



**Misheck v Kenya Airways Limited (Cause E6469 of 2020)
[2024] KEELRC 1291 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1291 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6469 OF 2020**

**JK GAKERI, J
MAY 27, 2024**

BETWEEN

NELSON KIMATHI MISHECK CLAIMANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Memorandum of Claim filed on 17th November, 2020 alleging unfair termination of employment and failure to pay for work done.
2. It is the Claimant’s case that he was employed by the Respondent on 6th May, 2014 as the Manager Facilities Development at Grade H13 reporting to the Finance Director.
3. The Claimant avers that he acted as Manager Facilities Management from 1st July, 2015 but no acting appointment letter was given by Human Resource as requested by the Finance Director.
4. The Claimant avers that the Respondent’s Human Resource Policy Manual provided for acting appointments including payment of acting allowance of 20%.
5. That although the appointment formalities were not complied with, the Claimant rendered services and was evaluated in 2017.
6. It is the Claimant’s case that the restructuring in June 2017 retained the position of Manager Facilities Management but in a further restructuring in November 2017, facilities was combined with Motor Transport but the Manager’s position remained vacant, but subsequently attended an interview for the position but it was given to one Michael Bor and the Claimant was notified that he was unsuccessful.
7. It is the Claimant’s case that the new structure revised in April 2018 virtually made his role as Manager Facilities Management redundant and neither the Human Resource nor his supervisor provided a



revised job description on request and had not received the same by 7th October, 2018 when he approached the Finance Director who was to offer an exit package which fell through.

8. The Claimant faults the termination on the premise that he was not accorded a fair hearing as he was not afforded sufficient information to enable him understand the charges and defend himself as his request for a copy of the investigation report was not honoured.
9. The Claimant prays for;
 - a. A declaration that termination of the Claimant's employment was unfair.
 - b. Award of Kshs.96,270,030.66 comprising;
 - i. Acting allowance for 42 months and 12 days @ Kshs.75,191.00, Kshs.3,260,164.60 or Kshs.4,398,377.00 for having been confirmed after 6 months.
 - ii. Employer's contribution to the Provident Fund Kshs.326,016.46.
 - iii. Salary till retirement age Kshs.80,167,136.00
 - iv. Employer's contribution to the pension fund Kshs.8,016,713.60.
 - v. Medical Allowance till retirement Kshs.4,500,000/=.
 - c. Such other orders as the Honourable Court may deem fit.
 - d. Costs of the suit.

Respondent's case

10. By a Memorandum of response dated 8th February, 2022, the Respondent admits that the Claimant was its employee in Hay Grade 13 as Manager Facilities Development and was in the same Grade until 11th February, 2019 when the parties separated.
11. It denies that the Claimant acted in Hay Grade 14 or was appointed to the Grade and additionally denies having refused or failed to appoint the Claimant as Manager Facilities Management or pay acting allowance.
12. It is the Respondent's case that investigations revealed that the Claimant had not complied with Procurement Procedures between 1st December, 2016 and 30th September, 2018 as he had contracted an Office Assistant through Creative Consolidated Systems Ltd without invoking Supply Chain Procedures and the contractor overcharged for the services.
13. That the Claimant was suspended effective 12th November, 2018, a notice to show cause followed on 4th January, 2019 and responded vide letter dated 9th January, 2019, was invited for a hearing on 14th January, 2019 and was terminated from employment on 11th February, 2019, appealed on 15th January, 2019, was heard on 22nd May, 2019 and the termination was upheld and the Claimant was unwilling to invoke the other appeal mechanism which he was notified of.

Claimant's evidence

14. On cross-examination, CWI confirmed that he was appointed as the Respondent's Manager Facilities Development Grade 13.



