



**Kaguchia v Equity Bank Kenya Limited (Cause E508 of 2020)  
[2024] KEELRC 1084 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1084 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E508 OF 2020  
NZIOKI WA MAKAU, J  
APRIL 9, 2024**

**BETWEEN**

**JOSEPH MACHARIA KAGUCHIA ..... CLAIMANT**

**AND**

**EQUITY BANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent Bank through a Memorandum of Claim dated 9<sup>th</sup> September 2020 wherein he seeks: 12 months' salary as compensation for unfair loss of employment; damages for discrimination, psychological and mental torture, development of withdrawal syndrome and insomnia, and unfair labour practice; unlawful, unfair and unconstitutional dismissal from employment; lost opportunity for the period remaining to retirement at 60 years; and a certificate of service. The Claimant averred that he was employed by the Respondent from around 8<sup>th</sup> April 2011 and that he rose through ranks to the position of General Manager Agency Banking vide a promotion letter of 20<sup>th</sup> March 2017. That while serving in the said position, he initiated widespread reforms, with the approval of the Respondent, which increased the Bank's profitability, reduced losses and led to the Bank being recognised as the best in Agency Banking in 2017, 2018 and 2019. He further averred that on or around October 2019, the Respondent's Compliance Department purported to carry out a compliance check on the Agency Banking Department and prepared a Preliminary Raw Compliance Report in December 2019 that was handed over to him for his response by 20<sup>th</sup> January 2020. He stated that during the said period, he proposed to the Respondent various agency banking reforms by procedurally submitting the proposals to the relevant offices for approvals prior to any implementation. That unbeknown to him, the said Preliminary Raw Compliance Report had been handed over to the Group Managing Director (MD) without considering his responses to the same. That the Bank's procedures were that the said Report be escalated to this immediate superior, who is the Respondent's MD, before the same is then escalated to the Group MD. He contended that the purpose of this omission was therefore sinister and geared towards bypassing his responses and



denying him a chance to controvert the allegations contained in the Preliminary Compliance Report. The Claimant's case was that he was subsequently suspended on 5<sup>th</sup> March 2020 purportedly based on the Preliminary Compliance Report for purposes of facilitating investigation on the same. According to the Claimant, the reason for his suspension was to satisfy ulterior motives by exerting pressure on the other staff to forward his response to the Group MD and which report was still being unlawfully and unprocedural withheld by the General Manager Compliance.

2. It was the Claimant's averment that on 30<sup>th</sup> April 2020, he was summoned for a disciplinary hearing scheduled on 5<sup>th</sup> May 2020 against six (6) allegations as enumerated in his Claim. That in order to prepare for the said hearing and proffer an effective defence against the said allegations, on 2<sup>nd</sup> May 2020 he requested to be furnished with copies of the final compliance check report, the final investigation report, his job description, access to emails and physical documents, and a confirmation that the hearing as scheduled had been cancelled. That unfortunately, the Respondent responded to his request on the day of the hearing – 5<sup>th</sup> May 2020 – by only reinstating his system access rights but declined to give him the requested documents and further indicated that the hearing would continue as scheduled. The Claimant further averred that while awaiting the outcome of the Disciplinary Committee, he was again ambushed with another Show Cause Letter dated 16<sup>th</sup> June 2020 that raised six (6) new allegations against him, purportedly arising from a Final Compliance Report, Investigation Report, failure to perform as per Job Description and queries on an Audit Report. The Claimant asserted that he thus considered the first set of accusations as having been unsubstantiated and abandoned by the Respondent. That vide a letter of 18<sup>th</sup> June 2020, he again requested for copies of the reports referred to in the Respondent's correspondence but which documents the Respondent again refused to avail to him. The Claimant notified the Court that the Respondent proceeded to convene a rushed disciplinary hearing without according to him an opportunity to respond and he was required to attend the hearing. He fronted that on 20<sup>th</sup> July 2020, the Respondent suddenly sent him a termination letter on a completely new allegation of insubordination, which was neither part of the two initial show cause letters nor was he required to respond to any such allegation of insubordination. In context, the reason for the termination was insubordination by the Claimant's failure to attend the two disciplinary hearings. The Claimant's stance is that the charges contained in the two show cause letters remain pending and that the Respondent had neither availed to him the records and minutes of the two disciplinary sittings nor the outcome of the same. That the Respondent having abandoned the first disciplinary process and he having responded to the issues raised in the second disciplinary process, the claim for insubordination cannot stand.
3. The Claimant further averred that the Respondent denied him a chance to appeal against his termination as it rejected the appeal he filed on 2<sup>nd</sup> August 2020 on 7<sup>th</sup> August 2020 under the pretence that the same was filed out of time, yet he received the termination letter on 27<sup>th</sup> July 2020 and policy allowed him 14 days to appeal. He also asserted that the Respondent condoned a discriminative disciplinary process because the General Manager-Shared Services, who was equally suspended alongside him on similar allegations and who refused to attend the disciplinary committee hearing, was never terminated from the Respondent's employ, is still in its payroll and no adverse action was taken against him. He stated that the Respondent deliberately failed to understand the Chinese wall between the Shared Services Department (back office) and the Agency Banking (customer facing) since he was wrongly accused of the same issue as was the General Manager-Shared Services. That the Respondent also failed to investigate and ascertain the interest of Mr. Martin Miruka of the Group MD's office, who had in fact handed over the Raw Compliance Report to the Group MD yet the issues at hand were not within his jurisdiction. In this regard, the Claimant alleged that the Respondent is aware that Mr. Miruka being an employee of the bank, is illegally a major agent in the Agency Banking



