considered his response and decided to dismiss him, but states that the said minutes are not authentic as they were not signed by the clerk and speaker jointly.

The Respondent's case

53. It was the Respondents' case through the Speaker of the County Assembly, Emmanuel Situma, who is also the Chairman of the County Assembly Service Board, that the Claimant was the Principal Clerk Assistant in the committee for ICT.
54. That documents in the form of a file were received at the clerk's office for decision by the ICT and Administration Committee and the same were signed by the Claimant who took the file away and never brought it back.
55. The Speaker testified that the file was later found in Nairobi in the hands of strangers and they carried out investigations that revealed that the Claimant was arrested in Nairobi and later brought to Bungoma and charged.
56. The Respondents state that the Claimant was suspended and later on the Respondents received information from the DCI that the Claimant had been arrested.
57. They state that as a policy, any staff who is facing a criminal charge is interdicted and this was done and the claimant was interdicted from 2020 until January 2022.
58. The respondents state that a show cause letter was issued for insubordination to the Board and based on his response of 7th February 2022, the board dismissed him summarily looking at the response.
59. The Respondents state that the Claimant has never brought the file back to the County Assembly and even on interdiction he was to hand over all property of the Assembly but he failed to do so to date.
60. The Respondents state that the Claimant did not respond to the handover request and that the file was an exhibit in Nairobi and the same is still in the custody of the police.
61. The Respondents state that the show cause letter (EM- 3) was issued and as evidenced by the minutes of 8th February 2023, the disciplinary meeting of Tome was a summary dismissal. (EM-4).
62. That the Claimant on being issued with the show cause letter did not Respond to the issues raised but had side shows to the show cause.
63. The respondents stated that they received no orders under the Judicial review (JR) case barring them from recruiting new staff and the Claimant's position was advertised and filled. Therefore, the prayer for reinstatement is not available to the Claimant, three years have passed since 18th August 2022.

Cross-examination of DW by the Claimant

64. The Speaker (DW) testified that though no evidence that the claimant's position was filled, the speaker as the Chairman of the 1st respondent confirmed that the position was filled and it was three years since the claimant's dismissal had lapsed.
65. The Speaker testified that he chairs the Board and staff meetings and that minutes of 8th February 2022 were taken by the Clerk of the County Assembly, John Musongo, although he was not a witness in



- this case. He testified that the Minutes of 8th February 2022 were confirmed on 22nd September 2022 but the Clerk did not sign them though he had authored them.
66. DW stated that the show cause letter indicated that the respondents discovered that the file was stolen but there was no specific date of the said discovery and that no specific nature of the information alleged to have been disclosed to the public was stated.
 67. The Speaker stated that since the Claimant had the file, then there was evidence that he had disclosed information to the public. There was no investigation report on the issue by the clerk and the Board had no evidence of the investigations that was before the court.
 68. DW on being questioned whether the Staff Advisory Board had investigated and advised the Board as required, affirmed that the report was not before court and that the said Staff Advisory Board Report does not bind the Board.
 69. DW referred to Minute No. 2/02/2022(c) relating to the Claimant's conduct and confirmed that there was no evidence before the court but the same was in the Claimant's personal file.
 70. DW confirmed that there was no invitation letter to the Claimant for the interview.
 71. DW was asked to confirm that the Front Desk Manager cannot give out a file unless with permission to which he responded that the Claimant was a senior officer.
 72. DW was questioned whether the signing of the register of documents for a file meant that a file was stolen, and he responded that the file was found in Nairobi.
 73. DW testified that there was no evidence that the claimant had been given the file without authority.
 74. DW confirmed that the Clerk had confirmed that he had not recorded any statement before the police or knew who had recorded the complaint yet the County was a party to the proceedings that were quashed. (Vol. 1C pg. 254-255).
 75. Referred to Pg. 458-459 of Volume 2B, DW confirmed that the claimant was arrested at the County assembly precincts as he was in attendance at the ICT and Administration Committee Meeting.
 76. DW testified that the interdiction had been based on their finding that since the Claimant had not brought back the file and had been arrested on 6th August 2020. That the interdiction was not based on the police charge sheet.
 77. DW was asked about the procedure for returning files and he stated that the same was by Practice. On whether he had confirmed whether the Committee had dispensed with the file, DW said the same had been dispensed with.
 78. On being asked whether there was evidence of a request to the claimant to avail the file, DW stated that on hand-over and at the dismissal time the claimant did not avail the file.
 79. DW told the court that they were not aware at the interdiction time, whether the file was in the custody of the Claimant or not.
 80. DW told the court that the report from the police was that the file had been found in the possession of Dennis Wangila.
 81. DW confirmed that they did not appeal against the Judgement of the High Court, Nairobi in the Judicial Review Case (Pg.293).



82. DW stated that the letter from the DCI that led to the Claimant's interdiction was not availed in court as evidence and there was no evidence of insubordination of the Board by the Claimant in the show cause letter.
83. DW stated that the Claimant did not hand over though no follow-up was done with the Claimant to hand over, as he was a senior officer and he was never prevented from handing over.
84. DW stated that the Claimant's dismissal was by a full Board based on his response to the Show Cause letter; and that there was no need for the Claimant to appear before the Board as his response was sufficient.
85. The Respondents stated that the claimant got a chance to file his response and thus it was appropriate to dismiss him without a hearing or any documentation, though the Claimant had asked for material evidence.

Re-Exam

86. DW told the court that the Clerk was not obligated to file a complaint for an offence to be deemed to have occurred and the file was never recovered to date, and if the same had not been stolen, the Claimant could have handed the same over as he was not barred from entering the Assembly's precincts and there exists no proof that he signed the return of the file. DW stated that it is not necessary to produce all documents as evidence, especially court documents.

Written Submissions

87. The court gave directions for the filing of written submissions after the hearing. The parties complied. The Claimant acting in person first filed his written submissions dated 14th November 2023 which had been received in court on 15th November 2023. On 30th November 2023, he sought leave to amend typos on the filed submissions and was directed to file submissions by the close of that date. He complied and filed his supplementary submissions dated 30th November 2023. The Respondents' written submissions dated 8th December 2023 were drawn by the Legal Counsel, County Assembly of Bungoma, and were received in court on 11th December 2023. The Claimant filed further supplementary submissions dated 15th December 2023 and received them in court on an even date.

Determination

Issues for determination.

88. The Claimant identified the following issues for determination: -
 - a. Whether the impugned minutes in support of the summary dismissal are inadmissible
 - b. Whether the Summary dismissal letter was null and void ab initio
 - c. Whether the summary dismissal was unconstitutional, unlawful.
 - d. Whether the Claimants' summary Dismissal was unfair.
 - e. Whether the Claimant's interdiction was unlawful and unfair.
 - f. Whether withheld ½ salaries for August 2020 to January 2022 should issue.
 - g. Whether the Claimant's prayer for exemplary damages, Punitive, aggravated damages and general damages should issue.



- h. Whether the Claimant is entitled to the unpaid Leave Allowances.
 - i. Whether the Claimant is entitled to the alternative prayer of 12 months compensation for unlawful, unfair and malicious summary dismissal.
 - j. Whether the Claimant is entitled to alternative prayer for severance pay.
 - k. Whether this court should order the Bungoma County Criminal Investigations Officer (CCIO) to investigate and arraign in court the 2nd respondent for perjury and uttering false documents for purposes of interfering with the administration of justice.
 - l. Whether the Respondent to issue the claimant with Certificate of Service under section 51 of the [Employment Act](#) 2007.
89. The Respondents on the other hand identified the following issues for determination: -
- a. Whether the Claimant has come to this Honourable Court with clean hands.
 - b. Whether the termination was fair on substantive justification.
 - c. Whether the orders sought in the Claim are available to the Claimant.
 - d. Whether the Termination of criminal proceedings in favour of the Claimant precluded the respondent from taking disciplinary measures.
 - e. Whether the Claimant was entitled to an oral hearing.
90. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the issues to be addressed in the determination of the dispute were as follows: -
- a. Whether the termination of employment of the claimant by the respondent was lawful and fair.
 - b. Whether the claimant was entitled to the reliefs sought.
 - c. Who bears the cost of this suit?