15. It was the Claimant's evidence that by an email dated 8th June, 2015, the Finance Director, Mr. Alex Mbugua asked Latiffa Cheronu to let the Claimant act as Manager Facilities Management in place of one Burton but had no evidence as to whether the email was responded to.
16. That the Respondent's Human Resource Manual provided for a 20% acting allowance but admitted that the formalities were not complied with.
17. That the Performance Appraisal Form indicated that his grade was H13.
18. The Claimant admitted that Facilities and Motor Transport section were merged and he earned a salary from April 2018 to February 2019 when his employment was terminated and Mr. Michael Bor was the Manager of the outfit from April 2018 and could give instructions to those in the Department including the Claimant as exemplified by the email dated 28th September, 2018.
19. The witness admitted that he received the suspension letter as well as the notice to show cause and was aware of the period of investigation as well as the contract referred to but did not know the accusations made against him.
20. The Claimant, however admitted that his response to the notice to show cause did not indicate that he did not understand the charges.
21. It was his testimony that Creative Consolidated Systems Ltd had been contracted by the Respondent to supply personnel.
22. The witness admitted that Linda Machoka requested for an Office Assistant and he okeyed it but did not examine the contract and could have asked for a copy.
23. That after 2017, the Claimant continued seeing the Office Assistant and he enquired but had no evidence of the inquiry and confirmed that he was involved in the approval of invoices for the payment of the Office Assistant by verifying the amount payable.
24. The Claimant confirmed that he was invited for the disciplinary hearing and advised to bring a colleague, attended, was afforded a chance to defend himself and the minutes on record were those of the meeting and was terminated from employment vide letter dated 11th February, 2019 and appealed, was heard and dismissal affirmed.
25. The Claimant admitted that he was paid 3 months' salary in lieu of notice.
26. On re-examination, the Claimant testified that after the email of 8th June, 2015, he took up the responsibilities of the position and a handover took place and a copy of the handover report was on record.
27. The Claimant testified that the Finance Director confirmed that the Acting would be effective 1st July, 2015 and he was not to blame for non-compliance with procedural formalities.
28. That the restructuring rendered him technically redundant as some roles were removed from him such as projects and facilities management.
29. That the new Human Resource Manual came into operation 3 months after termination of his employment.
30. That although he requested for a copy of the investigation report in writing, it was not availed not even during the hearing and the Chair of the Committee commented about it.



31. According to the Claimant, three departments were involved in the engagement of staff and administration was in-charge.
32. That he wrote a letter to the Manager cancelling the recruitment via email as requested by Mr. Murianki.
33. Concerning clarity of charges, the Claimant testified that he was not given a notice to show cause and did not approve any invoice after the email on cancellation of the recruitment.

Respondent's evidence

34. RWI, Grace Wamiti confirmed that she had worked for the Respondent for 6 years and worked with the Claimant for about one (1) year.
35. The witness admitted that the investigation report was not signed and could not tell who prepared it or the date.
36. The witness testified that the Claimant violated the procurement process in 2016 and the manual was signed in March 2017.
37. The witness admitted that in 2016, the Claimant was the Manager Facilities Development and Acting Manager Facilities Management and Winnie Waithanji was the Manager Facilities Administration.
38. That the Claimant's acting role was not formalised and was verbal and the email from Mr. Alex Mbugua dated 8th May, 2015 and the Claimant was not given an appointment letter.
39. RWI confirmed that an employee in an acting position was entitled to acting allowance which had to be claimed and the Claimant did not claim.
40. That Winnie Waithanji's employment was terminated for the same reason but Linda Machoka was not as she only requested for an Office Assistant.
41. That the Respondent undertook a retrenchment exercise in 2016.
42. RWI also confirmed that the Claimant stopped the recruitment via email but it was not complied with and a loss of Kshs.1,151,319.2 was incurred.
43. That Linda Machoka sought approval and the Claimant granted it and ought to have sought approval from above.
44. That the Claimant complained of lack of facilitation and materials and the duration was extended by 24 hours on request.
45. That the alleged disobedience was not part of the notice to show cause.
46. That the Claimant was aware that the intern was still in service and had not been terminated.

Claimant's submissions

47. Counsel for the Claimant submitted on dismissal and the reliefs sought.
48. On substantive and procedural justice, counsel submits that the Claimant was neither given the investigation report, the basis of his dismissal from employment nor facilitated as requested and had to request for an extension of time to respond to the notice to show cause and the procurement manual came into operation months after the procurement had taken place and should be construed contra proferentes i.e restrictively against the drafter or party relying on it.



