



**Kivisi v Performers Rights Society of Kenya (PRISK) (Cause 58 of 2019) [2024] KEELRC 1316 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1316 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 58 OF 2019  
NJ ABUODHA, J  
MAY 27, 2024**

**BETWEEN**

**DERECK KIVISI ..... CLAIMANT**

**AND**

**PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK) ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim dated 31<sup>st</sup> January, 2019 and pleaded inter alia as follows: -
  - a. On or about 1<sup>st</sup> August, 2012 the Claimant was employed by the Respondent to 15<sup>th</sup> December,2017 when the Respondent unlawfully terminated his services.
  - b. The Claimant averred that he began his employment with the Respondent at the position of IT Assistant where he served the Respondent diligently and honorably where he was later promoted to the position of Head of member Services. That his employment was governed by his contract of employment dated 1<sup>st</sup> August,2016 and the Respondent’s Human Resource Policy.
  - c. The Claimant averred that he was earning a gross salary of Kshs 84,100/=with other benefits entitlements like medical, transport and Pension benefits at 6% of basic salary.
  - d. The Claimant averred that he reported directly to the CEO and coordinated most of his duties through the office of the CEO as his immediate supervisor. That the Respondent suspended the CEO which led to her resignation from the Respondent’s employ. That this caused issues within the Respondent’s organization forcing the Claimant to request for guidance from the HRM on whom he was to report to.



- e. The Claimant averred that he was in charge of two other employees of the Respondent and he was responsible for organizing the events, seminars, workshops and general meetings of the Respondent's members which role he exercised in conjunction with other employees and departments within the Respondent.
- f. The Claimant averred that due to his background in IT and extensive interaction with the Respondent's providers he also carried out regular supportive roles to the IT department. That the Respondent chose to single him out together with the members of his department in a systematic bid to cause his removal from its employ.
- g. The Claimant averred that the Respondent issued all employees in his department with warning letters claiming various transgressions committed by those employees. That over the 5 years the Claimant was employed by the Respondent he was never subjected to any other disciplinary procedures and indeed no warning letters at all were issued to him prior to the Respondent's letter termed a first and final warning letter dated 16<sup>th</sup> October, 2017.
- h. The Claimant averred that in compliance with the procedures laid down in the Respondent's Human Resource Manual he requested an impartial committee to listen to an employee grievance he had with the way that him and members of his department were being treated by members of the board. That he reduced his grievance in to writing and furnished the same to the Respondent for the purposes of resolving the issues raised against him and members of his department.
  - i. The Claimant averred that the Respondent was sluggish in accepting his request for an impartial tribunal until he insisted it is when the Respondent through the HRM he was directed to attend hearing of his grievance.
- j. The Claimant averred that by an email dated 17<sup>th</sup> October, 2017 sent by the CEO of Kenya Copyright Board he was invited to attend a world Intellectual Property Organisation training in Namibia on the 19<sup>th</sup> November, 2017 to 24<sup>th</sup> November, 2017. That he accepted the opportunity to attend as a trainer and provide training to the attendees as he had the relevant experience having served in a collective management organization.
- k. The Claimant averred that as he would be on official duty by the WIPO and Kenya Copyright Board it was not necessary to seek leave days to attend such trainings.
- l. The Claimant averred that on Friday 10<sup>th</sup> November, 2017 he fell ill while attending a function at the Nairobi Securities Exchange on behalf of the Respondent. That he checked himself in the hospital on 11<sup>th</sup> November, 2017 and informed his office colleagues of his admission to hospital. That because he was very weak he requested one of his colleagues to alert the Respondent via Whats App group specifically formed to provide an easy channel of communication within the Respondent's organization. That he



was discharged on 14<sup>th</sup> November,2017 and given four days to fully recover by the doctor from 15<sup>th</sup> Novembwr,2017 to 18<sup>th</sup> November,2017.

