



**kenya Union of Domestic, Hotels, Education Institutions and Hospital  
Workers v Board of Management Hospital Hill High School (Cause  
E802 of 2021) [2024] KEELRC 553 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 553 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E802 OF 2021  
SC RUTTO, J  
MARCH 8, 2024**

**BETWEEN**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS AND  
HOSPITAL WORKERS ..... CLAIMANT**

**AND**

**THE BOARD OF MANAGEMENT HOSPITAL HILL HIGH  
SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant brought the instant suit on behalf of the grievants who it avers, are its members. The Claimant avers that the said grievants, Mr. Peter Mutinda and Ms. Lilian Jisii were at all material times relevant to the suit, employees of the Respondent. From the record, the grievants were terminated from employment on 31<sup>st</sup> October 2018. According to the Claimant, the termination of the grievants from employment was unlawful. The grievant’s claim against the Respondent is for notice pay, service pay, compensatory damages and salary underpayment.
2. The Respondent challenged the Memorandum of Claim through a Memorandum of Response dated 22<sup>nd</sup> October 2021, in which it avers that the termination of the grievants from employment was fair and in line with labour regulations and practices as they were each offered a chance to be heard before the Board and defend themselves. Consequently, the Respondent has asked the Court to dismiss the claim with costs.
3. During the hearing which took place on 2<sup>nd</sup> October 2023, both sides called oral evidence.



## 1st Grievant's Case

4. Mr. Peter Mutinda who is the 1<sup>st</sup> grievant herein, testified as CW1. At the outset, he adopted his witness statement and the documents filed alongside the Memorandum of Claim to constitute his evidence in chief.
5. It was Mr. Mutinda's evidence that he was engaged as an Accounts Clerk on 1<sup>st</sup> September 2005. He performed his duties diligently prompting his promotion as school Bursar on 1<sup>st</sup> January 2008.
6. On 25<sup>th</sup> May 2017, he was issued with duties and responsibilities of a Bursar by the Respondent as follows:
  - a. Responding to financial queries from students, parents and auditors.
  - b. Reconciling of school financial statements (Bank and cash books).
  - c. Keeping in safe custody all financial data.
  - d. Entering and safely keeping data and invoices from payments.
  - e. Managing weekly cheques, running and recording all cheques written and cashed.
  - f. Assisting in the preparation of financial reports (Balance sheets, income and expenditure accounts).
  - g. Preparation of the school's annual budget.
  - h. Performing any other duties as may be assigned from time to time by the school principal.
7. Mr. Mutinda averred that on 30<sup>th</sup> May and 25<sup>th</sup> July 2017, the Respondent through the principal addressed him to be handing over credit books, petty cash and daily collection/financial transactions on a weekly basis, a task he contends belonged to the Accounts Clerk according to his job description.
8. As the frustrations intensified, he applied for leave on 31<sup>st</sup> July 2017 for 28 days from 1<sup>st</sup> August 2017 to 7<sup>th</sup> September 2017. However, upon resumption on 8<sup>th</sup> September 2017, he was issued with an indefinite extension of annual leave.
9. On 14<sup>th</sup> September 2017, the Respondent through the Secretary Mr. K.S Bunyasi issued him with a show cause letter requiring his explanation on two allegations/charges of negligence of duty and collusion to fraud.
10. It was further alleged in the show cause letter that the orders for Milk and Bread were inflated. On 3<sup>rd</sup> August 2017, he was verbally instructed to hand over the keys to his office and to proceed on leave which instruction, he failed to take heed of.
11. On 22<sup>nd</sup> September 2017, he responded to the allegations brought against him forwarding the alleged missing copies of the records.
12. It was his further evidence that on 6<sup>th</sup> November 2017, the Respondent gave him a letter requiring that he hands over access to his office by giving an extra key to the Principal before the end of the day.