49. Counsel further submits that the termination letter included a charge not in the notice to show cause and the Claimant had no opportunity to respond to it.
50. According to counsel, termination of the Claimant's employment by the Respondent was unfair by dint of Section 45 of the [Employment Act](#), 2007.
51. Concerning the reliefs sought, counsel urges that having acted as Manager Facilities Management from 15th July, 2015, the Claimant was entitled to Acting allowance as he had no letter to facilitate claiming the same at Kshs.75,191.00 per month for 42 months till the date of termination, although the manual capped the acting period to 6 months.
52. Reliance was made on the decision in *Edah Cherono Maiywa V University of Nairobi Enterprises & Services Ltd* (2020) eKLR where acting for 3 years was held to be discriminatory and an unfair labour practice and the court could confirm the Claimant nunc pro tunc as equity considers as done what ought to have been done as held in *Walsh V Lonsdale* (1882) 21 Ch D. 9 as the Human Resource ought to have confirmed him in the position.
53. That in the alternative, the Respondent pays acting allowance for the entire duration.
54. Reliance was also made on *Gichini Kagwe V Elizabeth Kusienya* (2020) eKLR to buttress the submission.
55. Counsel invites the court to award 12 months compensation as the termination of employment fell below the threshold for want of substantive and procedural justice.
56. Finally, counsel urges the court to award exemplary damages as they need not be pleaded as held in *Abdulhamid Ebrahim Ahmed V Municipal Council of Mombasa* (2004) eKLR.

Respondent's submissions

57. On 29th February, 2024, counsels requested and were granted 14 days a piece to file and exchange submissions.
58. On 11th April, 2024, counsel for the Respondent notified the court as he was served on 5th April, 2024, he needed 10 days to file and serve and the court granted 10 days as requested.
59. By 26th April, 2024 when the court retired to prepare this judgement, the Respondent had not filed its submissions.

Findings and determination

60. It is common ground that the Respondent employed the Claimant effective 6th May, 2014, as Manager Facilities Development, H13 and was confirmed on 6th November, 2015 and joined the Provident Fund and claims to have acted as Manager Facilities Management effective 1st July, 2015.
61. The Respondent argues that the acting appointment formalities were not complied with.
62. It is also not in dispute that Respondent restructured severally and while in mid-2017, the position of Manager Facilities Management was retained, in November 2017 the position of Manager Facilities and Motor Transport was left open and later occupied by Michael Bor.
63. From the evidence on record, it is clear that by April 2018, the Claimant's position as Manager Facilities Development did not exist in the Respondent's organizational structure.



64. The Claimant is challenging the substantive and procedural aspects of termination of his employment by the Respondent.
65. The issues that commend themselves for determination re;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
66. Concerning termination of employment, counsels have adopted contrasting positions with the Claimant maintaining that it was unfair not only substantively but also procedurally.
67. It is settled law that for a termination of employment to pass the fairness test encapsulated in Section 45 of the *Employment Act*, 2007, it must be demonstrated that the employer had a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the employer and that the termination of employment was conducted in accordance with a fair procedure.
68. Put in the alternative, there must have been not only a substantive justification for the termination but also procedural fairness, as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.
69. The provisions of the *Employment Act*, 2007 prescribe both the substantive and procedural precepts of a fair termination of employment as highlighted in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.

Reason for termination

70. It is common ground that by letter dated 12th November, 2018, the Respondent suspended the Claimant from employment on even date for failure to follow procurement procedures regarding contracting.
71. The letter was emphatic that the Claimant would be on full pay during suspension.
72. The purpose of the suspension was to pave way for investigation into the matter and the suspension was for a duration of 60 days.
73. It is equally not in contest that the Claimant was issued with a notice to show cause dated 4th January, 2019 citing 3 charges as;
 1. Failure to follow procurement procedures and regulations.
 2. Irregularly engaging staff through a 3rd party as an Office Assistant.
 3. Negligence in carrying out his responsibilities.
74. The letter demanded a written response within 2 days and the Claimant responded by letter dated 9th January, 2019.
75. The Claimant admitted that an Office Assistant joined his department or section from Creative Consolidated Systems Ltd for cleaning services. According to the Claimant, the recruitment went through the normal process though the same is not captured and who did what and when.
76. On the 2nd charge, the Claimant states that when he discussed the issue with the Acting Finance Director, he declined the same and a withdrawal notice was given to Creative in March 2016.