Issue a) Whether the termination of employment of the claimant by the respondent was substantively and procedurally fair.

The standard of proof

- 91. Employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to the extent the termination is unfair if ‘(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’.
- 92. What the court is called to do is to consider what a reasonable employer would have done in the circumstances as per the test defined by Lord Denning in *British Leyland UK LTD V Swift* (1981) I.R.L.R 91 where the reasonableness test was defined to wit: - ‘the correct test is: ‘was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair.’
- 93. Section 43 of the [Employment Act](#), 2007 provides that:-



- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the Act provides that:

- (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 employee's 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.”

94. As rightly held in *Josephine M. Ndungu & others v Plan International Inc* (2019) eKLR observed: ‘68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee’s contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee’s conduct, capacity and compatibility or based on the employer’s operational requirements....”

95. The Claimant was interdicted through the letter of 18th August 2020(pg. 256 Vol. 1B) which read that: - “it has been reported to this office vide letter dated 18th August 2020 ref: CID/CRI/6/4/VOL.39(109) from the Directorate of Criminal Investigations, that you were arrested on 13th August 2020 and charged in court of Law with the offence of stealing on 14th August 2020.

In view of the foregoing, you are hereby interdicted from exercising the duties of your office with effect from the date of the letter pursuant to the provisions of the *Employment Act* 2012, the Human Resource Policy and Procedure Manual 2016, Section K6 (1)(2)(3) and the Discipline Manual 2016 Section 4.2(a)of the Public Service.

While on interdiction, you will be paid half basic salary, full House Allowance and Medical Insurance Cover....”

96. The Claimant was then issued with the show cause letter dated 31st January 2022(pg. 257 Volume 1B) which read: -

“it has been discovered by the management that you stole a public office file and disclosed confidential information to the Public without the knowledge of the authorized officer.

You contravened the code of secrecy of the public service which you signed.

In view of the above, your dismissal is from service on account of gross misconduct is contemplated but before this is done, you are hereby called upon to show cause why the intended action should not be taken.



Your representation if any, should reach this office within 7 days from the date of this letter failure to which the contemplated action will be taken without further reference to you. ...”

97. The Claimant having been accused of having stolen a public file, through a Response letter of 6th February 2022 which was received in the office of the Clerk of the County Assembly on 7th February 2022, sought among others for particulars of information disclosed and denied that he had stolen any file(Pg. 258-261).
98. The Claimant testified that he had indeed signed the Register to collect the file on the Budget Response from the Office of the County ‘Sec’ as evidenced on the said Register (Pg. 9 Volume 1). He testified that he was the Principal Clerk Assistant in the committee for ICT and that he collected the file for submission before the said Committee.
99. The Summary dismissal Letter dated 8th February 2022 was in part couched in the following words:
- “the County Assembly Service Board in its Show Cause Letter dated 31st January 2022 ref: BCA/CASB/ST/025(43) required you to respond on the following accounts.
- a. You stole a public office file.
 - b. Disclosed confidential information to the public without the knowledge of the authorized officer.
 - c. Previous records show that you have had discipline issues.
- In your response dated 6th February 2022 to show cause, you requested to be furnished with information and material evidence to enable you respond. Please note that your response was unsatisfactory as the said materials were in your custody and above-mentioned offences amount to gross misconduct.
- The County Assembly Service Board in its MEETING held on 8th February 2022 CASB MIN No. 2/02/2022 resolved to summarily dismiss you from service pursuant to section 44(33) (4g) of the Employment Act 2007.....”
100. It is not in dispute that the collection of the file from the Clerk’s office was within the Claimant’s capacity in the workplace as a Committee Clerk. The Claimant denied the allegations against him by the Respondents in his response. The Court proceeded to consider whether the reason for the employment termination was valid.

The Claimant’s submissions

101. The Claimant submitted that the 1st Respondent falsely and maliciously accused him of theft of a public file contrary to Section 281 of the Penal Code, Cap 63, and of disclosing confidential information without authority.
102. The claimant submitted that the file in question was submitted by a Chief officer in the County executive on 6th July 2020(Pg. 4-5, para.2-3 Volume 1) for submission before the Public Administration and ICT Committee (PA & ICT Committee). That the Claimant in the course of his duty was issued the file (pg. 9 Volume 1) by Messrs. Tumphrose Muyundo, a front desk manager, for him to submit the file before the Committee for consideration (pg.545 Vol. 2B).
103. The claimant submits that he submitted the file before the PA & ICT Committee deliberations, recommendations were made and a report was authored therefrom which was signed by the



- Chairperson and the Claimant in his capacity as a Procedural Clerk of the PA & ICT Committee (pg. 10-16 of Volume 1) and transmitted by email by the claimant to the County Assembly Fiscal Analyst, Diana Naliaka, and the Clerk to the Budget and Appropriations Committee, Joselyn Situma (pg.18 of Volume 1).
104. The claimant submits that being the Procedural Committee Clerk of the PA & ICT Committee, he retained the file in the event of subsequent issues on the same and for reference.
 105. The Claimant submits that he retained the file to prepare procedural advice to the committee and to assist in the preparation of a draft report.
 106. The claimant states that the file was not confidential and it had been transmitted by the Chief Officer with no indication of confidentiality (pg. 4-5 Volume 1) and he retained and kept it in an open shared office space (pg. 965 Volume 4B).
 107. The Claimant submits that neither the 1st respondent who is the clerk nor the Deputy Clerk who was the claimant's immediate supervisor filed a complaint that the claimant had stolen a file, as they were aware that the impugned file was under consideration before the committee and understood the retention of file was a common practice.
 108. The Claimant submits that this position on retention of files was not rebutted and submits that once a party fails to rebut an issue they cannot raise it in another forum.
 109. The Claimant submits that he further retained the file which was also at the heart of two petitions, as advertised (SFT3-Pg. 184), that had been filed for the removal of the Governor(then)Mr. Wangamati, regarding the expenditure of public funds and the same petitions, were to be considered within 60 days as per the Assembly's standing orders 225(6) and the petitions were public interest.
 110. The Claimant submits that the Speaker could not direct a procedural clerk to return a file that was under consideration before a Committee, as the then Governor Mr. Wangamati had been invited to appear before the Committee for a pre-trial conference between the 10th and 13 August 2020(SFT4-pg. 185-186) and the impugned file was one of the documents for consideration.
 111. The Claimant further avers that the file could not have been returned as the clerk through the letter dated 10th August 2020 requested the status of the implementation of the Approved Bungoma County Annual Budget Estimates FY 2020/2021 and evidence from the CECM for Public Service Management and Administration. (pg. 248 Volume 1B).
 112. The Claimant submits that he was never asked to avail the file and the assumption that the file had been stolen was misdirected, as neither the Chairperson nor any member of the PA & ICT Committee adduced evidence that the said file was ever missing from the County Assembly precincts at the intervening period.
 113. The Claimant states that the 2nd Respondent has no mandate to administer and manage affairs of record management under Section 17(1) (c) & (e) of the County Assembly Service Act 2017 which is the work of the secretary, unless a complaint is lodged under Regulation 50(6) of the Bungoma County Assembly Service Regulations 2020. The clerk clarified that he never lodged any complaint of the alleged theft (SFT9- PG. 194).
 114. The Claimant states that while DW states that the file was in the custody of the police in criminal case no 810 of 2020, DW still indicated that the Claimant failed to return the file upon interdiction on 18th August 2020 and states that upon the finalization of the criminal case, the 3rd Respondent could have obtained the file from the custody of the police.