- m. The Claimant averred that he was expected to attend the WIPO training in Namibia from 19<sup>th</sup> November,2017 to 24<sup>th</sup> November,2017 and so he opted to inform all members of staff on the Whats app group called PRISK Team” of his intended whereabouts.
- n. The Claimant averred that he attended the training sessions in Namibia and returned to his place of work on 27<sup>th</sup> November,2017. That by an email dated 27<sup>th</sup> November,2017 from HRM the Claimant was informed that he was to attend employee grievance committee hearing on 29<sup>th</sup> November,2017.
- o. The Claimant averred that he attended the grievance committee meeting only to find that *the Constitution* of the said meeting was made up of the same people whom he had an issue with who were both board members as well as the HRM who was the secretary of the Committee. That he reluctantly participated in the meeting which was to serve as a review of his statement of grievance and expected at the end of it to receive the minutes of the meeting and report on the same highlighting how the grievance would be handled. That the minutes and the Report were never issued to him despite it being a mandatory requirement in the Respondent’s Human Resource policy to have such proceedings documented and signed by all parties.
- p. The Claimant averred that on 5<sup>th</sup> December 2017 he received an email from the Respondent citing various transgressions by him and questioning his whereabouts from 13<sup>th</sup> November,2017 to 27<sup>th</sup> November,2017. That he was required to respond in two days which he did on 7<sup>th</sup> December,2017. That the HRM not being satisfied with his response directed him to meet with her without specifying the particulars of the accusations against him.
- q. The Claimant averred that on 14<sup>th</sup> December,2017 the Claimant attended the meeting with the said HRM which the Respondent purported to be a disciplinary hearing despite failing to adhere to the provisions of the Human Resource Manual governing such matters.
- r. The Claimant averred that on 15<sup>th</sup> December,2017 the Respondent issued him with a letter terminating his employment summarily while referencing the Respondent’s first and final warning letter of 16<sup>th</sup> October,2017. That he was required to prepare an handing over report despite a short notice and return all property to the Respondent.
- s. The Claimant averred that summary dismissal for gross misconduct was not available to the Respondent since he was a senior staff and the Respondent should have first suspended him at half pay as per the Respondent’s Human Resource Policy. That he was considered an exemplary employee prior to this turn of events and was awarded as the Respondent’s employee of the year in 2014.
- t. The Claimant averred that the Respondent breached the Claimant’s Constitutional and statutory rights, contract of employment dated 1<sup>st</sup>



August,2016 and the accompanying Human Resource Policy in unlawfully terminating his employment.

2. The Claimant in the upshot prayed for the following against the Respondent;
  - a. A declaration that the termination of his employment was unlawful and unfair.
  - b. Lost salary for the remainder of the Claimant's contract of employment being 19 months Kshs 1,597,900/=
  - c. Pension Contribution for the remainder of the Claimant's contract of employment at 6% of gross salary for 19 months Kshs 95,874/=
  - d. General damages being 12 months salary Kshs 1,009,200/=
  - e. Service pay for each year worked before unlawful termination Kshs 210,250/=
  - f. Costs of the suit and interests.
  
3. The Respondent filed its statement of Response dated 15<sup>th</sup> April, 2019 and averred inter alia as follows;
  - i. The Respondent denied the contents of the claim and averred that the Claimant's termination was lawful, justified and in accordance with the Claimant's contract of employment, the Human Resource Policy and [Employment Act](#).
  - ii. The Respondent averred that the resignation of the CEO never affected the procedures to be followed by employees in the event they were absent from work for any reason. That the Claimant never sought guidance on who to report to as alleged or at all and which in any event would not have been of any relevance since he was not a senior employee reporting to the CEO or the Board.
  - iii. The Respondent further averred that the CEO resignation did not alter the Claimant's terms of employment and he was still expected to discharge his duties and abide by the terms governing his employment with the Respondent. That clause 7 of the Employment Contract provided that when an employee was absent from work due to sickness, a medical report must be presented when the employee reported back to work while clause 8.2.6 of the Human Resource Policy provided that all sick leave must be recorded by the Human Resource office. That the Claimant did not provide the Human Resource office with any medical report upon return to work contrary to the above provisions hence his claims that he was sick between 13<sup>th</sup> November to 17<sup>th</sup> November,2017 could not be substantiated and justified.
  - iv. The Respondent further submitted that clause 8.2.11 (e) of the Human Resource Policy provided that employees should utilize special leave to participate in staff development activities. Further clause 8.2.5 provides that special leave should be obtained by making a formal request in writing to the CEO or the Board at least 30 days before the intended departure. That justifiable emergencies would also be considered. That the Claimant neither never wrote to the Board requesting to be granted a special leave to



attend the training alleged nor was he granted permission to attend any such training. Therefore, his absence from work from 20<sup>th</sup> November,2017 to 27<sup>th</sup> November,2017 was not authorized by the Respondent and was in violation of clause 5 of the contract and the above clauses of the policy.

