



**Mutula v Kenya Revenue Authority (Cause E883 of 2021)  
[2024] KEELRC 555 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 555 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E883 OF 2021  
SC RUTTO, J  
MARCH 8, 2024**

**BETWEEN**

**DENNIS OTIENO MUTULA ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. The Claimant was employed by the Respondent as a Graduate Trainee with effect from 1<sup>st</sup> October 2003. He was confirmed on permanent and pensionable terms with effect from 27<sup>th</sup> July 2006, as an officer in the Respondent's Domestic Taxes Department. It is common ground that in the period preceding the Claimant's exit from employment, he was working with the Data Cleaning Division within the Respondent Authority.
2. From the record, the Claimant was cited for absenteeism through a Notice to Show Cause dated 29<sup>th</sup> July 2021. A disciplinary process ensued and on 13<sup>th</sup> October 2021, the Claimant was terminated from employment. It is that termination that has triggered the instant suit. According to the Claimant, his termination from employment was unfair and unjust as he contends that the same was based on unsubstantiated allegations. Consequently, he seeks the following reliefs against the Respondent:
  - a. A declaration that the dismissal of the Claimant from employment was not based on any valid reasons and is therefore unfair, unlawful and null and void.
  - b. Reinstatement of the Claimant to the position he occupied prior to his dismissal or to any other equivalent position with no loss of benefits.
  - c. Payment to the Claimant of any salaries, allowances and/or emoluments that may have been withdrawn and/or withheld from him as a result of his unlawful dismissal from employment.

Alternatively



- d. Payment to the Claimant of the sum of Kshs 585,000 being the equivalent of his three month's salary in lieu of termination notice.
  - e. Payment to the Claimant of the sum of Kshs 2,340,000 being the equivalent of his 12 months' salary for unfair termination.
  - f. Payment of the equivalent of the Claimant's salary withheld from him from 13<sup>th</sup> October 2021 until the date of judgment.
  - g. Compensation to the Claimant for discrimination.
  - h. Compensation in lieu of untaken leave.
  - i. Payment to the Claimant of the full proceeds of pension accruing to him from the KRA pension scheme without any deductions therefrom.
  - j. Interest and costs.
3. The Respondent has countered the Claim through its Response in which it avers that it ensured that due process was followed and the Claimant was given an opportunity to defend himself prior to termination of his employment. The Respondent further avers that the Claimant was found culpable after due consideration of both his written and oral representation. On account of the foregoing, the Respondent has termed the Claimant's suit as being devoid of merit and has asked the Court to dismiss the same with costs.
  4. The matter proceeded for hearing on diverse dates, during which both parties called oral evidence.

#### **Claimant's Case**

5. The Claimant testified in support of his case and for starters, he sought to adopt the Supporting Affidavit which was filed together with the Notice of Motion accompanying the Memorandum of Claim, to constitute his evidence in chief. He proceeded to produce the documents filed alongside his Memorandum of Claim as exhibits before Court.
6. It was the Claimant's testimony that during his entire period of employment, he served the Respondent diligently with unmatched industry and did not have any disciplinary actions taken against him.
7. He averred that on or about the month of July 2021, he received a letter dated 29<sup>th</sup> July 2021 from the Respondent, accusing him of being absent from work for 81 days between January 2021 to June 2021. He was required to show cause why he should not be dismissed from employment on that basis.
8. In the said letter, it was particularly alleged that an analysis of attendance data revealed that he had been absent from work for 20 days in January, 17 days in February, 16 days in March, 7 days in April, 10 days in May and 11 days in June. The said letter made reference to a memo dated 16<sup>th</sup> June 2021 Ref: KRA/SIRM/003/026 from his manager to the Deputy Commissioner – Human Resources. He further averred that the alleged memo, which was the genesis of the allegations against him was and has never been shared with him.
9. According to the Claimant, he was so surprised at the outrageous allegations that he had been absent from work for a whole period of 81 days when the truth was and still is, that he did not absent himself from work as alleged.