13. On 7<sup>th</sup> November 2017 the following day, he was given another letter suspending him from duty up to 2<sup>nd</sup> December 2017, when he was due to appear before the full Board. The said letter required him to hand over all the accounts documents and his office keys to the Principal with immediate effect.
14. On the same day, Mr. Jackson Martim who is the Accounts Clerk, was appointed the school Bursar in an acting capacity by the Principal/Secretary to the Respondent.
15. On 1<sup>st</sup> and 21<sup>st</sup> March 2018, the Respondent requested the Ministry of Education to conduct quality assurance & standards assessment together with an accounts audit. However, he was not invited to be part of the said exercise save for the audit.
16. Mr. Mutinda further averred that when the Respondent met to decide his case, the outcome of the above exercise/report was not shared with him nor was he invited to attend the Board meeting.
17. That the Respondent without color of right proceeded to issue him with a termination letter dated 31<sup>st</sup> October 2018.
18. Ms. Lilian Jisii, the 2<sup>nd</sup> grievant herein, testified as CW2. Similarly, she sought to rely on her witness statement together with the documents filed alongside the Memorandum of Claim, to constitute her evidence in chief.
19. Ms. Jisii stated in evidence that she was engaged by the Respondent as a Cleaner in July 2002 and later on as a Cateress on 1<sup>st</sup> January 2009.
20. It was her evidence that on 26<sup>th</sup> July 2017, the Respondent through the Principal addressed her by way of a show cause letter for alleged negligence of duty in that 8kgs of Pishori Rice and beans were not cooked for teachers and that the kitchen environment was not tidy.
21. On 7<sup>th</sup> August 2017, she was issued with a deployment letter from heading the Kitchen as a Cateress to the ground section with immediate effect. Her duties were as follows:
  - i. General Cleanliness of the compound which includes but not limited to gardening of flower beds, trimming of flowers, collection of litters around the tuition block and its environs.
  - ii. Maintenance of playground and drainage canals cleaning.
  - iii. Arranging meeting rooms.
  - iv. Any other duty as may be allocated by the head of the institution.
22. She engaged the Deputy Principal, Mr. Paul Mutemi and showed him her medical condition as indicated in a medical report dated 27<sup>th</sup> February 2017. She explained to the Respondent her back-pain condition which triggers swelling of knees and difficulty in walking as a result of any slight bending.
23. Unfortunately, the Principal stood his ground and insisted that she must proceed to work as a ground's person.
24. It was Ms. Jisii's further evidence that on 14<sup>th</sup> September 2017, the Respondent through the Secretary Mr. K.S Bunyasi invited her to show cause why disciplinary action should not be taken against her on two allegations/charges being insubordination, negligence of duty and collusion.
25. She responded to the show cause letter on 25<sup>th</sup> September 2017, categorically stating that the Rice was issued from the store by the storekeeper and brought to the Cateress who in turn took the same to the kitchen for preparation. At no point in time was rice cooked which was not issued from the store.



26. Ms. Jisii termed the issue of insubordination as farfetched as there has never been official communication with respect to handing over the required records to the storekeeper apart from handing the same to the Bursar on a weekly basis which she did.
27. On the issue of milk and bread, she stated that she did order what was needed for a particular day and gave a spreadsheet of the breakdown for the period 3<sup>rd</sup> May to 26<sup>th</sup> July 2017. In Ms. Jisii's view, this allegation is not only in bad faith but a well calculated move to malign her name and terminate her services.
28. She further averred that on 7<sup>th</sup> November 2017 the following day, she was handed another letter suspending her from duty up to 2<sup>nd</sup> December 2017, when she was due to appear before the full Board. The said letter required her to hand over all the accounts documents and the office keys to the Principal with immediate effect.
29. Ms. Jisii further stated that when they appeared before the Respondent, it was recommended that an audit has to be carried out first before they could be invited for a further meeting.
30. On 1<sup>st</sup> and 21<sup>st</sup> March 2018, the Respondent requested the Ministry of Education to conduct a quality assurance & Standards assessment together with an accounts audit. However, she was not invited to be part of the said exercise save for the audit.
31. When the Respondent met to decide her case, the outcome of the above exercise/report was not shared with her nor was she invited to attend the Board meeting.
32. Ms. Jisii contended that the Respondent without color of right proceeded to issue her with a termination letter dated 31<sup>st</sup> October 2018.