- v. The Respondent averred that carrying out of roles reserved for the IT department was not within the Claimant's job description and neither was he sanctioned to perform them. Further that the memo dated 4<sup>th</sup> October,2017 referred to by the Claimant was not addressed to the Claimant or his department but to all staff.
- vi. The Respondent averred that letters issued to the other employees were justified and reasons for their issuance were clearly outlined therein. That it was within the Respondent's administrative mandate to discipline its employees where they have breached the terms of service. That the Claimant should substantiate its imputation of malice on the warning letters issued to the aforesaid two employees. That the said two employees are still employees of the Respondent and they have never complained against the said warning letters issued to them. The Claimant cannot purport to complain on their behalf.
- vii. The Respondent averred that there were also reasons for the said warning letter dated 16<sup>th</sup> October,2017 issued to the Claimant. That was failure to facilitate and coordinate the Respondent's 2017 AGM and proceeding on leave with office equipment contrary to the directive by the Board of directors contained in the memo dated 4<sup>th</sup> October,2017. That the said reasons in the warning letter warranted summary dismissal but the Respondent was considerate then in not terminating his services.
- viii. The Respondent further averred that by an email dated 31<sup>st</sup> October,2017 the Admin and Humana Resource Officer explained the circumstances and reasons behind the issuance of the warning letters complained of by the Claimant. That as per the Claimant's request the Respondent convened a meeting constituting of the directors and Human Resource Officer to hear the Claimant's grievances.
- ix. The Respondent averred that save for licensing the Respondent the said Kenya Copyright Board had no mandate either in law or practice to interfere with the Respondent's internal administrative processes. That the Claimant was not an employee of the Kenya Copyright Board or the WIPO nor do these two organizations dictate the terms of employment between the Claimant and the Respondent.
- x. The Respondent averred that Whats app notifications were not a recognized mode of communication by the Respondent. That in any event the said notification did not constitute permission or approval to attend such training as required by clause 8.2.11(e) and clause 8.2.5 of the Human Resource Policy.
- xi. The Respondent further averred that it was not open to the Claimant to dictate without a basis which members of the board were to attend the said



grievance meeting. That in any event the said grievance meeting did not discuss the Claimant's gross misconduct which resulted to his termination.

- xii. The Respondent averred that via an email dated 13<sup>th</sup> December,2017 the Respondent's Human Resource Officer invited the Claimant to a meeting scheduled for 14<sup>th</sup> December,2017 to discuss his notice to show cause which he had been sent to him via email dated 5<sup>th</sup> December,2017 setting out all particulars of the complaints which he was supposed to respond to. That the Claimant's insinuations that he was not aware of the accusations against him are thus dishonest and misleading.
- xiii. The Respondent admitted conducting the disciplinary hearing on 14<sup>th</sup> December,2017. That summary dismissal was a right available to the employer in law and which was provided for under clause 12(i) of the Claimant's Employment Contract and clause 8.1.11(c) of the Human Resource Manual.
- xiv. The Respondent further averred that the award earned more than 3 years ago would not in any way have a bearing on the Claimant's termination. That the Claimant was terminated for a valid reason, informed of the complaints against him by email of 5<sup>th</sup> December,2017, invited for disciplinary hearing scheduled for 14<sup>th</sup> December,2017 by email of 13<sup>th</sup> December,2017 where he was given opportunity to be accompanied by a person of his choice.
- xv. The Respondent further averred that it complied with all the substantive and procedural fairness processes prior to the Claimant's summary dismissal.
- xvi. The Respondent averred that the Claimant's termination was lawful, fair and procedural and hence the reliefs sought could not issue. That the Claimant was not entitled to service pay having being summarily dismissed. The Respondent prayed that the Claimant's claim be dismissed with costs.