115. The claimant submitted that DW's position of the claimant having stolen the file changed to that of not returning the file as the claimant had obtained the file legally which was not the reason on the show cause letter.
116. The Claimant submits that as the Procedural Committee clerk, one retains files for Committees and either hands them to the Records Department or the clerk upon dealing with issues at hand.
117. The Claimant submits that the allegations that he did not hand over the Assembly's property during interdiction were not in the show cause letter or dismissal letter and only arose during the hearing.
118. The claimant states that no evidence was produced to show that the Committee had dispensed with the file to have required the Claimant to have returned the file.
119. The Claimant submitted that he could not hand over an office while the JR E1093 of 2020 was still pending and orders staying the interdiction (SFT1- Pg.196-198 Para.5) in place; though the same were never obeyed and the claimant filed contempt proceedings (C.A. COACA/E343/2021); and additionally that the Respondents refused to allow him to enter his office.
120. The claimant submits that the reason for his dismissal was premised on the allegations by the DCI Officers that the claimant handled the impugned file in Nairobi on 6th August 2020 which was not justified as the said DCI letter was never availed and there was no evidence that the incident had been booked in any O.B in Kenya or the recovery of the file in Nairobi (Pg.11-14 Para. 2).
121. The Claimant submitted that evidence at the High Court demonstrated that at the time of his arrest, he was at the Bungoma County Assembly precincts on 6th August 2020.
122. The claimant submits that it was alleged by the DCI, that the file was recovered from Dennis Wasike, who said Dennis is a personal staff of the former Governor Wangamati, and that meant that the file had been taken from the open space at the Assembly and the accusations against the claimant are political machinations.
123. The claimant submits that the former governor had contacted him on 31st July 2020 for discussions on the two petitions against the Governor, but the Claimant refused to so meet him, which he believes led to the ill-advised, falsified, bogus investigations and falsified allegations against him, mainly to prevent the discussions by the PA & ICT Committee of the two Petitions against the Former Governor and to prevent the upward mobility of the claimant in the positions that were about to be unoccupied, such as that of the Deputy Clerk who was about to exit the 1st Respondent's service.
124. The Claimant states that the impugned file was picked from his desk and handed to the DCI to frame him and as confirmed by the clerk that he had not made any report of a missing file (SFT9-Pg. 194) or was any file stolen from the Assembly.
125. The Claimant relied on the statement of Rael Khisa (SFT23- Pg.323-324) who was a member of the 1st Respondent who voted against the claimant's dismissal basing it as malicious and politically motivated and that there was no evidence to support the said allegations against him.
126. The claimant asserts that there is no evidence adduced by the Clerk or his secretary to show that the file was issued to the claimant illegally and the failure to give any evidence to controvert it means that the claimant's position remained uncontroverted and to buttress this assertion the Claimant relied on the decision in Motex Knitwear Mills Limited HCC 834/2002.
127. The Claimant submits that there was no evidence whatsoever that investigations were conducted and the Respondents failed to justify the burden of the Claimant's dismissal.



128. The Claimant submits that he never disclosed any confidential information as the Respondents failed to adduce evidence that the impugned file was put to any other use other than its intended purpose. That the particulars of the alleged confidential information were never disclosed and that the allegations against the Claimant were only meant to frame him against the *Evidence Act* and he relied on the decision in *Kyallo Elly Joy V Samuel Gitahi Kanyeri (2021) eKLR*

Respondents' Submissions on Substantive Fairness

129. The respondents submitted that the Claimant had in his testimony adduced evidence that he had received and signed for a file from the County Assembly and that he had confirmed to had not returned it, which file contained crucial proceedings of the Committee and documentation.
130. The respondents submit that the claimant confirmed having been arrested in Nairobi and the file was found in possession of Third parties and the Claimant was at pains to explain how the same found its way into the hands of third parties.
131. The Respondents submit that the claimant indeed acknowledged he did not have the file in his possession and that the same was possibly among exhibits adduced in the criminal case he had been charged. The Respondents said that the file is still in the possession of the police and nothing stops the police or prosecution from initiating other proceedings against the claimant.
132. The Respondents submit that an employee should act in the Employer's best Interest in good faith which includes the duty not to disclose confidential information of the Employer's business without the Employer's consent. To buttress this assertion, the respondents relied on the case of *Iys & Tees Limited V Everlyne Medegwa & Anor (2009) e KLR* to assert that the Claimant's conduct attracts summary dismissal under Section 44 of the *Employment Act* and relied on the case of *Pascalina Masyula V Paul Wambua Valuers (2015) ECLR*.

Analysis

Substantive fairness

133. The claimant argues that no Board minutes were provided to interdict him and only the Board could interdict him as it has the power to interdict him only as per Regulation 46 (1) (2) of the Bungoma Assembly Services' Regulations, 2020 and that the 3rd Respondent acted ultra vires in interdicting him. He relied on the decisions in *NML V Judicial Service Commission & Another (2029) eKLR*; *Onesmus Sintole Saidimu v Sane Ole Saidimu Nkikoora & 5 others (2021) eKLR* and *Eustace Muriithi Njeru v energy and Petroleum Regulatory Authority (2020) e KLR*.
134. The Board acts through its agents either the chairperson or the secretary. The Decision to interdict the Claimant was communicated by the 3rd Respondent, the Secretary to the Board, relating to a letter from the DCI that the Claimant had been arrested. The Claimant agrees that he was indeed charged on 14th August 2020. The interdiction letter was of 18th August 2020, after the Claimant had been charged in Court.
135. By dint of Section 4.2 of the Discipline Manual 2016:-

“The interdiction process entails the following:



- (a) An officer may be interdicted where gross misconduct which is likely to lead to dismissal is reported and requires investigation or a report that an officer has been charged in criminal proceedings is received.”
136. The Interdiction was within the mandate of the Board and the Clerk is a member of the Board with the authority to act on behalf of the Board, there was no indication from the Board that the Clerk acted unilaterally.
137. While Interdiction is a mandatory action where a Public officer is Charged with a Criminal Offence in an external forum as per the Discipline Manual 2016, 4.2.1. (b), the show cause letter arises from an internal administrative action by the employer.
138. The Show cause letter dated 31st January 2022(pg.257 Volume 1B) read:-
- “..it has been discovered by the management that you stole a public office file and disclosed confidential information to the Public without the knowledge of the authorized officer.
- You contravened the code of secrecy of the public service which you signed.
- In view of the above, your dismissal is from service on account of gross misconduct is contemplated but before this is done, you are hereby called upon to show cause why the intended action should not be taken.
- Your representation if any, should reach this office within 7 days from the date of this letter failure to which the contemplated action will be taken without further reference to you. ...”
139. The Claimant in his response of 6th February 2020 and delivered on 7th February 2020 to the Clerk, pointed out that the Show Cause letter was ambiguous and the specific file in question was not mentioned, the particulars of the confidential information disclosed were neither mentioned. He demanded to be provided with the clear particulars of the charge against him.
- The Claimant however went on to presume the alleged allegations against him and responded to the Show cause letter.
140. Section 43 of the *Employment Act*, 2007 provides that:
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
141. There is no record or evidence provided by the Respondents whether the Claimant was supplied with a clarification on the issues raised in the Response by the Claimant to the show cause letter.
142. An employer is required to prove the reason or reasons for the termination as per Section 43 of the *Employment Act*. The Show Cause letter as drafted by the Respondents read: - “It has been discovered by the management that you stole a public office file and disclosed confidential information to the Public without the knowledge of the authorized officer.
- You contravened the code of secrecy of the public service which you signed...”. There were no particulars of the nature of the file the Claimant had stolen nor particulars of the nature of confidential