### **Respondent's Case**

33. The Respondent called oral evidence through Mr. Kennedy Bunyasi, who testified as RW1. He identified himself as the Principal of Hospital Hill School and confirmed that he is well versed with the facts of the case as available in the records of the Respondent. Similarly, Mr. Bunyasi adopted his witness statement and the documents filed on behalf of the Respondent to constitute his evidence in chief.
34. It was Mr. Bunyasi's evidence that the Respondent did not sign any Recognition Agreement with any union to represent any workers at the school.
35. He further stated that complaints were raised about poor performance and negligence of duty on the part of the grievants. Through a report dated 25<sup>th</sup> July 2017 and a Board of Management report dated 26<sup>th</sup> May 2017, the school confirmed that the employees were not dispensing their duties as agreed.
36. He averred that Mr. Mutinda deliberately failed to update the creditors' book on a weekly basis even after being advised on the same. Further, he deliberately locked the invoices of Milk and Bread and the records were not made available to the storekeeper among others.
37. Findings were also made in relation to Ms. Jisii's involvement in gross mismanagement of school kitchen resources. On 3<sup>rd</sup> May, which was the opening day, she received a supply of 115 loaves but only 9 loaves were consumed. Other accusations made were showing rudeness and defiance at work among others.
38. Following these accusations and complaints, a Board meeting was conducted where it was agreed that professional investigations should be conducted including the services of an auditor. The same was



- done and the results were that Mr. Peter Mutinda Kimoni and the School Cateress, Ms. Lilian Jisii did not execute their duties in the management of school resources appropriately.
39. Mr. Bunyasi further averred that through an Investigative Audit Report, various weaknesses were noted regarding the account's office and the store management. That further, there was failure to update the store ledger which is the most essential record in the school stores.
  40. The Investigative Report confirmed that during the year 2017, the consumable stores ledger was maintained during the first term only. When questioned Ms. Lilian Jisii, provided a handwritten document that did not display any interactions with other members.
  41. Mr. Bunyasi further stated that the Respondent issued the grievant with show cause notices both dated 14<sup>th</sup> September 2017, requiring them to respond to the issues raised against them.
  42. The grievants received the show cause notices and they replied to the same whereinafter, they were invited to attend a hearing before the full board of management.
  43. The reason for the sitting was stated in the hearing invitation, and they were well advised to have a witness of their choice to attend the full Board sitting with them.
  44. After the full Board hearing and the findings following the disciplinary hearing, the Respondent terminated the services of the grievants and gave reasons for the termination.
  45. Mr. Bunyasi averred that it was upon the full Board hearing and findings that the services of the grievants were terminated.
  46. The terminal dues owing and accruing to the grievants were calculated and the same paid subject to any obligation and liability they had with the Respondent.

### **Submissions**

47. The Claimant submitted that the Respondent failed to comply with Section 41(2) of the [Employment Act](#). It was the Claimant's further submission that the Respondent failed to prove the allegation of negligence of the grievants and how they colluded to defraud the school funds. To this end, it urged the Court to find as much.
48. On its part, the Respondent contended that the Claimant Union had no locus standi to institute the claim herein on behalf of the grievants. The Respondent stated in further submission that it had no Recognition Agreement with the Claimant Union. In support of the Respondent's submissions, reliance was placed on the case of *Communication Workers Union v Safaricom Limited* [2014] eKLR.
49. The Respondent further posited that the Claimants have not provided any evidence that the grievants are its members.
50. It was further submitted that the Respondent had proved beyond any reasonable doubt that the reasons for termination of the grievants' employment were valid.
51. Citing the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the Respondent further submitted that it had genuine reasons to terminate the grievants' employment. That the grievants were perfect employees to be dismissed from employment as their continued stay in school would have completely erased the good order and management of the school. In the same vein, the Respondent submitted that any reasonable man would have made the same decision to terminate the grievants' employment if presented with the same circumstances.



52. The Respondent further submitted that it faithfully followed fair procedure and thus met the parameters under Section 41 of the *Employment Act*.
53. It was the Respondent's further submission that the Claimant did not demonstrate prima facie that there was want of procedural fairness and or substantive justification in the termination or dismissal of the grievants' employment.

### **Analysis and Determination**

54. Flowing from the pleadings by both parties as well as the evidentiary material on record, it is apparent that this Court is being called to determine the following issues:
- a. Whether the Claimant union has locus standi to bring the instant suit on behalf of the grievants.
  - b. Whether the Respondent has proved that the termination of the grievants from employment was unfair and unlawful.
  - c. Are the grievants entitled to the reliefs sought?