## **EVIDENCE**

4. The Claimant's case was heard on 17<sup>th</sup> October,2023 and on 30<sup>th</sup> November,2023 where the Claimant called three witness. The first witness to testify was the Claimant (CW1) who testified and adopted his statement and documents filed in court as his evidence in chief. He requested that the court allows prayers in his claim.
5. On cross examination CW1 confirmed that he was absent from 13<sup>th</sup> November,2017 to 24<sup>th</sup> November,2017. That he notified the staff members of his absence as well as the HR in writing (appendix 16) That the WhatsApp group for staff members was a means of communication to staff members and to the HR. He confirmed that the name of the HR was not on the screenshot but she was a member of the group. That it was one way of confirming his absence to the HR for he was unwell and attended the training by WIPO between 19<sup>th</sup> November,2017 to 24<sup>th</sup> November, 2017.
6. CW1 confirmed that he did not seek direct permission from the HR to attend the training and he never communicated to the board over his absence. He Confirmed that he provided his medical records upon return as per the Policy and his contract. He confirmed that he responded to the email of 5<sup>th</sup> December,2017 raising issues of absenteeism on 7<sup>th</sup> December,2017 that he had provided the medical records. That the email did not have any attachment of the medical records. That he gave a physical copy of the records to his employer but did not have a signed copy.



7. CW1 confirmed that he attended the disciplinary hearing after receiving the email of 13<sup>th</sup> December, 2017. That he attended alone he never invited anyone to accompany him. CW1 confirmed that there was no need to apply for special leave to attend to the WIPO training since the appendix did not require him to apply for the same.
8. CW1 further confirmed that he did not apply the leave in writing 30 days prior as required by the clause 8.2.11(e) of the Policy. That he did not have the authority to attend the training. CW1 confirmed that he received one warning letter. That he was paid his terminal dues.
9. In re-examination CW1 clarified that he informed the HR of his intention to attend training and WhatsApp was an official communication at the Respondents. That the information was sufficient. That he did not have an immediate supervisor in November and December since she had resigned. That he provided medical records as well as discharge from Nairobi hospital as appendix 17. CW1 clarified that the special leave was without pay. That the warning letter was signed by the chairperson of the Board.
10. The Second witness was an ICT consultant who adopted his statement filed in court as his evidence in chief. In cross examination CW2 confirmed that the HR knew the education background of the Claimant.
11. The 3<sup>rd</sup> Claimant's witness testified on 30<sup>th</sup> November, 2023. She stated that he was the former CEO of the Respondent. CW3 adopted her statement filed in court as her evidence in chief and testified that she supervised the Claimant during her employment. In cross examination CW3 confirmed that she left the Respondent's employ in September, 2017 and that she was not an employee of the Respondent when the Claimant was terminated. That she did not attend the Claimant's disciplinary case. In re-examination CW3 confirmed that the office used WhatsApp and everyone including HR was in the group.
12. The Respondent's case was heard on 30<sup>th</sup> November, 2023 with only one witness its CEO testifying. RW1 adopted his statement filed in court together with the Respondent's documents filed with the Claim as his evidence in chief. He stated that he was employed by the Respondent since 2019 to date. RW1 further testified that the Claimant was absent from work from 13/11/2017 to 19/11/2017 and he never communicated with the office about his whereabouts. That the Claimant alleged he was sick but did not provide any medical evidence. The Claimant never sought approval to be absent as per HR procedure.
13. RW1 confirmed that the Claimant was taken through the disciplinary process before termination and upon termination he was paid his dues.
14. In cross examination RW1 confirmed that she did not participate in the proceedings leading to termination of the Claimant. That employees were to use special leave for personal development and the same would not be for extended period. She confirmed that not all trainings required special leave.
15. RW1 confirmed that the Respondent was not overseen by any international bodies. She confirmed that the Respondent did not have any link with WIPO as they did not have guaranteed engagement with WIPO. That WIPO did not have control over what the Respondent does but engaged with it.
16. RW1 confirmed that the Respondent was a private company regulated by Copyright Society of Kenya. That the Respondent promotes member services. That the Head of Member services plays a critical role and the Claimant was not the only one participating in core functions of the Respondent. RW1 confirmed producing a warning letter signed by the chair of the board.



17. In reexamination RW1 clarified that the case was filed in 2019 when he had taken over as the CEO of the Respondent. That he had records relating to the Claimant's case. That any external training not organized by the Respondent required special leave. That the Respondent did not have formal engagement with WIPO. That the Claimant was not a senior member of the staff as his contract was signed by the CEO.