- information that had been disclosed, to whom the said information had been disclosed to and on which date that said information or theft had taken place in the said show cause letter.
143. The Claimant asked the Respondents to provide the particulars of the “stolen file and particulars of the disclosed information”, but this information was not availed to the Claimant.
144. The employer is required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
145. The Summary dismissal letter stated that:-
- “the County Assembly Service Board in its Show Cause Letter dated 31st January 2022 ref: BCA/CASB/ST/025(43) required you to respond on the following accounts.
- a) You stole a public office file.
- b) Disclosed confidential information to the public without the knowledge of the authorized officer.
- c) Previous records show that you have had discipline issues.
- In your response dated 6th February 2022 to show cause, you requested to be furnished with information and, material evidence to enable you respond. Please note that your response was unsatisfactory as the said materials were in your custody and above-mentioned offences amount to gross misconduct.
- The County Assembly Service Board in its Meeting held on 8th February 2022 CASB MIN No. 2/02/2022 resolved to summarily dismiss you from service pursuant to section 44(33) (4)g) of the *Employment Act* 2007.....”
146. The Respondents are mandated by Section 43 to avail to an employee whom they are considering terminating, the reasons for the said termination, and to provide all particulars to ensure the employee on his part defends himself on the reasons provided.
147. For the Respondents to have acknowledged that the Claimant had requested particular allegations against him and going ahead to indicate that they could not avail the said because the alleged information and documents were in the Claimant’s custody, shifted the burden of availing the evidence against the Claimant from the Respondents to the Claimant.
148. The Claimant is only required to show that his termination was unfair and not to provide for the reasons for his termination.
149. The respondents having stated that the management had discovered that a file had been stolen and confidential information disclosed, were mandated to give the Claimant the particulars thereof without any ambiguity. The umbrella statement that a public office file was stolen and confidential information disclosed fell below the mandate required of an employer to ensure the reasons for the termination were given to an employee before terminating him, by ensuring that the employee understood the charges and allegations against him. This was not the case here, the Respondents directed that all evidence was within the Claimant’s knowledge in the dismissal letter and thus they had no reason to avail the evidence against the Claimant on the said allegations.
150. On the reasonableness test, ‘was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair.’”



151. The Respondents did not provide the Claimant with the particulars of the allegations against him, they shifted the burden of finding the particulars of the dismissal to the Claimant. The Show Cause letter was based on ambiguous allegations as the specificity of the File stolen, the confidential information disclosed, to whom it was disclosed, when was the file stolen, and when the information disclosed was never disclosed to the Claimant.
152. The Dismissal letter conspicuously also introduced the allegation of: -
“ Previous records show that you have had discipline issues.”. This was never an issue raised in the show cause letter, the Claimant had not been given an opportunity to address the new issue in any forum. No evidence of the alleged discipline issues was availed as evidence in this case by the Respondents.
153. The failure to provide the specific particulars of the allegations against the Claimant violated Section 43 of the *Employment Act*, requiring the employer to provide the reasons for termination against the Claimant. The respondents assumed that the Claimant was aware of the allegations against him based on other court cases that were before different courts. The Process of Administration Disciplinary proceedings are specific to an employer and are to be commenced through clear grounds. A reasonable employer is required to ensure:- “a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason -(i) related to the employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer;”
154. The Claimant stated that he was authorized to collect a file as the Procedural Committee Clerk of the PA & ICT Committee, and he had signed for the said file which was tabled before the committee and later he kept it at his desk in an open shared office space. The show cause letter though did not specify which file was stolen, the claimant assumed based on the Criminal proceedings against him, that the file was about the PA & ICT Committee, and the Respondent had already at this point failed on giving the details of the lost file.
155. The Respondents did not indicate when the file had been stolen by providing the claimant with evidence thereof, neither did the Respondents provide details of when the Confidential information alleged to have been disclosed had been so disclosed; to whom the same had been disclosed to; the date when the file had been stolen or the information disclosed. The reasons provided by the Respondents were that they had discovered that a file had been stolen. No other details were given.
156. A reasonable employer understanding the nature of the work that was performed by the Claimant should have considered whether the file was with the Claimant but in the first place by asking the Claimant to avail the file, investigations could have flagged which confidential information had been disclosed and to whom.
157. The Court holds there was no proof of valid reason for dismissing the Claimant from the employment of the 1st Respondent.

Procedural fairness

158. For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
159. In *Josephine M. Ndungu & others v Plan International Inc (2019) eKLR (supra)* the court observed that - “Fair procedure, on the other hand, refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under section 43(1), 45(2) and 47(5) of the Act,



to justify the reason for the termination and prove that a fair procedure was followed.” The court holds that the 4 corners of legal threshold referred to in the foregoing decision are stated in section 45)2(b) of the *Employment Act* namely: - (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer;”

160. Section 41 of the *Employment Act* provides as follows: -

“(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

Claimant’s submissions on Procedural Fairness.

161. The Claimant submitted that the Minutes resulting in his dismissal ought to have been signed on the same date and not on a subsequent meeting, as the Meeting was held on 8th February 2022 and the minutes confirmed by the 2nd Respondent on 22nd September 2022 solely by the 3rd Respondent. To Buttress his assertion he relied on the Authority in *Kiilu v Isinya Resorts Limited (2022)eKLR*.

162. That the same minutes having been signed on a subsequent alleged meeting meant they were not authentic as there is no proof that the said subsequent meeting took place seven months after the Claimant’s dismissal. That the minutes were only signed by the Chairperson against the practice of public institutions for minutes to be signed by both the Chairperson and secretary.

163. The Claimant states that the 1st Respondent who was the author and secretary of the Meeting leading to his dismissal failed to appear to authenticate the minutes the office being a successive one where in case the old officer leaves the new secretary can authenticate the minutes.

164. The Claimant submits that the Minutes indicate that the issues discussed during the disciplinary meeting did not deal with the matters of theft of the alleged stolen file or disclosure of confidential information raised on the Show cause letter (SFT19-pg.290)(see *Kiilu v Isinya Resorts Limited (2022)eKLR*).

165. The Claimant submits that Minutes dealt with matters not raised in the show cause letter such as MIN CASB 2/02/2022 which stated that the claimant:- ‘persistently used abusive, insulting language and behave in a manner insulting, to his employer and further to people placed in authority over him by his employer.’

166. The Claimant prays that the minutes be expunged for dealing with unsubstantiated and foreign allegations as DW testified.