#### Locus standi of the Claimant Union

55. The Respondent has averred in its Memorandum of Response that they have never signed any Recognition Agreement with the Claimant to represent workers at the school hence lacks locus standi to bring the instant proceedings before Court. The Respondent further submitted on the issue extensively. Notably, the Claimant did not address the issue by way of a Reply to the Memorandum of Response or in its submissions.
56. The Claimant Union contended that the grievants were its members. However, it did not provide proof of such membership. Does that disentitle the grievants from union representation before the Court?
57. Section 54 of the *Labour Relations Act* which is relevant in this case, provides for recognition of trade unions in the following manner:
- [54]. Recognition of trade union by employer (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
58. What can be deduced from the aforestated statutory provision is that recognition of a trade union is only for purposes of collective bargaining. As such, the absence of a Recognition Agreement cannot deny an employee membership to a trade union. In other words, membership to a trade union is not pegged on the existence of a Recognition Agreement.
59. Indeed, pegging trade union membership on recognition of a trade union is tantamount to curtailing an employee's constitutional right under Article 41(2)(c) of *the Constitution*, to form, join or participate in the activities and programmes of a trade union.
60. In light of the foregoing, the Respondent's argument that the Claimant lacks locus standi to move the Court on behalf of the grievants owing to lack of a Recognition Agreement does not hold water.



61. My position is fortified by the decision by the Court of Appeal in the case of *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR, where it was held that:

“In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.... We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members...A recognition agreement is defined under Section 2 of the *Labour Relations Act* as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court...”

62. What’s more, Articles 22(2) and 258(2) (d) of *the Constitution*, are unequivocal that post *the Constitution* 2010, the principle of locus standi has been broadened and there is a wide latitude as to who can move the Court to enforce *the Constitution* and the Bill of Rights.

63. This position was fortified by the Supreme Court in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR where it was held as follows:

“

“(67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. In *John Wekesa Khaoya v. Attorney General*, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

“...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice...”

64. Accordingly, I am satisfied that the Claimant Union has locus standi to bring the instant suit on behalf of the grievants.

### **Unfair and unlawful termination?**

65. Sections 43 and 45(2) of the *Employment Act* (Act), qualifies termination of employment unfair, where the employer fails to prove that such termination was justified and based on a fair and valid reason, related to the employee’s conduct, capacity or compatibility.

66. That is not all, the employer is further required to prove that in arriving at the decision to terminate the employment of an employee, it adhered to the requirements of a fair procedure. Differently put, an employer is enjoined to prove that termination of employment was both fair substantively and procedurally.

67. I will address these two elements under separate heads.



- i. Substantive fairness
68. Under Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove-
- a. that the reason for the termination is valid;
  - b. that the reason for the termination is a fair reason-
    - i. related to the employees conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; ...
69. Notably, the 1<sup>st</sup> grievant's letter of termination was not exhibited by both parties. Be that as it may, the notice to show cause issued to the 1<sup>st</sup> grievant on 14<sup>th</sup> September 2017, cited him for negligence of duty and collusion to fraud.
70. On the other hand, the 2<sup>nd</sup> grievant's employment was terminated on grounds of insubordination, negligence in the performance of her duties and collusion to defraud school funds leading to the school losing a lot of resources.
71. In support of its case, the Respondent exhibited a number of reports. Of significance, is the investigative audit report relating to the investigations that were undertaken between the 20<sup>th</sup> to 22<sup>nd</sup> of February 2018. With respect to the 1<sup>st</sup> grievant, the following observations were made:
- “We noted the books of accounts for the institution for the years 2015, 2016 and 2017 had not been submitted for annual audit as required by the Educational Act Section 23(2) (a & b).
- Submission of monthly trial balances was poor from the perusal of our records. No trial balances were submitted for the periods March to December 2015, no submissions were received for the year 2016, no trial balances were received for the duration between May 2017 to January 2018.
- We observed that during the handing/taking over conducted on the books of accounts had not been updated.
- No reasonable explanation was given by the bursar who was in charge of the accounts office for failure to update the financial records.”
72. The cause for the foregoing set of events was noted as follows: “The probable cause of the aforementioned condition was general laxity by the bursar in preparation and updating the books of accounts.”
73. It is common ground that the 1<sup>st</sup> grievant was the school bursar hence his duties entailed preparation of monthly trial balances, preparation of the books of accounts and submissions for auditing on time.
74. It thus goes without saying that the foregoing gaps and lapses in the accounting processes of the school squarely fell on his shoulders. Indeed, the observations made in the investigative report indicted the 1<sup>st</sup> grievant in the performance of his duties and portrayed him as being a negligent officer.