trading as Zeepo with the Respondent in a case of conflict of interest and breach of the CBK Agency Prudential Guidelines.

### **Respondent's Case**

4. In response, the Respondent filed a Memorandum of Response dated 9<sup>th</sup> October 2020 averring that some of the administrative roles allocated to the Claimant in the capacity of General Manager Agency Banking were: recruitment of sub-agents in accordance with the prudential guidelines; management of the movement of the POS terminals; ensuring there is no splitting of transactions and automation of payment of commissions. It asserted that the growth of the bank was as a result of the growth strategy collectively implemented by the Respondent's pool of employees and was not therefore the sole effort of the Claimant as alleged. As per the Respondent, the Agency Department failed to efficiently reconcile the agents accounts and check the system's robustness when the Claimant was the General Manager of Agency Banking. That the inefficiencies slowed down the bank's expansion presence in remote areas and reduced enhancement of customer services and that the bank incurred unnecessary additional costs of setting up the agency banking retail approach under the Claimant's leadership.
5. The Respondent's case was that the Claimant was suspended on half salary with full benefits, to facilitate investigation on the irregularities raised in the compliance check carried out in the Agency Banking Department. While it admitted that the Claimant requested to be furnished with certain documents, it averred that the letter of 2<sup>nd</sup> May 2020 was actually delivered to the Bank on 4<sup>th</sup> May 2020 and received at the HR Department on 5<sup>th</sup> May 2020. The Respondent averred that both the Final Compliance Check Report and the Management's response on the Report had been availed to the Claimant prior to his request and were still provided to him on 5<sup>th</sup> May 2020. It explained that the Final Investigation Report could not be availed to the Claimant because it was a management document but that the relevant provision of the said report was indicated in his Show Cause Letter dated 30<sup>th</sup> April 2020. Furthermore, that the Claimant was aware of his duties and responsibilities aligned to his job description and thus did not require furnishing of the same. The Respondent denied the Claimant's averments on his being a discriminatory disciplinary process and maintained that he was properly communicated to. It averred that the 2<sup>nd</sup> Show Cause Letter was issued to the Claimant in light of new discoveries of irregularities against him and was a build-up of previous charges against him. That the Claimant however refused to attend the disciplinary hearing against him thus necessitating its decision to terminate his employment for the gross misconduct amounting to insubordination. The Respondent asserted that it nevertheless undertook to pay the Claimant any outstanding salary and leave dues owed and issued him with a certificate of service. As regards the Claimant's appeal, it averred that the letter appealing the decision to terminate his employment was delivered to the Bank on 6<sup>th</sup> August 2020, which date was outside the appeal period and which meant that the Bank could not grant his request. The Respondent thus prays that the Claimant's case be dismissed with costs.
6. In support of its case, the Respondent also filed Witness Statements made by Mr. Richard Musotsi on 3<sup>rd</sup> June 2021 and Mr. Wycliff Ontumbi on 21<sup>st</sup> June 2022. Mr. Musotsi stated in his statement that the assessments conducted on the Respondent's Agency Business for the period between 21<sup>st</sup> November 2019 and 18<sup>th</sup> December 2019 clearly revealed that the Claimant had failed in his management and supervisory responsibilities. That although the Respondent cannot adduce the Assessment Report as it contains trade secrets, the particulars of the said Claimant's failures are captured in the two show cause letters dated 30<sup>th</sup> April 2020 and 16<sup>th</sup> June 2021 respectively. Similarly, Mr. Ontumbi asserted in his statement that the Claimant's suspension was in accordance with the Bank's disciplinary handling procedures. That the Claimant was issued with a 2<sup>nd</sup> show cause letter after the Bank was not satisfied