10. He wrote a letter dated 4<sup>th</sup> August 2021, denying the allegations that he had been absent from work and explained that the alleged report against him did not factor in, the 33 days on which he had been officially on leave.
11. Further, the alleged report did not factor in public holidays such as New Year's Day, Good Friday, Easter Monday, Idd-Ul-Fitr and Madaraka day.
12. He further stated that for a period of 33 days between the months of February and March 2021, he had no access to his office computer as the same was being reformatted by the ICT department as they had been instructed to install the Legacy system. Therefore, he either worked offline (on taxpayers' physical files) or requested to use VDI machines that colleagues with log-in rights had access to.
13. The Claimant further stated that the fact that his computer was being formatted by the ICT department to install the legacy system meant that he could not use the same and as such, no user-log-on activity could be generated from it.
14. He further averred that failure to generate user log-on activity from his computer during the period aforesaid, simply means that he did not use his computer at the time alleged. He contended that this does not mean that he absented himself from work.
15. The Claimant further stated that whereas it was alleged that he had been absent from work on 22<sup>nd</sup> March 2021, 26<sup>th</sup> April 2021, 20<sup>th</sup> May 2021 and 24<sup>th</sup> June 2021, he was actually on duty on all these days and prepared work reports and sent emails. These reports were done to cover work done on a weekly basis.
16. He further contended that whereas it was alleged that he had been absent from work on 23<sup>rd</sup> March 2021, he had attended the funeral ceremony of a former Deputy Commissioner, Ms. Beatrice Gichobi with the permission of his supervisor.
17. According to the Claimant, out of the 81 days, he was alleged to have been absent from work without explanation, he had actually been on duty for 77 days. He however admitted to being absent from work for four (4) days between 15<sup>th</sup> to 18<sup>th</sup> June 2021 for medical reasons.
18. The Claimant further averred that despite the allegation that he had been absent from work for 81 days between January 2021 to June 2021, he was appraised over the same period and scored an exemplary performance. It is not possible that he could have scored as such if it was true that he had been absent as alleged.
19. The Claimant further stated that he was invited for a disciplinary hearing where despite the committee insisting that they had attendance data showing that he had absconded duty as charged, no such data was shared with him. No attendance register was shown to him at the said hearing despite his request to be shown the same.
20. That despite his explanations in writing and orally, he received a letter dated 13<sup>th</sup> October 2021, from the Respondent dismissing him from employment forthwith.
21. In the letter of dismissal, it was alleged that he had been absent from work for 48 days down from the initial 81 days stated in the Notice to Show Cause.
22. The Claimant was categorical that he never absconded duty as alleged.