### **CLAIMANTS' SUBMISSIONS**

18. The Claimant filed written submissions dated 22<sup>nd</sup> December, 2023. On the issue of whether the Claimant's termination was unlawful and/or unfair, the Claimant submitted that Section 41 of the Employment provided for the procedure to be taken before termination of employee.
19. It was the Claimant's submission that the termination was on the alleged basis of absconding duty, lack of respect and failing to follow the Respondent's procedure as per the Respondent's termination letter.
20. The Claimant submitted that the Respondent alleged that his termination was linked to his prior warning letter dubbed "first and final" warning letter to the Claimant without subjecting him to any disciplinary proceedings prior to issuing the said letter.
21. The Claimant submitted that he raised an employee grievance against the warning letters and sought for a neutral executive committee of the board of directors to consider the same as his complaint was against the Chairperson and the then Director of the Respondent but the Respondent elected to assign the very persons that the Claimant raised a grievance about to act as arbiters. The Claimant submitted that this was a violation of Article 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act* and rules of natural justice.
22. The Claimant submitted that the Respondent through the Human Resource Manager solely conducted a disciplinary proceeding which hearing the Claimant submitted he was not made aware of the accusations raised and minutes were not produced by the Respondent.
23. The Claimant submitted that he had notified the relevant persons whose duty was to note and record the same contrary to the Respondent's allegation that the Claimant had absconded. Furthermore, the Claimant submitted that he was granted permission by his immediate supervisor to attend the World Intellectual Property Organization training in Namibia.
24. The Claimant relied on the case of Anthony Yamo Ihito vs Basco Products (Kenya) Limited[2022] while submitting that in determining whether a termination is fair or not ,the elements of fair procedure and valid reason by the employer must be considered .
25. The Claimant submitted that the termination was unlawful and unfair as the Respondent failed to demonstrate that a fair procedure was followed or a valid justifiable reason tendered for the termination.
26. On the issue of whether the Claimant is entitled to Prayers sought, the Claimant submitted that having submitted that the reason for termination put forth by the Respondent was not valid and due process was not followed while terminating his employment, the Claimant is entitled to remedies under Section 49 of the *Employment Act* and relied on the case of Benjamin Langwen vs. National Environmental Management Authority [2016] Eklr.
27. The Claimant submitted that on lost salary under the contract of employment, the Claimant must be compensated for the lost income as the same was due to him but for the respondent's malicious and unlawful termination of his contract.



28. The Claimant submitted on pension contribution under the contract of employment, he should be paid the remainder of the pension contributions due from the Respondent under the fixed term contract of employment.
29. The Claimant submitted that on service pay for each year worked before unlawful termination, he should be awarded service pay for the 5 years worked.
30. On the issue of who should bear the cost, the Claimant submitted that the costs follow the event as per Section 27 of the [Civil Procedure Act](#).

## **RESPONDENTS' WRITTEN SUBMISSIONS**

31. On the other hand, the Respondent filed its submissions dated 4<sup>th</sup> February 2024 and on the issue of whether the Claimant's termination was for a valid and fair reason submitted that Section 45 (2)(a) and (b) of the [Employment Act](#) anchors the requirement of substantive fairness.
32. The Respondents relied on among others the case of Walter Ogal Anure –vs- Teachers Service Commission in Submitting that substantial reason refers to establishment of a valid reason for termination.
33. It was the Respondents' submissions that the Claimant was absent from work for about two weeks without the Respondent's permission and equally did not provide a medical report upon return to work contrary to clause 7 of his employment contract to prove the allegation that he was sick.
34. The Respondent submitted that the Claimant's absence from work from 13<sup>th</sup> to 17<sup>th</sup> November 2017 on account of sickness was not proven or substantiated. The Respondent also submitted that the Claimant's absence from 19<sup>th</sup> to 24<sup>th</sup> November on account of WIPO training in Namibia, he did not seek the Respondent's permission and was not authorized to attend the training contrary to Clause 5 of the Contract and Clause 8.2.11(e) as read together with Clause 8.2.5 of the Human Resource Policy Manual.
35. In conclusion, the Respondent submitted that the Claimant's termination was for a valid and fair reason in compliance with Section 45(2)(a) and (b) of the [Employment Act](#) on account of absenteeism.
36. On the issue of whether the Claimant's termination was procedurally fair the Respondents submitted that Section 41 of the [Employment Act](#) sets out the requirement of procedural fairness.
37. The Respondents relied on the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Compant Ltd [2013]eKLR in submitting the ingredients of procedural fairness.
38. The Respondent submitted that the Claimant was informed of the charges against him, given an opportunity to defend himself in writing and orally, invited for a disciplinary hearing and finally terminated. The termination was thus procedurally fair and satisfied the criteria set out in the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Compant Ltd [2013]eKLR.
39. On the issue of whether the Claim is merited the Respondent submitted that the claim was without merit as the Claimant's termination was substantively fair and procedurally fair and his terminal dues were paid.
40. On the issue of who should bear the cost of the proceedings it was the Respondents' submissions that the principle of "cost follow the event" as established in Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 Others [2014] should apply and costs awarded to the Respondent.