167. The Claimant submits that under Section 29 (c) and (f) of the County Assemblies Services Act, 2017, the Board was obligated before dismissing him to consider an Investigation Report originating from investigations that were to be conducted by the Staff Advisory Committee(SAC) which has powers to



- undertake investigations against an employee and advise the 1st Respondent on the appropriate action to be meted against the employee.
168. DW confirmed that the Board did not have any investigation report by SAC and acted on its own motion.
169. The Claimant submits that this was in violation of Articles 47, 50,73 & 236 of *the Constitution* and relied on the authority in *Ojako V County Assembly Service Board, Homabay & 2 others (Petition E004 of 2022)(2022)KEELRC 1174(KLR)(11 May 2022) (Judgement)* and *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly(2022)eKLR*.
170. The Claimant states that if the investigations had been conducted, it could have found that he was at work on 6th August 2020 when the police allegedly found the file in Nairobi (pg. 499 Volume 2B) and; later on attended a Liaison Committee in Kisumu(Pg. 514 Volume 2B) and asks the court to consider the finding in JR E1093 of 2020 that the theft allegations were contrived for ulterior purposes.
171. The Claimant submitted that the show cause letter served on 31st January 2022 was premised on allegations of theft in the criminal case at Kibera and no investigation Report was produced to justify the allegations
172. Further, the claimant submits that he was not invited to appear before the 1st respondent to defend himself. The Claimant submits that though the 2nd Respondent stated that the Claimant was invited to testify but he disregarded the invite, it is clear that his dismissal was hurried since after the show cause letter was served on 31st January 2022, the Claimant was dismissed eight days later on 8th February 2022. The Claimant submits that to ensure the Claimant was dismissed, the 1st Respondent ensured that the 3rd Respondent authored the dismissal letter on the day that he resigned from office.
173. The Claimant submits that he was not allowed to face his accusers and the allegations in the summary dismissal letter(SFT21- Pg. 322) that he had discipline issues with no proof of any previous warning letters is false.
174. The Claimant states as evidenced by the dissenting Vote of Rael Khisa, who was a former member of the 1st Respondent that the Claimant had been invited to defend himself, (SFT23-Pg.323-324) the respondents failed to avail the evidence against him after he requested in his response to the show cause letter (SFT20- Pg.291 Para. 1.2) and the respondents state that they could not provide the evidence as the same was in the Claimant's custody.
175. The Claimant submits the failure to provide him with the evidence against him and the failure to invite him for a hearing was against Sections 43 and 45 of the *Employment Act*.
176. The Claimant submits that he complied with the internal appeal under Regulation 54(1) and (2) of the Bungoma County Assembly Service Regulations 2020 on 16th February and 16th March 2022 and on the Respondents' failure to respond, he invoked this court's jurisdiction on 16th May 2022 and the Issue on the jurisdiction has already been dealt with by the Court ruling on 1st December 2022.
177. The Claimant avers that initiation of a complaint or suit against his employer should not be a ground for termination unless the same is irresponsible and the Claimant avers that his suits against the Respondents were a reaction to his termination. To buttress this point he relied on the decision in *Kenfreight (E.A) Limited v Benson K Nguti(2016)eKLR*
178. The Claimant avers that although the decision to dismiss him was sanctioned by a majority of Board Members, the same ought to be within constitutional confines, by undertaking investigations, adducing evidence, a fair hearing granted, and as a public officer under Article 236 before any



disciplinary action is undertaken he must have been taken through the due process of the law. To buttress these assertions the Claimant relied on the decisions in *Judicial Service Commission v Mbalu Mutava & Another* (2015) eKLR; *Gichuru V Package Insurance Brokers Ltd* (2019) eKLR and *Postal Corporation of Kenya v Andrew K. Tanui*(2019) Eklr.

Respondents' Submissions on Procedural Fairness

179. The respondents submit that the Claimant's response to the Show Cause letter was considered before his dismissal, and the Minutes of the Board (EM-4) resulting in the dismissal were produced. The Respondents submit that contrary to the claimant's assertions that he was not heard, the Respondents assert that an oral hearing is not necessary and relied on the authority in *Kenya Revenue Authority VS Menginya Salim Murhgan C. A Civil Appeal No. 108 of 2009* where the court held that:-

“the hearing does not necessarily have to be an oral hearing in all cases other than Courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to the task, it is for them to decide how they will proceed and there is no rule that fairness always require an oral hearing. whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision made.”

180. The same assertion was reiterated in *Jacob Orianda Chanda V Kenya Hospital Association Ltd T/a Nairobi Hospital* (2019) eKLR as quoted by the Respondents.

Analysis

181. The Claimant was appointed as an employee of the County Assembly Service Board as a Principal Clerk Assistant on 20th August 2014. Clause 13 of the Appointment letter provides that the Regulations of PSC and those of the Board would apply in Disciplinary action. The Contemplated Board Regulations are the Bungoma County Assembly Service Regulations(BCASR) 2020 produced by consent of the parties.

182. The Disciplinary process therein is provided under Regulation 50 as herein below:-

“ 50

- (1) A public officer who Commits an act of misconduct shall be dealt with immediately in accordance with this part.
- (2) if any case comes to the attention of the Board and the Board is of the opinion that disciplinary proceedings should be instituted against public officer, the Board shall, despite any other provisions of these regulations, direct the authorized officer to initiate such proceedings.
- (3) the Board shall not prescribe any disciplinary process that offends the rules off natural justice.
- (4) No penalty shall be imposed against a public officer unless-
 - a. The public officer has been notified, in writing, of the particulars of the misconduct, as preferred, including the applicable provision of *the*



- constitution, legislation, or code of conduct alleged to have been breached.
- b. The officer has been given a reasonable opportunity to respond to the allegations.
 - c. The allegations have been investigated by a public officer or officers who are senior to the officer subject to the proceedings or by any other lawful authority, and the findings are such that the public officer has committed the misconduct as alleged;
 - d. The person or authority investigating the case has not been directly or indirectly involved in the case as a witness or complainant or otherwise as an interested party; and
 - e. The mitigating or aggravating circumstances of the case have been considered.
- (5) where a penalty is imposed in a disciplinary process, the affected public officer or the representative shall be informed of the outcome of the disciplinary process including such penalty that may have been imposed and any right of appeal or review, in writing.
- (6) Every alleged case of misconduct that is likely to lead to the commencement of disciplinary action shall be-
- a. Promptly recorded and reported by the relevant supervisor, and
 - b. Investigated without delay and a report which shall be submitted together with relevant evidence compiled.
- (7) in every investigation of an alleged misconduct, the lawful authority or public officer undertaking the Investigation shall:-
- a. Establish and maintain a record relating to the investigations;
 - b. Give every party involved especially the affected public officer a chance to produce relevant documents, call and examine witnesses, and peruse any documents that may have been produced.
 - c. Record all relevant and material oral and documentary evidence
 - d. Sum up the case and record the comments in order to clearly show the findings and opinion on the issues under investigation in view of the



evidence and the Mitigating and aggravating factors on record.

- (8) A person involved in investigating a disciplinary case shall not impose any penalty but only make findings and recommendations reserving imposition of penalty, if any to be decided by the Board or other person vested with authority to do so.
- (9) where the disciplinary proceedings have been taken against a public officer under these regulations, the public officer shall be informed by the board-
 - a. The findings on each alleged misconduct which has been preferred against the public officer;
 - b. The penalty, if any, to be inflicted upon the public officer; and
 - c. The right to appeal or application for review with the Board or other lawful authority within the time prescribed in the applicable disciplinary proceedings.
- (10) Any disciplinary proceeding against any public officer shall uphold the right to a fair administrative action as provided for in Article 47 of *the Constitution* and the Fair Administrative Actions Act....”

183. The Regulations uses the Word “Shall” to state that:-

“No penalty shall be imposed against a public officer unless....”