## Respondent's Case

23. The Respondent called oral evidence through Mr. Omondi Bernard Timothy, Mr. Frankline Kiogora, Ms. Mary Mathenge and Mr. Anthony Njeru who testified as RW1, RW2, RW3 and RW4 respectively. Mr. Omondi was the first to go. He identified himself as an officer of the Respondent in the Domestic Taxes Department working with the Data Clean Up Management Unit. He testified that at the material time, he was a Manager at the Data Cleaning Unit and the Claimant was one of the officers working under him.
24. From the onset, RW1 adopted his witness statement to constitute his evidence in chief. He further produced the letter dated 1<sup>st</sup> March 2021 and the email trail exchanged with the Claimant, as the Respondent's exhibits.
25. It was RW1's testimony that data cleaning entails reviewing files, preparing templates for data correction and credit transfers remission of penalties which were performed on the Respondent's computers in the Respondent's domain.
26. He further stated that there was a time when there was a system installation as stated by the Claimant. However, for the said system to be installed, one had to log in to the domain to allow the ICT team to install it on the respective desktops. Therefore, the allegation that the Claimant was unable to access the computer due to the installation of the system is not only untrue but farfetched.
27. He maintained that at no point was the Claimant denied access to the computer on account of formatting.
28. RW1 further stated that the Claimant on several occasions absented himself from work without permission from the supervisor or the Respondent.
29. Among the 33 days in the month of February and March 2021 the Claimant has alleged that he was unable to access his computer due to installation of the legacy system, he was absent from duty for five (5) days between 22<sup>nd</sup> and 26<sup>th</sup> February 2021 without permission or at the very least notification to the supervisor of the absenteeism. This is confirmed via a letter dated 1<sup>st</sup> March 2021 where the Claimant after being summoned, explained that he had family issues but he never bothered to inform his supervisor or anyone in the office
30. Further, from 15<sup>th</sup> March 2021 to 19<sup>th</sup> March 2021 the Claimant was absent for another five (5) days without permission and it took the intervention of the supervisor to locate his whereabouts. During those five (5) days, the Claimant did not bother to inform the employer or at least his immediate supervisor. This is confirmed via an email dated 20<sup>th</sup> March 2021 where the Claimant had been sought for a whole week. He alleged he was unwell but failed to avail any medical record or at least a sick off sheet from the doctor.
31. It was RW1's further testimony that contrary to the Claimant's allegation that he was present on 22<sup>nd</sup> March, 26<sup>th</sup> April, 20<sup>th</sup> May and 24<sup>th</sup> June 2021, he was absent from work. If at all the said reports were prepared and shared via email, the said reports were not produced during the written representation nor oral representation and the same have not been produced before this court.
32. RW1 further averred that the Claimant was absent from work on several occasions which forced his immediate supervisor to write to him an email on 17<sup>th</sup> May 2021 over the same issue of absenteeism.



33. It was RW1's further evidence that the Respondent made all the efforts including forwarding the Claimant's case to its Human Resource Department for counseling but the same did not bear any fruits.
34. Mr. Frankline Kiogora who testified as RW2, identified himself as an officer of the Respondent in the Human Resource (HR) Department working with the Discipline Management Unit. Similarly, RW2 adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
35. RW2 stated that prior to termination from employment, the Claimant worked with the Corporate Data office within the Authority. His role entailed reviewing files, preparing templates for data correction and credit transfers remission of penalties which were performed on the Respondent's computers in the Respondent's domain.
36. That for one to access the computer, they must log in using their personal number and password which registers automatically upon logging in.
37. It was RW2's evidence that on 16<sup>th</sup> June 2021 or thereabout, the HR received information from the Manager Data Cleaning that the Claimant had formed a habit of absenting himself from work without permission from his appointed place of work.
38. To verify the information, HR requested for material evidence from his supervisor to prove that he was not attending to duty. From the domain logins provided by his supervisor, the HR established that the Claimant absconded duty on various dates without permission from his supervisor totalling to eighty one (81) working days.
39. The report from the supervisor showed that the Claimant was absent from his workstation on various dates without permission or lawful cause totalling eighty one (81) working days.
40. The allegations set out against the Claimant amounted to a grave violation of both the [Employment Act](#) 2007 and the Respondent's Code of Conduct which resulted in the issuance of a show cause letter. The Claimant was notified of the allegations levelled against him via the show cause letter and he was given an opportunity to respond to the same.
41. It was RW2's evidence that the Claimant responded to the show cause letter vide a letter dated 4<sup>th</sup> August 2021 whereby he denied allegations against him but did not produce evidence to support his claim.
42. Subsequently, the Claimant was invited for a disciplinary hearing via a letter dated 17<sup>th</sup> August 2021. In the letter, he was advised that he could come with any employee of his choice as well as bring in other material evidence to support his case.
43. The Claimant appeared before the Respondent's disciplinary panel on 25<sup>th</sup> August 2021 when the allegations were formally read to him and he was given an opportunity to give his oral representation.
44. RW2 stated that the Claimant was accorded the opportunity to present his evidence both oral and written before the disciplinary panel.
45. The Respondent considered the Claimant's oral and written representation but found it unacceptable since he could not account for forty eight (48) working days out of the eighty-one (81) days he was accused of being absent without permission or lawful cause.
46. A decision to summarily dismiss the Claimant from the Respondent's employment was reached and the decision was duly communicated to him.