with his responses during the hearing of 5<sup>th</sup> May 2020 and following his letters dated 2<sup>nd</sup> and 5<sup>th</sup> May 2020. Mr. Ontumbi further asserted that the burden of proof lies on the Claimant to prove discrimination, ill motive and lack of proper procedure but that the Claimant had not produced any evidence in support of these allegations.

## **Evidence**

7. The Claimant testified that he was never issued with his Job Description for the position of General Manager Agency Banking. That the Show Cause Letter of 30<sup>th</sup> April 2020 was the first he ever received and that he was never given the decision of the first disciplinary process as required under the Respondent's Disciplinary Handling Procedures. He stated that POS (point of sale machine) used by merchants and agents, was not in his jurisdiction and that maintaining POS was the responsibility of the Shared Services Department. The Claimant further testified that as regards the issue of discrimination, he did not understand why the other user departments were not sanctioned. He acknowledged having received payment for the other half salary withheld by the Respondent during his suspension and thus withdrew the said claim and further prayed for costs. Under cross-examination, the Claimant confirmed he did not attend the disciplinary hearing and stated that he gave the reasons for not attending the hearing as being because the documents he had requested for were not availed to him. In re-examination, the Claimant argued that the Bank will still proceed to make a decision in the absence of an employee should one fail to attend a disciplinary hearing.
8. Mr. Richard Musotsi, the Respondent's first witness testified that he was part of the team that did the audit which found that the Claimant was not executing as expected of him and that the Claimant was splitting transactions and was not able to monitor movement of POS. He asserted under cross-examination that the loss of Kshs. 20 Million that the Bank incurred was through mismanagement of the POS terminals and that the Claimant is the one who ought to have had the inventory movement of POS Machines. The Respondent's second witness, Mr. Wycliff Ontumbi, testified under cross-examination that the only document not availed to the Claimant was the Investigation Report and that job descriptions are not documents they have.

## **Claimant's Submissions**

9. The Claimant submitted that the issues for determination are as follows:
  - a. Whether the Claimant was given sufficient time and resources to prepare for his defence hearing;
  - b. Whether the Claimant was wrongfully and unlawfully terminated; and
  - c. Whether the Claimant is entitled to the reliefs sought.
10. It was the Claimant's submission that all the documents he requested the Respondent to furnish him were significant to his disciplinary hearing, as he would have known the extent of the allegations levelled against him and forged the best way forward in responding to them. That as it stands, there is no proof that investigations were ever carried out as the alleged investigation report was neither adduced in Court nor was given to him, which further indicated that there were no valid reasons to warrant his dismissal. He further submitted that the Respondent convening a hushed disciplinary hearing without giving him an opportunity to respond and then requiring him to attend the hearing without knowing the extent of the allegations he was to respond to was a violation of the cardinal rules of Natural Justice of a fair hearing. Moreover, that the Respondent's actions were contrary to the Kenyan Constitution, the *Employment Act* and the Respondent Bank's Internal Disciplinary Policies. The Claimant fronted that he would not have been able to arrange with the HR Department regarding a witness of his choice



prior to the hearing as required by policy given the limited time he was given to access the Bank's work system on the same day of the disciplinary hearing.