184. The use of the word “shall” denotes that the procedure is mandatory in the disciplinary proceedings before the 1st Respondent.
185. DW testified that an oral hearing is not mandatory as the Claimant’s response to the show cause letter was considered before arriving at the decision to dismiss him.
186. Where an Internal procedure is set, the said procedure must be followed.
187. According to Regulation 50(4)(a,b,) of BCASR, the Show cause letter was sent to the Claimant with the ambiguous particulars of the allegations against the Claimant. The Claimant’s responded to the show cause letter.
188. As per Regulation 50(4)(c) and (d) of BCASR, there was no investigation Report provided by the Respondents concerning the findings of the alleged misconduct by the Claimant. The Respondents did not provide any Report in court.
189. Under regulation 50(6) of BCASR “Every alleged case of misconduct that is likely to lead to the commencement of disciplinary action shall be-
 - a) Promptly recorded and reported by the relevant supervisor, and



- b) Investigated without delay and a report which shall be submitted together with relevant evidence compiled.
190. There was no evidence that any report was made by the Claimant's supervisor relating to the loss of any file. The Claimant produced the letter from the Clerk of 27th August 2020 (Pg. 255 Volume 1B) where he confirmed that as the authorised officer, he had not made any report in any police station. There was no proof from the Respondents of the source and origin of the record of the theft of a file by the Claimant's supervisor and the interdiction of the Claimant had commenced on an alleged letter from the DCI which was never produced in court.
191. Regulation 60 of BCASR mandatorily requires that the report of any incidence of misconduct be reported by a supervisor, for investigations to be conducted and a report to be prepared without delay.
192. There was no compliance with this regulation by the Respondents.
193. Under Regulation 50(7) of BCASR, the Investigation officer is required to keep a record of the investigation; to give every party involved a chance to produce evidence; to call and examine witnesses; peruse any documents produced; and give a record of all oral and documentary evidence and under Regulation 50(8) the investigating officer is required to give the finding, and opinion on issues under Investigation in view of the evidence; any aggravated or mitigating factors and to only make a recommendation reserving the penalty to be decided by the Board.
194. It is after the Disciplinary proceedings through the investigations that under Regulation 50(9), the Board is required to inform the Member of the findings on his misconduct, the penalty, and his right to appeal or review and timelines of the appeal.
195. In the instant case, there was no Investigation report produced by the Respondents. The Respondents produced the Minutes of 8th February 2022(EM-4) which state as follows:-

“Min Casb 2/02/2-022: Disciplinary Matter – Francis Simiyu Tome

The Secretary to the Board took the Board Members through the Show Cause letter and further took members through the response filed by Mr. Francis Simiyu Tome. After the Board Member had been taken through on both the show cause letter and the Respondent members ventilated through and observed the following ;

- a. Mr. Francis Simiyu Tome was given a fair hearing under Article 47 of *the Constitution* of Kenya, through the response filed on the show cause letter received in the Office of the Clerk.
- b. The Response from Mr. Francis Tome did not respond on the matter of the show cause letter on the gross misconduct on the following matters;
 - i. Theft by Public Servant
 - ii. Unauthorised use or disclosure of confidential information.
- c. It was also observed that the officer in question persistently used abusive in insulting language and behaves in manner insulting to the employer and further to people placed in authority over him by his employer and thus breaching the employment law section 44(4)g. Further, this reason informed the Board to decline the formation of the Staff Advisory Committee to advise the Board under Section 29 of the County Assembly Service Act, 2017 and



dealt with the matter directly because the ultimate decision on the disciplinary matter rests with Board.

After deliberations, under Section 10 of the second schedule of the County Services Act, 2017 majority of the members resolved that the officer Mr. Francis Simiyu Tome be summarily dismissed from the Service immediately on the above observations, while one member Ms. Rael N. Khisa had a dissenting opinion, that the disciplinary case could be referred to the Sub- Committee of the Board on human Resource and Administration matters or Staff Advisory Committee. In response, the majority members of the Board indicated that the subject matter had already ben addresses as in observation.

The Secretary was directed to issue the letter of termination of the services of the said officer forthwith.....”

196. From the above excerpt of the minutes of the Meeting of the Board of 8th February 2022, it is clear that no investigations were undertaken into the Claimant’s conduct as the Board alleged that the Claimant was abusive and insulted people placed over him. There was no reference to any incidences of the use of abusive language or any warning letter relating to the Claimant’s conduct produced by the Board relating to the alleged conduct.

197. Section 29 of the County Assembly Service Act, 2017 provides that:-

“The Board Shall establish a committee to be known as the Staff Advisory Committee which shall be responsible for advising the Board, through the Committee, on matters relating to staff including—

(c) termination of the appointment of an employee;

.....

(f) interdiction of an employee;”

198. It is instructive to note that the use of the word ‘Shall’ denotes that the Board is obligated to establish the Staff Advisory Committee(SAC) for advice on matters relating to the interdiction or termination of an employee.

199. The 1st Respondent in its minutes, contrary to the mandatory statutory provisions, by-passed the formation of the Staff Advisory Committee to advise the Board relating to the Claimant’s termination of employment citing instances of lapse in discipline on the part of the Claimant without any evidence. There was no evidence that any warning letters had been issued to the Claimant on the use of abusive language.

200. This is what the board stated in declining to form the SAC:-

“It was also observed that the officer in question persistently used abusive insulting language and behaves in manner insulting to the employer and further to people placed in authority over him by his employer and thus breaching the employment law section 44(4)g. Further, this reason informed the Board to decline the formation of the Staff Advisory Committee to advise the Board under Section 29 of the County Assembly Service Act, 2017 and dealt with the matter directly because the ultimate decision on the disciplinary matter rests with Board.”



201. The Board violated the legal provisions requiring that the due process must involve the Staff Advisory Committee to advise the Board and delegated to itself the authority to investigate and determine the termination of the Claimant without obtaining the findings or recommendations of the SAC. The Board at this point had already violated the legal provisions that guide its operation and acted without any mandate in violation of Regulation 50 (4) that “No penalty shall be imposed against a public officer unless- The person or authority investigating the case has not been directly or indirectly involved in the case as a witness or complainant or otherwise as an interested party;” The Board was the Complainant against the Claimant and it purported to have investigated the Claimant’s offences.
202. The issues raised in the show cause letter were not considered by the Board, on whether the Claimant had stolen the file nor the disclosure of the confidential information. The Board digressed and focused on their observation relating to the Claimant’s conduct in reaching the decision to terminate the Claimant. The Board’s mandate as per regulation 50(9) is to inform the Member of the findings on his misconduct, the penalty, and his right of appeal or review and timelines of the appeal. The Findings were to be provided by the Investigation Officer, who is mandated to provide a Report setting out the evidence collected, which includes the hearing of all persons involved and the calling of witnesses.
203. Rightly quoted by the Claimant, Justice Agnes Nzei in *Kiilu v Isinya Resorts Limited* (Cause E022 of 2021) [2022] KEELRC 13240 (KLR) (17 November 2022) (Judgment) found that “Issues to be discussed at a disciplinary hearing must be the same as in the show cause letter; and minutes taken during a disciplinary meeting ought to be signed at the meeting during or in which they are taken, but not in a separate or subsequent meeting.”
204. The Minutes of the Respondents were confirmed only on 22nd September 2022 by the Chairperson, Mr. Emmanuel Situma, and they did not contain the signatures of the members or the Secretary of the Board who sat through the said disciplinary meeting on 8th February 2022. It could not be ascertained whether the meeting had taken place indeed on 8th February 2022 or any other date and this was a violation of the right to a fair hearing.
205. The Board did not call any witnesses, despite taking over the investigation mandate, nor did it call the Claimant to appear before it for adducing any evidence. There was no event of invitation of the claimant to the disciplinary hearing. DW told the court the response was enough.
206. Regulation 50(10) of BCASR, mandates that “Any disciplinary proceeding against any public officer shall uphold the right to a fair administrative action as provided for in Article 47 of *the Constitution* and the *Fair Administrative Action Act*.”
207. Section 4 of the *Fair Administrative Action Act*, 2015 Provides that
- “ 4. Administrative action to be taken expeditiously, efficiently, lawfully, etc.
- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable, and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;



- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

208. Additionally, Section 41 of the *Employment Act* provides as follows:-

- “(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

209. It is not in dispute that no invitation letter to attend to the Disciplinary proceedings were produced by the Respondent. The minutes of the board indicate that the Claimant did not appear before the Board, nor was the Claimant given any information, materials, and evidence to be relied upon in making the decision or taking administrative action against him.