47. RW2 maintained that the Respondent has not breached any of the Claimant's rights under the *Employment Act* nor the Code of Conduct. That contrary to the Claimant's allegations, the Respondent ensured that due process was followed to the letter.
48. He stated that the Claimant had been given several warnings both verbal and written on account of absenteeism. The Respondent went even a step further to attempt to help the Claimant by taking him through the HR counselling process but the same did not bear any fruits.
49. In RW2's view, the Claimant is not entitled to general damages since his dismissal was fair and within the law.
50. Further, the Claimant will be paid his pension benefits as provided for in his letter of summary dismissal upon production of the Pension Commutation Form (PCF).
51. Ms. Mary Mathenge who testified as RW3, identified herself as an officer of Respondent in the Domestic Taxes Department working with the Data Cleaning Unit. She further told the Court at the material time, she was the Claimant's supervisor. Similarly, she adopted her witness statement to constitute evidence in chief. She further produced an email dated 17<sup>th</sup> May 2021 as an exhibit before Court.
52. It was RW3's evidence that the Claimant on several occasions absented himself from work without her permission as the immediate supervisor or the Manager in charge of the unit. Whenever he (Claimant) was absent from work, she would call him to establish his whereabouts but most of the time whenever he was away, his phone would be switched off making him completely unreachable. The Claimant would later appear for a couple of days and then disappear again.
53. Among the 33 days in the month of February and March 2021, the Claimant has alleged that he was unable to access his computer due to installation of the legacy system, he was absent from duty for five (5) days between 22<sup>nd</sup> and 26<sup>th</sup> February 2021 without permission or at the very least notification to the supervisor of the absenteeism.
54. The Claimant after being summoned, offered an explanation that he had family issues during his absence from work but never bothered to inform his supervisor or anyone in the office.
55. RW3 further stated that from 15<sup>th</sup> March 2021 to 19<sup>th</sup> March 2021, the Claimant was absent for another five (5) days without permission and it took the intervention of the supervisor to locate his whereabouts. During those five (5) days, the Claimant did not bother to inform the employer or at least his immediate supervisor. That via an email dated 20<sup>th</sup> March 2021, the Claimant alleged he was unwell but failed to avail any medical record or at least a sick sheet from the doctor.
56. Contrary to the Claimant's allegation that he was present on 22<sup>nd</sup> March, 26<sup>th</sup> April, 20<sup>th</sup> May and 24<sup>th</sup> June 2021, he was absent from work. If at all the said reports were prepared and shared via email, the same were not produced during the written representation nor oral representation. The reports have also not been produced before this court.
57. RW3 further stated that the Claimant's issue of absenteeism continued for a while which forced her to write him an email on 17<sup>th</sup> May 2021 over the same issue.
58. It was her evidence that she attempted everything she could to assist the Claimant including forwarding the case to the Manager who in turn escalated the issue to the Respondent's Human Resource Department for counseling but the same did not bear any fruits.



59. Mr. Anthony Njeru who testified as RW4, introduced himself as an officer with the Kenya Revenue Authority in the Corporate Support Services Department working with the ICT Division. Equally, he adopted his witness statement to constitute his evidence in chief.
60. RW4 confirmed that he is the person who extracted the Computer log presented before the Court following a request by the Manager Data Clean up from within the SIRM Department.
61. He averred that the information was extracted from the Respondent's Domain Controllers audit server. He explained that the Domain Controller is a server that authenticates and validates user access, effectively acting as the gatekeeper.
62. He further averred that the extracted report provides details of the user's logon activity for the specific entity (user) and period. He proceeded to give a description of each field in the log-in report exhibited.