11. The Claimant cited the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR wherein Ndolo J. observed inter alia that in order for an employee to respond to allegations made against them, the charges must be clear, the employee must be afforded sufficient time to prepare their defense and are entitled to documents in the possession of the employer to assist them prepare their defense. The Claimant also relied on the case of *Benjamin Mwendwa Ndauti & 4 others v East African Portland Cement Company* [2016] eKLR in which the Court found that two days was insufficient time to prepare for hearing and that the claimants were not given resources to prepare for hearing. It was the Claimant's submission that he was not given sufficient time and resources to prepare for the disciplinary hearings and that his termination was based on an allegation that he was neither charged with nor given a chance to respond to.
12. As to whether the termination of his employment was wrongful and unlawful, the Claimant submitted that he was terminated for insubordination, which allegation was never part of the two show cause letters the Respondent issued to him. He noted that as per paragraph 6.7 of the Respondent's Disciplinary Handling Procedures, when an employee fails to attend their disciplinary hearing, the disciplinary committee is supposed to proceed with its deliberations on the charges before it and take any available evidence before then making a decision; so that any eventual termination is pegged on the charges being investigated. That this is however not the procedure the Respondent followed and no explanation has been given for such deviation. The Claimant argued that failure to attend a disciplinary hearing does not amount to insubordination and that it can only be construed that the employee waived his right to attend the hearing, after having been adequately notified and furnished with the documents upon which the charges were founded. He further submitted that the Respondent unprocedurally and unfairly denied him a chance to appeal against his termination. In support of the foregoing submissions, the Claimant relied on the case of *Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K)* [2013] eKLR in which the Court held that section 41 of the [Employment Act](#) makes it mandatory for an employer to notify and hear any representations an employee may wish to make whenever the employer contemplates termination and that the employee is entitled to have a representative present. Further, that the Court in the case of *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR affirmed that under section 47(5) of the [Employment Act](#), the burden of proving unfair termination lies with the employee and that the said burden is discharged once the employee establishes a prima facie case that the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.
13. In addition, the Claimant submitted that section 43 of the [Employment Act](#) provides that 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. That under section 45 of the Act, a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and fair and further, if it is found 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. The Claimant cited the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR wherein the Court held that there must be both substantive justification – establishment of a valid reason for the termination – and procedural fairness for a termination of employment to pass the fairness test. It was the Claimant's submission that since he was terminated on an allegation of insubordination that he was not charged with, there was no substantive justification for the termination of his employment. He further submitted that he had hereinabove also expounded on the instances when the Respondent exhibited procedural unfairness. That this Court should



therefore find and hold that termination of the Claimant's employment by the Respondent was unfair, unreasonable, unlawful and discriminatory both in substance and in procedure.

14. Regarding the reliefs sought, the Claimant reiterated his pleadings and cited the case of Daniel Musinga t/a Musinga & Co. Advocates v Nation Newspapers Ltd [2005] eKLR in which the Court while awarding the plaintiff Kshs. 10Million general damages, stated that the Court has to look at the whole conduct of the parties before action, after action and in compensatory damages, such sum as will compensate him for the wrong he has suffered. The said Court further observed that the award must cover injured feelings, the anxiety and uncertainty, undergone during court trial. The Claimant also cited the case of Alfred Muthomi & 2 others v National Bank of Kenya Limited [2018] eKLR where the Court considered the claimant's long service in granting 12 months of salary compensation for unfair termination. The Claimant relied on the decision of the Court in Peter Kamau Mwaura & another v National Bank of Kenya [2020] eKLR in finding that the claimants were entitled to compensatory damages. He submitted that in the case of Patrick Njuguna Kariuki v Del Monte Kenya Limited [2012] eKLR, the Court awarded Kshs. 5Million as exemplary damages to purge the malicious and outrageous conduct of the employer that caused suffering to the employee. It was the Claimant's contention that the termination of his employment violated his right to fair labour practices and right to fair administrative action as envisaged under Articles 41 and 47 of *the Constitution* of Kenya and lifted by sections 41, 43, 45 and 47 of the *Employment Act*, 2007. That as such, he is entitled to the reliefs sought in his Memorandum of Claim dated 9<sup>th</sup> September 2020.