210. There were no witnesses availed for the Claimant to cross-examine nor was there any evidence that investigations as contemplated by the Respondents' own Regulations were undertaken.

211. The Board usurped the investigative role of the SAC or any Investigating Officer, who was to undertake independent investigations and came up with a finding. The Board on taking up the investigative role, could not on a fair basis, come up with an independent finding and recommendation and still reach a fair decision having as evidenced, not undertaken any investigations but only considered the show cause letter and response on the same date of the meeting of coming up with a decision to dismiss the Claimant. I agree with the authorities cited by the Claimant and specifically in *Judicial Service Commission v Mbaluka Mutava* (supra) that the administrative actions of public officers, state organ and other administrative bodies are now subject to Article 47 (1) of *the Constitution*, on to the principle of constitutionality.



212. The court holds that there was no procedural fairness in dismissing the Claimant, the Board having failed to establish the Staff Advisory Committee as mandated under Section 29 of the County Assembly Services Act, having failed to undertake any investigations as contemplated in Regulation 50 of the Bungoma County Assembly Service Regulations and having failed to invite the Claimant to a hearing and having failed to consider the issues raised in the Show cause letter. The court holds that the reasons for dismissal were not proved to exist at the time of dismissal for lack of investigations. The court also took notice that Justice Ngaah In JR HC E1093 of 2020 (VOL2(1) Pages 295 -311 made a finding to the effect that the charges of stolen file against the claimant were in bad faith. That the claimant could not have stolen the file while there was no dispute he obtained the file from the Clerk's office by signing for it in the course of his duties as clerk to the ICT and Public Administration committee of the assembly. The reasons do not meet the reasonable test as espoused by Lord Denning in *British Leyland Uk Limited V Swift* (1981), where he stated the test as: -“the correct test is..”was it reasonable for the employer to dismiss him? if no reasonable employer would have dismissed him, then the dismissal was unfair. but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.”. The employee obtained the file legally in the course of work for use by the assembly's committee for which he was the clerk. He was arrested at work for a stolen file. The clerk stated he never complained. There were no investigations by the employer before the complaint to the police nor a demand to the claimant to produce the file. This was indeed a case of bad faith as found by my brother Justice Ngaah in Nairobi HC E1093 of 2020(supra).
213. Consequently, the Court finds and holds that the termination of the employment of the claimant by the 1st Respondent was unlawful and unfair.

Whether the claimant was entitled to the reliefs sought.

214. The Claimant sought for reliefs that: _-
- a. A declaration that the unilateral interdiction of the Claimant by the Respondents was unfair, unprocedural, and illegal hence null and void.
 - b. A declaration that the summary dismissal of the Claimant by the Respondent was unprocedural, unfair, and illegal hence null and void.
 - c. Unconditional reinstatement of the Claimant to the position of the Principal Clerk Assistant.
 - d. A Permanent injunction restraining the Respondents from recruiting another person to take over the claimant's office.
 - e. A permanent injunction barring the Respondents from demoting the Claimant.
 - f. Notice Pay; 3 months 'pay in lieu of Notice (Kshs. 187,870/-) = Kshs. 563,610/-
 - g. Unpaid house allowances
 - h. Service Pay of Kshs. 187,870 x ½ x 8 years of work 2013-2021= 751,516.
 - i. Severance pay Kshs. 187,870x ½ x 8 years of work 2013-2021= 751,516.
 - j. Gratuity pay Kshs...../-
 - k. Certificate of Service
 - l. Costs and interests of this suit
 - m. Damages for wrongful dismissal Kshs. 187,8760 x 12 months = Kshs. 2,254,440/-



- n. Punitive damages.
- o. Exemplary damages.
- p. Damages for violation of the claimant's rights.
- q. Anticipatory benefits

A declaration that the unilateral interdiction of the Claimant by the Respondents was unfair, unprocedural, and illegal hence null and void, and A declaration that the summary dismissal of the Claimant by the Respondent was unprocedural, unfair, and illegal hence null and void.

215. The Court holds that the substantive and procedural fairness in the Claimant's dismissal was not met and therefore the dismissal was unfair and unlawful.

Unconditional reinstatement of the Claimant to the position of the Principal Clerk Assistant.

216. Guided by the Court of Appeal's decision in *Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union* [2017] eKLR where G.B.M. Kariuki, Sichale & Kantai, JJA stated that:-

“The ordinary meaning of the language of Section 12 of the *Employment and Labour Relations Court Act* is that the Labour Court is empowered to order reinstatement of a dismissed employee within three years of dismissal. Parliament in its wisdom capped that period at three years and there is no provision or proviso qualifying that provision to say that time stops running or is interrupted by an action filed in court. We do not accept that submission on the part of Mr. Aduda and it is telling, as pointed out by learned counsel for the appellant, that the respondent had abandoned the prayer for reinstatement in submissions made before the trial court. The learned trial Judge made no mention of this at all in the judgment and we think that it was a misdirection for the learned Judge to make an order for reinstatement when the effect would be to order the appellant to reinstate Siro to employment when the period of three years allowed in law had long passed. To that extent, the learned Judge acted without jurisdiction.....”

217. Section 49 of the *Employment Act*, grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case.
218. This is made clear by section 49 (4) which sets out some 13 considerations which the trial court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination the extent to which the employee caused or contributed to it, and the practicability of reinstatement or re-engagement.
219. The Claimant relied on various decisions to support the claim for reinstatement namely:- *Samuel Nguru Mutonya v National Bank of Kenya Limited* (2017) eKLR, *Anthony Njue John v National Bank of Kenya Limited* (2017) eKLR; *Kenya Education Staff Institute V Kenya Union of Post Primary teachers & 2 others* eKLR(2020); *Laban Maloba Atemba v Kakamega County Assembly Service Board & Speaker Kakamega County Assembly*, Claim 34 of 2023(unreported); *Mary Chemweno Kiptui V Kenya Pipeline Company Limited*(2014)eKLR.
220. The Claimant was dismissed on 8th February 2022 and as of the time of Judgement about two years have passed since the Claimant's dismissal. The Respondents argued that the three-year period had lapsed, which is not the case.



221. In light of the fact that the reasons leading to his dismissal were unjustified; the court should exercise its discretion within the confines of Section 49 of the *Employment Act*.
222. The prayer of reinstatement is available to the claimant as the same is within three years after dismissal but the court in granting a remedy for reinstatement is guided by various principles under Section 49(4) of the *Employment Act*, 2007 namely:-
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee's length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) the value of any severance payable by law;
 - (i) the right to press claims or any unpaid wages, expenses, or other claims owing to the employee;
 - (j) any expenses reasonable incurred by the employee as a consequence of the termination;
 - (k) any conduct of the employee which to any extent caused or contributed to the termination;
 - (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”
223. In *Kenya Airways Limited v Aviation & Allied Worker Union Kenya & 3 others* (2014) eKLR, the Court of Appeal stated that:-
- “Section 49 of EA specifies the remedies which a Labour Officer can recommend or the Industrial Court could award for unjustified summary dismissal or termination and section 49(3) authorises reinstatement or re-engagement for unfair termination or summary dismissal.
224. Lastly, section 49(4) stipulates the matters that should be taken into account in awarding damages, reinstatement, or re- engagement which includes:
- “(c) the practicability of recommending reinstatement or re-engagement and
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances”.