### Submissions

63. On his part, the Claimant submitted that the Respondent did not discharge the statutory burden placed upon it to demonstrate the truth about the allegations made against him. The Claimant posited that it was not enough to allege that he had been absent from work for the days mentioned. He maintained that it is the duty of the Respondent to prove such allegations. In support of this argument, the Claimant placed reliance on the case of *John Jaoko Othino v Intrabealth International* [2022] eKLR.
64. The Claimant further submitted that the Respondent did not produce any evidence to prove that he had absented himself for 48 working days as alleged or at all. He submitted that relying on footprints (log-in printouts) that are only generated when an officer works online as evidence of work attendance, is not only irrational but also unfair.
65. He further argued that pursuant to Section 5.1.2 of the Code of Conduct, it is not possible that he would have been absent for 48 days without the Respondent noticing.
66. The Claimant further submitted that having failed to produce the attendance data, the Respondent did not prove that he had been absent from work on the days alleged hence the reasons for dismissing him from employment. Referencing the case of *Abubakar Aslam Shikolio v Savannah Cement (EPZ) Limited* [2015] eKLR, the Claimant urged the Court to find that the termination was unfair as the Respondent had failed to demonstrate the reasons for his dismissal.
67. It was further submitted by the Claimant that failing to share with him evidence relied on in dismissing him, is unfair as it infringed on his right to fair hearing. On this score, reliance was placed on the case of *Abdulabi Mobammed Omar v Energy Regulatory Commission* [2020] eKLR.
68. In conclusion, the Claimant, urged the Court to find that his dismissal was both procedurally and substantively flawed and therefore amounts to unfair termination of employment.
69. On its part, the Respondent invited the Court to note the documented incidences of the Claimant's absenteeism running for a whole week without a trace of communication. The Respondent proceeded to submit that from the oral testimony of the Claimant's two line managers, it was clear that there were several other days he was absent but not documented.
70. Relying on the cases of *Titus Wasike v General East Africa Limited* [2020], *Thomas Dzombo Kirunga v Krystalline Salt Ltd* (2020) eKLR and *Richard Kiplimo Koech v Yuko Supermarket Ltd*, the Respondent posited that the issue of absenteeism was serious and amounted to grave violation of both the *Employment Act* and Code of Conduct.



71. With regards to the log-in reports, the Respondent submitted that the Claimant's response corroborated the accuracy of the said report as it picked any day that there was no user activity, which days tallied with documented block days of being absent without a trace.
72. It was the Respondent's further submission that the Claimant was accorded an opportunity to present his evidence both orally and written before the disciplinary panel. In the same breath, the Respondent contended that the Claimant has not provided any evidence to demonstrate that his evidence was not considered.
73. In closing, the Respondent maintained that it had demonstrated that it complied with the law as spelt out in Sections 41 and 43(1) of the *Employment Act* in terminating the Claimant's employment hence his termination was substantively and procedurally fair.

### **Analysis and Determination**

74. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before Court, together with the rival submissions and the following issues stand out for determination: -
  - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
  - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
  - iii. Is the Claimant entitled to the reliefs sought?

### **Valid and fair reason?**

75. In determining this question, regard must be had to the provisions of Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Further along the Act, Section 45 (2) (a) and (b) 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; ...
76. In the case herein, the Claimant was summarily dismissed from employment on grounds that he had absented himself from duty without permission or lawful cause for a period of 48 working days between 1<sup>st</sup> January 2021 and 24<sup>th</sup> June 2021. The specific dates of the Claimant's alleged absence were indicated in his letter of summary dismissal.
77. It is notable that the reasons for the Claimant's dismissal flowed from the Notice to Show Cause dated 29<sup>th</sup> July 2021. In the said Notice to Show Cause, the Claimant was alleged to have been absent for 81 days. Upon his response, the days of absence were reduced from 81 to 48.
78. Protesting the dismissal, the Claimant contended that he never absconded duty and that for a period of 33 days between the months of February and March 2021, he had no access to his office computer as the same was being reformatted by the Respondent's ICT department which had been instructed to install the legacy system.