### **Respondent's Submissions**

15. The Respondent submitted that it conducted investigations and suspended the Claimant in accordance to clause 3.0(f) of the Respondent's Disciplinary Handling Procedures Manual (hereinafter "the Respondent's Disciplinary Manual") which provides that:
- (f) If, given the circumstances of the case, the line manager and HR consider it appropriate, staff may be suspended on half pay with medical benefits whilst the investigation is being conducted. The period of suspension should be kept to a minimum. Suspension may occur at any point during the investigation process.
- Suspension will be made after serious consideration of the circumstances and should not be regarded as disciplinary action in itself. During the suspension, staff will be required to report to Security Department or member of management at any nearest branch every Monday and Thursday and sign an attendance register. (Emphasis by the Respondent)
16. The Respondent submitted that further, the relevant provisions on issuing a show cause letter to an employee are under clause 4 of the Respondent's Disciplinary Manual as follows:
- (b) The staff shall receive the written Notice to Show Cause, acknowledge receipt by endorsing the said letter and respond in writing within three (3) days to the issue raised in the Notice to Show cause.
- (g) If the Staff's response to the Notice to Show Cause is unsatisfactory and inadequately addresses or fails to disprove the issues raised in the Notice to Show Cause then the Company shall proceed with the disciplinary proceedings and convene a disciplinary meeting. (Emphasis by the Respondent)
17. It was the Respondent's submission that therefore, the Claimant was given three (3) days as per the Disciplinary Manual and which fact was well known to him and that the Claimant cannot rely on such time frame to challenge either the substantive or procedural fairness. That the opportunity as per the



said Manual was duly given and whereas it complied with all the required procedures, the Claimant chose not to co-operate causing issuance of the second show cause letter to draw his attention to further related issues. The Respondent further submitted that clause 6.5 of the Respondent's Disciplinary Manual provides the consequence of failing to attend a hearing as follows:

- 6.5 Staff must take all reasonable steps to attend the disciplinary hearing. Failure to attend a hearing without good reason may be treated as misconduct in itself. If a staff fails to attend a disciplinary hearing without providing a good reason for this, the Company will take a decision based on the information available at the time. (Emphasis by the Respondent)
18. It submitted that clauses 8.5 and 8.6 of the Respondent's Disciplinary Manual further provide that:
- 8.5 If a staff commits a serious offence or gross misconduct or despite a warning (that is still active), the staff's conduct still fails to reach the prescribed standards, termination will normally result. In the case of gross misconduct, staff will normally be summarily dismissed without notice or payment in lieu of notice.
- 8.6 Despite the categorization of section 8.1- 8.5, the company reserves the right to administer any of the mentioned disciplinary sanctions taking into consideration the circumstances of each particular case. (Emphasis by the Respondent)
19. It was the Respondent's stance that the disciplinary panel deliberated on the Claimant's failure to attend the disciplinary hearing and concluded that the same amounted to insubordination before proceeding with the decision to terminate his employment. That under section 44(4)(e) of the Employment Act, an employee who knowingly fails or refuses to obey a lawful and proper command within the scope of his duty to obey, is a matter that constitutes justifiable or lawful grounds for the dismissal. According to the Respondent, it followed the proper procedure right from the point of notifying the Claimant of the charges against him up to the disciplinary hearings but he chose not to attend.
20. On the claim of discrimination, the Respondent submitted that the Claimant has not adduced any evidence in support of this assertion and that contrary to his averments, the General Manager - Shared Services was indeed terminated on similar grounds of insubordination. The Respondent argued that a reasonable employer faced with the same facts as in this case would have decided to dismiss on those facts as affirmed by this Court in the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] eKLR. It maintained that the Claimant was granted adequate time to prepare for his defence and that a reasonable employer would have equally dismissed their employee for failing to attend the disciplinary hearing even after being informed the seriousness of the disciplinary hearing and being warned that a decision would be made regardless of their attendance. The Respondent further submitted that no medical records have been adduced by the Claimant in proof of the psychological and mental torture he alleges to have suffered as held in the Court of Appeal's decision in *Michael Maina Kamami & another v Attorney General* [2019] eKLR. That the Claimant having failed to prove any discrimination or show that anyone else in the same circumstances and same employer was treated differently from how he was treated, the claim for Kshs. 10Million as damages for discrimination, psychological and mental torture must fail.
21. Regarding the other reliefs sought by the Claimant, it was the Respondent's submission that the Claimant has neither adduced any documents in support of the claims sought nor substantiated any of the prayers sought. That on the other hand, the Respondent has argued and demonstrated that the termination of the Claimant's employment was fair. The Respondent seeks the Court to exercise its discretion by dismissing the prayer for 12 months' salary compensation as such an order would be in the interest of justice based on the peculiar circumstances of this case, as similarly provided in section



49(4) (b) of the Employment Act. It noted that in the case of CMC Aviation Limited v Mohammed Noor [2015] eKLR, the Court of Appeal in allowing the appeal and partially setting aside the decision of the Industrial Court, reduced the award to one month's salary in lieu of notice and pronounced that whilst the trial Court should have been guided by the provisions of section 49(4), the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did. Further, the Respondent submitted that the claim for compensation for lost opportunity for the period remaining to retirement at 60 years cannot be awarded because the Court ordinarily does not award claims on lost years. It cited the case of D K Njagi Marete v Teachers Service Commission [2020] eKLR the Court of Appeal in dismissing the appeal by appellant held that:

“...We are fortified in this finding due to the fact that the appellant went ahead to secure employment shortly after the termination of his employment. Our consideration of the circumstances herein alongside the case law on the subject as well as Section 49(f) and 49(g) of the Employment Act lead us to find that the claims for exemplary or aggravated damages must fail.”