225. The Claimant testified that he had filed various cases against the 1st respondent which he states were responsible and within his right. This fact was raised by the Respondents in their submissions that the Claimant went on a suing spree suing the Respondents in Bungoma ELRC Petition No. 11 of 2021; Bungoma ELRC Petition No. 7 of 2021; and JR No. E1093 of 2020; and Petition No. E006 of 2021.
226. The trust relationship between the Claimant and the Respondent appeared to the Court to have broken down based on the referenced court proceedings. The Claimant testified that he was 49 years old at the hearing and he had never had any employment. There was no proof that the Claimant has sought alternative employment and failed to secure new employment.
227. Based on the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances, the present circumstances do not show a case of exceptional circumstances, observing that the relationship between the Claimant and the Respondents escalated to court proceedings and to order the reinstatement of the claimant would be to order specific performance.
228. The Respondents states that the Claimant's position was filled after the advertisement to fill the position of Principal Clerk Assistant Legislative Services) (FSTS-PG 69 of Amended Petition No. 7 of 2021). The Claimant states that his position was of Principal Clerk Assistant (Committee Services). The Claimant has been out of the said position for over a period of three years, with the interdiction having been in August 2020.
229. The Claimant's appointment letter states that he was employed as a Principal Clerk Assistant, with no designation as Committee Services as alleged. The Position of the Claimant was a public officer and the court could not issue orders to stop the order barring the Board from filing a position that is relevant to its operations.
230. The court finds compensation for unlawful and unfair termination is the ideal remedy in this case. The court in exercising its discretion awards the claimant as the alternative remedy an equivalent of 12 month's salary at the rate of his last salary considering that the procedural tenets leading to his termination were not followed, the arrest which the High Court found to be have been made in bad faith and the unlikelihood to get a similar appointment at the age of 49 years old.
231. The Claimant prayed for Damages for wrongful dismissal of Kshs. 187,870 x 12 months = Kshs. 2,254,440/-.
232. The Payslip of January 2022(attached to the affidavit of 26th April 2023, indicates that the Claimant received a basic salary of Kshs. 66,935. This was half salary as the claimant had been interdicted.
233. The gross salary for the Claimant was Kshs. 133,870 (pay slip of January 2022) plus housing allowance of Kshs. 40,000 and other allowances at Kshs.14,000(per appointment letter) as at the time of his dismissal. The court having held the claimant was entitled to the Maximum compensation of 12 months' salary at Kshs. 187,870 x 12 months = Kshs. 2,254,440/-.

Prayer for A permanent injunction restraining the Respondents from recruiting another person to take over the claimant's office.

234. The Court pronounced itself on this issue in Petition No. E007 of 2021 and the same was overtaken by events.



Notice Pay

235. The claimant prayed for 3 month's pay in lieu of Notice. The Claimant's Appointment letter at Clause 13 stated that on termination, the claimant was entitled to one month's notice on termination or one month's pay in lieu of notice.
236. Having found that the dismissal was unfair, the Claimant is entitled to one month's pay in lieu of Notice = Kshs. 187,870.

Unpaid house allowances

237. The Claimant did not provide particulars of when his house allowances had not been paid nor provide the specific amount claimed. As a special claim, the House allowance must be pleaded for the court to consider. The Claim fails.

Service Pay

238. The Claimant's Pay slip indicates that he was deducted funds for a Provident fund. Under Section 35(6) an employee who is a member of NSSF or a Provident fund is not entitled to service pay. The claimant having been a member of the provident fund is not entitled to service pay.

Severance pay Kshs. 187,870x ½ x 8 years of work 2013-2021= 751,516.

239. Severance pay is provided for under Section 40(1)(g) as a benefit for an employee who has been declared redundant. The Claimant was not declared redundant to be entitled to the same.

Gratuity pay

240. The Claimant's Appointment Letter did not provide for Gratuity payment. The gratuity claim is not based on any evidence and the *Employment Act* does not provide for the same as a statutory right. The claim fails.

Certificate of Service

241. The Claimant is entitled to a Certificate of Service under Section 51 of the *Employment Act* and the same should be issued by the 1st Respondent unconditionally.

Costs and interests of this suit

242. The Claimant is entitled to the costs and interest in the suit from the date of judgment at the court rate.

Punitive damages and exemplary damages

243. The Court in *Barclays Bank of Kenya Limited v Mema* (Civil Appeal E011 of 2021) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment) held that:-

“ Apart from the finding I have made that the general damages cannot be awarded for breach for contract, I also hold that the general damages and punitive damages are different species or heads of damages awarded distinctly. Punitive damages also known as exemplary damages are awarded in two instances. First, where the Government action or conduct complained of is oppressive, arbitrary or unconstitutional. Second, where the defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant (see *D. K. Njagi Marete v Teachers Service Commission NRB CA*



Civil Appeal No. 316 of 2013 [2020] eKLR, Obonyo and Another v Municipal Council of Kisumu [1971] EA 91 and Godfrey Julius Ndumba Mbogori and Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR). I have considered the evidence and record and I do not find any basis for awarding punitive damages within the established principles.”

244. The claimant did not adduce any evidence of any oppressive action against him as relates to his dismissal and this confines compensation to be awarded to the Claimant to be within the provisions of Section 49 of the *Employment Act*.

Damages for violation of the claimant’s rights.

245. The Court finds that in the claim and evidence before the court was of lack of fair hearing. The Court has granted of compensation for Unfair termination which it holds sufficient and within the Court’s jurisdictional confines under the *Employment and Labour Relations Court Act* section 12.

Anticipatory benefits

246. The Claimant is not entitled to anticipatory benefits as the claim against the Respondents was based on an employment Contract and no evidence of future benefits was produced.

½ salaries from August 2020 to January 2022- 17 months and 8 days - Kshs. 1,146,819 claim under written submissions of the claimant

247. The Claimant in his submissions sought for the withheld half salary of the period of interdiction. The interdiction period was from August 2020 until the Claimant’s dismissal on 8th February 2022.

248. The ½ Salary was not pleaded in the statement of Claim and was only brought at submissions. Submissions are not pleadings and the parties are bound by their pleadings. The submissions not being pleadings the court cannot award.

Unpaid Leave Allowance

249. In his submissions, the Claimant claimed for Unpaid Leave allowance for the years 2019 and 2020.
250. The Leave allowance was not pleaded in the statement of Claim and was only brought at submissions. Submissions are not pleadings and the parties are bound by their pleadings. This claim fails.

Costs.

251. Cost follow the event. The claimant was successful. The claimant appeared in person. There were several applications by both parties. Voluminous documents were filed. The court exercising its powers under the law awards reasonable costs in the claim to the claimant to cover court attendance and filing costs which were voluminous and related costs for sum of Kshs. 150,000/-.

Conclusion

252. The Court enters judgment for the claimant that the termination of his employment was unlawful and unfair and awards as follows:
- a. One month notice pay Kshs. 187,870/-
 - b. Compensation pay equivalent of 12 months’ gross salary awarded at a gross salary of Kshs Kshs. 187, 870/-). Total sum awarded Kshs. 2,254,440/-.



- c. The claimant is awarded costs in the claim for Kshs. 150,000/-.
- d. All the above amounts (a,b and c) to be paid to the claimant by the 1st Respondent within 30 days, failing which interest at court rate to apply from date of this judgment until full payment.

253. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF MARCH 2024.

J.W. KELI

JUDGE

In the presence of: -

Court Assistant: Lucy Macheso

For Claimant: In Person

For Respondents: Musumba