79. He further averred that since he did not have his computer, he worked offline on taxpayer's physical files or requested to use VDI machines that his colleagues with log in rights had access to.
80. The Claimant further contended that failure to generate user log in activity from his computer simply means he did not use his computer at the alleged time and does not mean he absented himself from work.
81. The Respondent on the other hand contended that among the 33 days the Claimant alleges he was unable to access his computer due to installation, he was absent from duty for five (5) days between 22<sup>nd</sup> and 26<sup>th</sup> February 2021 without permission from his supervisor.
82. In support of its case, the Respondent sought to rely on email communication in which the Claimant's absence was discussed and user log-in activities generated from his computer.
83. The Respondent further exhibited a letter dated 1<sup>st</sup> March 2021 from the Claimant to the Project Manager Data Cleaning in which he stated as follows:

“RE” 22<sup>nd</sup> TO 26<sup>th</sup> February 2021

I refer to the meeting earlier today.

During the above-mentioned period, I was unable to attend to duty due to some unforeseen personal family issues. I therefore request that you allow me to use my outstanding leave days to offset the same.

As discussed above, I will ensure to inform the office in advance, to avoid work disruption.

Kindly approve my request.

Yours faithfully,

signed

Dennis O. Mutula”

84. Further exhibited was an email addressed to Dr. Mukwana from RW1 as follows:  

“This is well noted and thanks. Mr. Mutula has not reported since Monday and most probably he will be in on Monday next week.”

85. In another email dated 18<sup>th</sup> March 2021, RW1 addressed Dr. Tabitha as follows:  

“This is to request for your intervention/ assistance towards counseling of Mr. Dennis Mutula of personnel no 6084. Mr. Dennis is a dedicated diligent staff faced with problem of absenteeism.  
Verbal engagements, warnings have not yielded any fruits and it would be prudent to explore the counselling avenue before perhaps escalating the case.  
Thank you and look forward to fruitful and successful engagement for Mr. Dennis.”

86. The Claimant seemingly reacting to the email trail between his supervisor and the Respondent's Human Resources Department, stated as follows in his email dated 20<sup>th</sup> March 2021:  

“I have just seen the mail thread today. I had traveled last week Friday and was down with malaria and amoeba upon return. I will however be on duty on Monday.



Thank you.”

87. What manifests from the foregoing email correspondence, is that the Claimant was not consistent in his attendance to duty and in the instances noted, he was away without lawful authority. Indeed, the Claimant admits that he was away from duty from 21<sup>st</sup> to 26<sup>th</sup> February 2021 without permission.
88. He further admits in his email of 20<sup>th</sup> March 2021, that he was away from work as he was down with malaria and amoeba. Be that as it may, he did not provide any documentary evidence to prove the same. It is also notable that pursuant to Section 30(2) of the Act, an employee is only entitled to sick leave with full pay upon notifying his employer as much. Further, such notification ought to be accompanied by a certificate of incapacity to work, signed by a duly qualified medical practitioner.
89. In this case, the Claimant did not comply with the aforementioned statutory provisions hence his absence was without lawful authority.
90. Indeed, the foregoing email correspondence speaks for itself and confirms that the Claimant had a trend of absenting himself from work without lawful authority. This further corroborates the evidence of the Respondent’s witnesses that the Claimant was away from duty without permission in certain instances in the months of February and March. This is further evidence that the Claimant’s absence was too frequent hence the reason he was referred for counselling.
91. It is further evident that the Claimant did not break the cycle of absenteeism. This can be discerned from an email dated 17<sup>th</sup> May 2021, from RW3 to the Claimant, in which he was addressed as follows;

“Dear Dennis,

It has been continually observed that you do not report to work despite the several discussions and verbal warnings given to you by the Project Manager.

You have also informed the same of your willingness to reform.

Should you have any mitigation, kindly forward to the project manager before disciplinary action is taken against you.

Regards

Mary Mathenge.”