22. It was the Respondent's submission that the Court often determines the specific award of damages is often determined by Court, guided by principles of fairness and the specifics of the employment contract. That however, the awards for damages vary significantly from case to case, depending on factors such as the: nature of the wrongful termination, length of service of the employee, age of the employee, terms of the employment contract, and employee's efforts to mitigate their losses. According to the Respondent, the Claimant has not laid any basis nor justified why he should be awarded the colossal amounts sought for years not worked for up to retirement age. It cited Civil Appeal No. 25A of 2013 – Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR in which the Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR that there is no provision for payment of damages to the date of retirement. The Respondent prayed that since the Claimant has already secured employment with another employer, this Court ought to exercise its discretion and dismiss the prayer for lost opportunity and the entire Claim with costs to the Respondent.

23. The Claimant was dismissed by the Respondent. Prior to dismissal, the Claimant was served with 2 show cause letters. It would seem one was overlapped and the Claimant then was dismissed. He was not allowed to appeal as the time for lodging an appeal had apparently lapsed. Prior to his disciplinary hearing, the Claimant was given limited access to the Respondent's system in order to garner material to respond to the show cause. This was on the morning of the disciplinary hearing. In the case of Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology (supra) Ndolo J. held as follows:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.” [Emphasis supplied]

24. In this case, the Respondent ignored the Claimant's requests for information and documents that would have assisted him in preparing his defence. What is more, the impugned forensic audit report also called the Preliminary Raw Compliance Report had been handed over to the Group Managing Director (MD) without considering the Claimant's responses to the same. The Preliminary Raw Compliance Report seems to have informed the Respondent's decision to dismiss the Claimant. The



Claimant was also confronted with another show cause letter dated 16<sup>th</sup> June 2020 and the result was a dismissal. It was clear there was a scheme to dismiss the Claimant as a fellow manager facing similar charges went scot free. There were also allegations of impropriety against an employee of the Respondent which allegations were not rebutted. It would be in the interests of the Respondent to review the information availed by the Claimant in that regard lest the action of the said individual impact negatively on the Respondent.

25. In this case it is my finding that the Claimant was not given sufficient time to prepare for hearing. The Claimant was issued a termination based on an allegation that he was neither charged with nor given a chance to respond to contrary to the rules of natural justice. The Claimant asserted psychological and mental torture, a development of withdrawal syndrome and insomnia. He however did not avail any medical evidence to bolster the allegation nor proof to the required standard. In that regard, the Claimant would not recover for the alleged psychological and mental torture and the alleged development of withdrawal syndrome or insomnia. The Claimant also sought for lost opportunity for the period remaining to retirement. As held in the case of *D K Njagi Marete v Teachers Service Commission* [2013] eKLR where Rika J. held as follows:

“26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The *Employment Act*, 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.”

26. In my considered view, the Claimant has to mitigate his losses as anticipatory salaries and allowances are not remedies the court would sanction as section 49 of the *Employment Act* has sufficient answer to the Claimant in terms of remedies he would avail. He has not made out a case for exemplary damages or additional relief in excess of the provisions of section 49. This can be granted where there is discrimination for instance or where there was in addition to the dismissal a claim for which the court finds in favour of the party for something like libel etc. The Claimant has in this case only succeeded in demonstrating the Respondent was unfair and did not follow the law in the dismissal meted out. In the final result, I find for the Claimant and award him 6 months salary as compensation for the unlawful termination. He will also have costs of the suit to the extent he was partly successful. Judgment is entered for the Claimant against the Respondent for:-

- a. Kshs. 3,786,000/- being 6 months salary as compensation.
- b. Costs of the suit.
- c. Interest at court rates on the sum in (a) above from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF APRIL 2024**



**NZIOKI WA MAKAU**

**JUDGE**

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