## DETERMINATION

41. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
42. I have I have come up with two main issues;
  - a. Whether the Claimant's termination of employment was unfair and unlawful
  - b. Whether the Claimant is entitled to the reliefs sought.  
Whether the Claimant's termination of employment was unfair and unlawful
43. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of absconding duties and failing to follow office procedures. The Claimant was issued with a first and final warning letter dated 16<sup>th</sup> October,2017 but I note it was on different accusations not the ones in the termination letter.
44. Whereas the Claimant has alleged that the Respondent had decided to terminate his services since that was the only warning he had for over the 5 years he worked with the Respondent. The Claimant was however bound by his contract of employment, the Human Resource Policy Manual and the *Employment Act*.
45. It is not in dispute that the Claimant started as IT Assistant then later promoted to Head of member services and he received an award of employee of the year in 2014. Under Section 44 (4) (a) of the *Employment Act*, 2007 absenteeism without authority or lawful cause is one of the grounds of what amounts to gross misconduct and may lead to summary dismissal.
46. The Claimant alleged that he was sick from 11<sup>th</sup> November, 2017 to 14<sup>th</sup> November,2017. He requested his colleague to post in their WhatsApp group and he also posted that he was doing well. I have perused the screen shots shared and I confirm that this information was shared to the Respondent's group.
47. Whereas I am aware that the Employment contract provided under clause 7 and Clause 8.2.6 of the Human Resource Policy that the sickness must be communicated to the Respondent within 48 hours and a medical report be presented when the employee returns back to the office. I note that during the hearing the Claimant testified that he did produce the physical medical reports and produced a discharge summary from Nairobi Hospital.
48. On the issue of attendance by the Claimant in Namibia for the WIPO training I have checked the invitations and the Claimant was invited as an employee of the Respondent. I have also looked at the WhatsApp screen shot where the Claimant communicated that he will be attending the said training and the HR read the said message hence she was aware.
49. The Court is alive to the fact that the Human Resource Policy provided under clause 8.2.5 that the Claimant was to do a request to attend the training in writing 30 days before the departure. I note that the said 30 days would not be applicable in this case bearing in mind the short invite and the fact that the Claimant after being discharged on 14<sup>th</sup> November,2014 was asked to take 4 days sick leave to fully recover which means that would take him to 18<sup>th</sup> November,2017 yet on 19<sup>th</sup> November he was expected to attend the Namibia training.
50. In the circumstances I agree that the only way the Claimant could communicate to the Respondent was through the group. The court takes judicial notice digital technology as a means of communication. In the circumstances the Court is of the view that the Respondent was aware of the Claimant's



whereabouts and could not claim that the Claimant absconded duty. The Claimant was warned once but for different accusations. The Claimant did not just wake up once in five years and started absconding duties.

51. In the words of Nzioki Wa Makau J. in *Boniface Francis Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

52. In this case the Respondent did not make any effort to contact the Claimant on why he did not show up for work. It means they were aware of his absence. In the circumstances therefore, the reasons advanced by the Respondent were not valid and fair as per the provisions of section 43 of the *Employment Act*.

53. The court is also guided by the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

54. In conclusion I find that the termination of Claimant’s employment was substantially unjustified with no valid and fair reason for dismissal/termination.