92. This email goes further to depict the Claimant as an employee who had a tendency of being absent from work without lawful authority. If that was not the case, his supervisors would not have addressed him as much.
93. In his submissions before court, the Claimant argued that the Respondent did not produce any evidence to prove that he absented himself for 48 working days as alleged.
94. The Claimant’s argument takes me to the applicable standard of proof in cases of termination of employment. On this core, I will follow the determination by the Court of Appeal in the case of *Kenya Revenue Authority v Reuwel Waithaka Gitabi & 2 others* [2019] eKLR, in which the learned Judges of Appeal held that the standard of proof required is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services.
95. Applying the above determination to the case herein as well as the provisions of Section 43(2) of the *Act*, the Respondent only needed to prove that the reasons for which the Claimant was terminated



- from employment were matters that it genuinely believed to exist at the time of the termination. In this case, the said matters touched on the Claimant's absence from work without lawful authority.
96. Therefore, the Respondent was not required to strictly prove that the Claimant was absent for 48 days. Put another way, the Respondent was not required to prove beyond reasonable doubt that the Claimant was absent from work for 48 working days.
97. In this case, I am satisfied that the Respondent has proved to the requisite standard that the Claimant had a pattern of behaviour in that he would attend work inconsistently without obtaining permission from his supervisor. Indeed, from the email trail of 18<sup>th</sup> to 19<sup>th</sup> March 2021, it is evident that the Claimant was away and his whereabouts were unknown.
98. What this boils down to is that the Claimant's action of being away from his workstation with no evidence of formal approval from his employer was by all means improper and amounted to absence from work without lawful authority. The number of days he was away without permission does not count, rather it is whether he had official permission to be away.
99. Pursuant to Section 44(4) (a) of the *Act*, absence from work without leave or lawful cause is one of the grounds for summary dismissal.
100. Therefore, the mere fact that the Claimant was absent from work with no leave or lawful authority, availed the Respondent a fair and valid reason to terminate his employment.

#### **Procedural fairness?**

101. The requirement for compliance with a fair procedure in termination of employment is generally provided for under Section 45 (2) (c) of the *Act*. The specific requirements encompassing a fair hearing are provided under Section 41(1) of the Act. In this case, an employer is required to notify an employee of the intended termination in a language he or she understands. Further to that, the employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her and in so doing he or she is entitled to have a fellow employee or a union representative of own choice.
102. In the instant case, the process against the Claimant was commenced by way of a letter dated 29<sup>th</sup> July 2021, through which he was asked to show cause why disciplinary action should not be taken against him for absenteeism. The Claimant responded to the said letter through his of 4<sup>th</sup> August 2021.
103. The record bears that the Claimant was invited to appear for a disciplinary hearing on 25<sup>th</sup> August 2021. He was further advised of his right to be accompanied by a fellow employee of his choice and to take any document in support of his case.
104. Indeed, the Claimant has admitted appearing before the Respondent's disciplinary panel for a hearing. His only contention is that he was not given the evidence of attendance. Be that as it may, there is no evidence that he requested for the attendance data and the same was withheld from him.
105. In Considering the import of Section 41 of the Act, the Court of Appeal had this to say in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR:

“ Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;



- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

106. Applying the above decision to the instant case, I am satisfied that the Respondent has proved to the requisite standard that it complied with the requirements of Section 41 of the *Act*. As such, it fulfilled the spirit of Section 41.

107. To this end, it is the finding of this Court that the Claimant was accorded procedural fairness as he was informed of the allegations levelled against him and given an opportunity to be heard on his explanation to the allegations. To this extent, the Respondent cannot be faulted.

108. In the end, the Court finds that the Claimant’s termination from employment was neither unfair nor unlawful.

**Reliefs?**

109. As the Court has found that the Claimant’s termination from employment was not unfair and unlawful, the reliefs sought in the Memorandum of Claim cannot be sustained.

**Orders**

110. In the final analysis, I dismiss the Claim in its entirety with an order that each party bears its own costs.

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

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:

Mr. Juma for the Claimant

Ms. Otieno for the Respondent

Millicent Kibet Court Assistant

**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**