77. On charge number 3, the Claimant maintains that he performed his duties honestly and efficiently and had reduced cleaning costs by Kshs.5.5 million in 2017 and downsized the cleaning section from 13 to 8.
78. Puzzlingly, on cross-examination, the Claimant alleged that he did not fully understand the charges but admitted that he did not state so in his response or request for clarification.
79. The Claimant further admitted that the request for an Office Assistant was made by one Linda Machoka and when it was brought to him, his assessment was that it was alright and approved it without having perused the contract between Creative Consolidated System Ltd and the Respondent or requesting for a copy for perusal.
80. Similarly, the Claimant admitted that even after he gave instructions that the recruitment be cancelled in March 2017, the Office Assistant was still around the continued being paid and the Claimant verified the totals payable.
81. Also not in dispute is the fact that the Respondent terminated the Claimant's employment vide letter dated 11th February, 2019 which cited two related grounds of termination as contracting an Office Assistant through a 3rd party without obtaining necessary approvals and disobeying lawful instructions issued by a superior.
82. The 2nd ground of termination was not articulated in the notice to show cause and RWI confirmed as much on cross-examination and is of no consequence for purposes of this judgment.
83. The investigation report on record reveals that the Claimant and one Winfred Waithanji played the principal role in the recruitment of the Office Assistant without engaging Supply Chain section and both were dismissed from employment.
84. During the hearing on 24th January, 2019, the Chairperson, Mr. Tom Ogendo identified only one charge, namely;

“allegation of improper engagement of an office staff.”
85. In his initial submissions, the Claimant made no reference to his role in the recruitment of the Office Assistant.
86. Puzzlingly, while at the disciplinary hearing, the Claimant stated that he went through the contract and did not notice any discrepancy. On cross-examination, however, he testified that he did not ask for it.
87. The Claimant admitted that the supervisor, Mr. Murianki did not approve the hiring and the Claimant gave instructions that the Office Assistant's employment be terminated.
88. The fact that the Claimant discussed the issue with the supervisor after the recruitment of the Office Assistant would appear to suggest that he had not been consulted before the recruitment.
89. In his final submissions, the Claimant appears to justify the recruitment.
90. From the foregoing, it is clear that the recruitment of the Office Assistant was approved by the Claimant and one Winfred Waithanji without involvement of Supply Chain and the Human Resource department of the Respondent.
91. In addition, the Claimant provided no reason as to why he initiated the termination of the Office Assistant's employment if indeed the recruitment was regular and had all attendant approvals. His



- instructions on termination was an explicit admission that the recruitment was not regular and he was by so doing taking corrective action.
92. Concerning whether the Respondent had a reasonable basis to terminate the Claimant's employment, the court proceeds as follows;
93. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
94. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR, Manani J. states as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.
95. The foregoing sentiments are fortified by the holding of the Court of Appeal in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR as follows;
- “The standard of proof is on a balance of probability 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. That is a partly subjective test.”
96. Finally, the foregoing is further fortified by the range or band of reasonable responses test as explained by Lord Denning MR in *British Leyland (UK) Ltd V Swift* (1981) I.R.L. R 91;
- “... The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. . .”
97. The function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair but if the dismissal falls outside the band, it is unfair.
98. Applying the foregoing provisions and propositions of law to the facts of the instant case, the court is satisfied that the Respondent has on a preponderance of probabilities proved that it had a substantive justification to terminate the Claimant's employment.

Procedure

99. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the *Employment Act*, 2007 sets out an elaborate mandatory process which the employer must comply with in a termination of employment.
100. The precepts of procedural fairness are encapsulated in Section 41 of the *Employment Act*, 2007 and have been elaborated in legions of decisions by this Court and the Court of Appeal, such as *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR where the court isolated for elements as;



explanation of grounds of termination to the employee, reasons for which termination of employment is being considered, entitlement of the employee to the presence of another employee of his choice during the explanation and hearing and considering the representations made by the employer or the person chosen by the employee.