75. Besides, the 1<sup>st</sup> grievant had been asked a number of times by RW1, who was his supervisor, to avail certain financial information but he had failed to do so. In this regard, RW1 addressed the 1<sup>st</sup> grievant in a letter dated 30<sup>th</sup> May 2017, as follows:

“Re: Reminder

You are supposed to be submitting the following documents in(sic) my office on a weekly basis (Friday) for perusal and confirm(sic) that our financial transactions are as planned and budgeted for:

1. Creditor’s book;
2. Petty cash book;
3. Daily collection/financial transactions.

This is to remind you that since we agreed on the above and format of working shown to you and the accounts clerk, I have never received the above books as required.”

76. Further, in another letter dated 25<sup>th</sup> July 2017, the 1<sup>st</sup> grievant was addressed as follows:

“Re: Crediotr’s Book Update

I am yet to receive the creditor’s book as agreed on a weekly basis. You were to hand in the update on Wednesday 19<sup>th</sup> July 2017.

This is making it difficult for the office to know the position of the school on suppliers and what they are owed especially during this difficult financial time.

You are reminded to do this without fail before the end of the month.”

77. In as much as the 1<sup>st</sup> grievant distanced himself from the duties referenced in the two letters, and stated that it was the Accounts Clerk who was to submit the same, he did not tender any evidence proving that he had responded to RW1’s letter informing him as much.

78. In any event, the 1<sup>st</sup> grievant’s duties and responsibilities extended to other duties as may be assigned. Therefore, as RW1 was his supervisor, he was under an obligation to perform any duties assigned.

79. In view of the foregoing, I am led to concluded that the Respondent has proved to the requisite standard that it had a valid and fair reason to terminate the 1<sup>st</sup> grievant’s employment on account of negligence.

80. With regards to the 2<sup>nd</sup> grievant, the aforementioned investigative audit report made the following observations with respect to the management of the store:

“We noted various weaknesses in stores management through failure to update stores ledgers which are the most essential records in the schools stores.

During the year 2017 the consumable store ledgers (S1) was maintained during the first term only for the following commodities....

The aforementioned items were not recorded in the second and third terms of the year 2017.

The items were not entered on the standard consumable stores ledger (S1). During our interview with the storekeeper (Lilian Jisii) who was employed as a cateress to manage



the store and kitchen she provided a purported handwritten record. The handwritten record was however unacceptable as it was prepared by herself only and did not display any interaction with other members of staff who collected items from the stores. The handwritten document was not recognized in the management of store's record.

Our analysis of the payment vouchers supplies of major items especially milk and bread were not record on the relevant consumable stores ledger as follows:..”

81. The probable cause was noted as; “a deliberate attempt to conceal what was actually procured/ received and what was actually paid for by the account’s office.”
82. It is worth noting that at the time relevant to the investigations audit, the 2<sup>nd</sup> grievant was in charge of the stores hence the lapses noted in the management of stores depicted her as an officer who was negligent in the performance of her duties.
83. What’s more the report by the Respondent into the issues at hand, further indicted the 2<sup>nd</sup> grievant and portrayed her as a negligent officer.
84. For the foregoing reasons, I cannot help but find that the Respondent has proved that it had a fair and valid reasons to terminate the 2<sup>nd</sup> grievant’s employment.
85. Therefore, the termination of the grievants’ employment was substantively fair.
  - ii. Procedural fairness
86. Section 45 (2) (c) of the Act, enjoins an employer to prove that it terminated an employee in accordance with fair procedure. The specific requirements of a fair process are provided for under Section 41 of the Act in the following manner: -
  - (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 this 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.
87. It is common ground that both grievants were issued with notices to show cause dated 14<sup>th</sup> September 2017. The notices to show cause detailed the allegations against the grievants.
88. From the record, the grievants responded to the allegations contained in the show cause letters and were subsequently invited to appear before a disciplinary committee on 11<sup>th</sup> December 2017.
89. In this regard, the Respondent exhibited a copy of the minutes of the Board meeting held on 11<sup>th</sup> December 2017. At minute 4/11/12/2017, the grievant’s conduct was discussed and they were asked to respond to the accusations levelled against them.
90. The minutes further reveal that as a way forward, members of the Board felt that the matter could not be concluded at that level and that the school should instead invite the Ministry of Education Auditors to look into the issue, look at the books of accounts and wait for an audit report, from which the Board of Management members would draw a conclusion.