55. Regarding procedural fairness courts have repeatedly emphasized on both substantial and procedural fairness in a number of cases including in the case of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eklr that for termination to pass the fairness test, it must be shown that there was not only substantive test for termination but also procedural test.

56. Further Section 41. Provides for Notification and hearing before termination on grounds of misconduct which provides that the employee to be explained the reason for termination in language he understands and consider the representations by such an employee who should have an employee of his choice.

57. The Respondent gave the Claimant a show cause letter vide an email dated 5<sup>th</sup> December, 2017 where he was to respond in two days’ time and he responded on 7<sup>th</sup> December, 2017. The Respondent again invited the Claimant for meeting between himself and the HR which was said to be disciplinary hearing.

58. I note that the Claimant had raised his grievances after the warning letters to himself and the other two employees which were all levelled against the HR. It is interesting how the said HR heard his grievance and still was the one to sit on the disciplinary hearing. How can a disciplinary hearing be between the Claimant and the HR alone.

59. Whereas I note that the invite advised the Claimant to invite someone to sit in in the meeting, this from the onset was a sham disciplinary meeting which was not properly constituted since the HR was already biased.



60. The Respondent has alleged that the Claimant was not a senior staff. However as a senior employee and head of member services the Respondent should have adhered to its own manual by first suspending the Claimant or giving him a warning on the said issue of absenteeism. The Respondent did not produce disciplinary minutes to this court to show that the process was fair. The fact that the Respondent paid the Claimant his dues after termination does not make the whole process valid.
61. The Claimant admits attending the disciplinary hearing of 14<sup>th</sup> December 2018. He only faults the composition of the disciplinary meeting.
62. In *Kiilu v Isinya Resorts Limited (Cause E022 of 2021)* [2022] KEELRC 13240 (KLR) it was held that;  
 An employee is entitled to be given adequate notice to respond to a show cause letter and adequate notice to attend a disciplinary hearing/meeting. Minutes of a disciplinary meeting must be clear on the issues discussed thereat, and must clearly indicate whether the employee was given an opportunity to be heard, and what representation the employee and his fellow employee or union official made.  
 Issues to be discussed at a disciplinary hearing must be the same as in the show cause letter;
63. From the above case it is clear that the Claimant who was invited on 13<sup>th</sup> December,2017 to attend the disciplinary hearing in form of meeting with the HR on 14<sup>th</sup> December,2017 was not given sufficient notice and he could not be expected to attend with another invitee within such a short notice. There were no minutes to show what was discussed.
64. In addition, the Human Resource policy was clear that the employee was to be given a room for improvement before any action was taken and only support staff would be summarily dismissed. I do not agree that the Claimant was a support staff when he was the head of member services. The disciplinary action was to be taken by the board for senior staff as per the policy herein not the HR as it happened in this case.
65. On the burden of proving and justifying the grounds of dismissal/termination of employment, Section 47(5) of the *Employment Act* puts the same to the employer.
66. In conclusion I am of the view that the Claimant's termination was procedurally flawed hence unfair termination under section 45 of the *Employment Act*.  
 Whether the Claimant is entitled to reliefs sought.
67. Having established that the Claimant was unfairly terminated I proceed to award him general damages as per section 49 of the *Employment Act*. Taking in to account the conduct of the Respondent in terminating his services and the period he worked with the Respondent for 5 years I award him compensation for 8 months. On the prayer for lost salary I note that the contract was for a fixed period of three years hence the Claimant is entitled to the remainder of his contract.
68. On the prayer for service pay I note that from his pay slip his salary was subject to statutory deductions including NSSF hence failing on the exceptions under section 35(6) of the *Employment Act*. The Claimant is not entitled to the service pay.
69. In conclusion the Claimant's claim is hereby allowed with costs as follows;
- i. 8 Months Compensation for unlawful termination.....Kshs 672,000/=
  - ii. Lost Salary (19 Months).....Kshs 1,009,200/=
- TOTAL .....KSHS 1,681,200/=



- iii. Costs and Interests
- iv. The award shall be subject to taxes and statutory deductions but shall attract interest at Court rates from date of judgment until payment in full.
  1. It is so ordered.

Dated this 27<sup>th</sup> day of May, 2024

**Delivered this 27<sup>th</sup> day of May, 2024**

**Abuodha Nelson Jorum**

**Judge**

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