91. It is subsequent to this meeting that the investigative audit was undertaken between 20<sup>th</sup> to 22<sup>nd</sup> February 2018 and a report therefrom generated.
92. What is conspicuously missing from the record is evidence of a further disciplinary hearing following the said audit.
93. Evidently, the investigative audit report was presented to the Board's select committee on 4<sup>th</sup> October 2018 and thereafter to the full Board of Management on 18<sup>th</sup> October 2018. The record shows that it was at that meeting that the decision to terminate the grievants' employment was arrived at.
94. It thus follows that the grievants were terminated without being given an opportunity to be heard. I say so because the hearing of 11<sup>th</sup> December 2017 was inconclusive.
95. In the spirit of Section 41 of the Act, it was imperative that the grievants be given a fresh opportunity to defend themselves following the investigative audits undertaken in the month of February 2018.
96. Indeed, the grievants' letters of termination referred to the investigative reports dated 1<sup>st</sup> and 21<sup>st</sup> March 2018, clearly showing that the termination of the grievants from employment flowed from the said audit investigations and the findings therefrom. Indeed, one wonders why the Respondent failed to accord the grievants a hearing having noted that the erstwhile hearing of 11<sup>th</sup> December 2017 was inconclusive hence the need for further investigations.
97. In my respectful view, the hearing of 11<sup>th</sup> December 2017 did not count as it would be quite unprocedural to conduct a disciplinary hearing before investigations are undertaken. That would be tantamount to putting the cart before the horse.
98. In light of the foregoing analysis, it is the finding of this Court that the process applied in terminating the grievants' employment was not in accord with the spirit of Section 41 of the Act. To that extent, the termination of the grievants from employment was procedurally unfair.

### **Reliefs?**

99. Having found that the Respondent had a fair and valid reason to terminate the employment of the grievants but failed to accord them a fair hearing within the meaning of Section 41 of the Act, the Court awards each of them compensatory damages equivalent to three (3) months of their respective last gross salary. In arriving at this award, the Court has considered the length of the employment relationship in both cases and most of all, the contribution of the grievants to the termination of their employment.
100. The grievants have further sought to be paid three (3) months' salary in lieu of notice. At the outset, I note that they were paid salary in lieu of notice at the time of termination in accordance with their respective contracts of employment. Therefore, there is no basis for this claim. On the same note, the grievants are at liberty to collect their final dues as it was apparent during the hearing, that they were yet to collect the same.
101. The claim for service pay is declined as it is evident from the record that the grievants were registered members of the National Social Security Fund. Consequently, they fell within the exclusions under Section 35(6) of the Act. They are therefore not eligible for service pay.
102. The claim for underpayments is declined for want of proof. Here is why. Despite the Claimant making reference to Government Circular Ref: MPSYG.DPSM.2/6/4A VOL XI, it failed to exhibit a copy of the same. Therefore, it failed to prove its claim to the requisite standard. This is further noting that this was a specific Claim hence the grievants were bound to prove the same strictly. It is worth pointing out that the Claimant annexed a copy of a circular to its submissions. I must say that this was quite



irregular and unprocedural as such evidence ought to have been availed at the appropriate time, which was before the hearing. As such, it did not and cannot now form part of the court record.

## Orders

103. The total sum of my consideration is that Judgment is entered against the Respondent and the Court makes the following award in favour of the grievants:

### 1<sup>st</sup> Grievant

- a. Compensatory damages in the sum of Kshs 50,760.00 which sum is equivalent to three (3) months of his gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.

### 2<sup>nd</sup> Grievant

- a. Compensatory damages in the sum of Kshs 50,760.00 which sum is equivalent to three (3) months of her gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.

104. There will be no orders as to costs as both parties way surpassed the timelines issued by the Court for filing written submissions.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.**

.....

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

**For the Claimant Ms. Musyoka**

**For the Respondent Mr. Kipkoech**

**Court Assistant Millicent Kibet**

## ORDER

**In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**STELLA RUTTO**

**JUDGE**