101. In the instant case, it is common ground that the Respondent suspended the Claimant from employment effective 12th November, 2018 and issued a notice to show cause on 7th January, 2019 and a response was required within 48 hours. An advance copy had been sent on 4th January, 2019. The Claimant complained that he had neither a laptop or office nor office email to respond but responded on 9th January, 2019. The request to access office emails was not honoured by the Respondent, but was accorded an extension of 24 hours upto 5.00 pm on 9th January, 2019.
102. Evidence on record show that the Claimant was by letter dated 17th January, 2019 invited for a disciplinary hearing scheduled for 24th January, 2019. The invitation made reference to the notice to show cause and the fact that the Claimant's response thereto was deemed unsatisfactory.
103. The invitation informed the Claimant that he was at liberty to bring witnesses, adduce evidence and be accompanied by a colleague of his choice.
104. Thus far, it is safe to conclude that the Claimant was aware of the charges he had to confront, had been notified of his rights as well date, time and place of the disciplinary hearing.
105. Further, evidence reveals that by email dated 21st January, 2019, the Claimant requested for a copy of the investigation report, witness statements and recommendations for purposes of preparing for the hearing.
106. However, by letter dated 22nd January, 2019, the Respondent made reference to the finding that procedures were not followed but in lieu of furnishing the report referred him to the Procurement Manual and the contract between the Respondent and Creative Consolidated System Ltd as the documents he required to prepare for his defence.
107. Similarly, RWI confirmed on cross-examination that the Respondent had an investigation report and it was not given to the Claimant and it was the basis of his dismissal from employment.
108. Equally, the Claimant mentioned it in his final submissions at the hearing, but more significantly, Mr. Michael Bor, Manager Facilities and Transport, the Claimant's supervisor admitted having received the Claimant's request but in his view, the report was prepared for consumption by management in any case, the Procurement Manual and the Human Resource Manual were available to the Claimant.
109. It is trite law that a person facing charges is entitled to the documentary and other materials the other party proposes to rely on in the prosecution of the charges and they ought to be availed in good time to enable the person prepare his/her defence.
110. The foregoing is fortified by the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (Supra) as follows;

“ . . . The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictment which could torpedo his entire career and destroy his future. . . ”



111. In the instant case, the Claimant's request for a copy of the investigation report was rebuffed by the Respondent.
112. Strangely, the Respondent constituted itself into the person facing the charges and advised the Claimant on the documents he required for his defense, which in the court's view is a violation of the Claimant's right to fair hearing.
113. It is disingenuous for an employer to prescribe the materials an employee requires to defend him/herself against the charges preferred against him or her by the employer.
114. In the instant suit, the Claimant requested for the investigation report, which the Respondent blatantly refused to avail to the Claimant's detriment, a fact he brought to the disciplinary committee's attention in his final submissions.
115. To the Claimant, the investigation report was an important document and its non-availment may have affected his defence in a significant way.
116. In its letter dated 22nd January, 2019, the Respondent provided no justification for its refusal to avail a copy of the investigation report and on which basis the Claimant's employment was terminated.
117. It is also noteworthy the Respondent accorded the Claimant 48 hours only to respond to the notice to show cause and had to extend it by 24 hours at the instance of the Claimant. The 24 hours period was in the court's view not reasonable.
118. For the foregoing reasons, the court is satisfied that the procedure employed by the Respondent did not meet the threshold of procedural fairness.
119. Consequently, it is the finding of the court that termination of the Claimant's employment by the Respondent was procedurally flawed and thus unfair.

Whether the Claimant is entitled to the reliefs sought

a. Declaration

120. Having found that termination of the Claimant's employment by the Respondent was unfair for want of procedural propriety, a declaration to that effect is merited.

b. Acting Allowance for 42 months and 12 days Kshs.3,260,164.00

121. It is common ground that effective 1st July, 2015, the Claimant acted as the Respondent's Manager Facilities Management as requested by the Finance Director vide email dated 8th June, 2015 at 3.15 pm replacing one Burton Asanga who handed over later.
122. The supervisor's comment on the Claimant's Performance Appraisal 2014/2015 also confirms that the acting had been sanctioned by the supervisor.
123. RWI confirmed that indeed in 2016, the Claimant was acting as the Manager Facilities Management but the appointment was never formalised by the Respondent by way of a letter.
124. In the 2016/2017 Performance Appraisal which is unsigned by the Human Resource Manager, the supervisor states that "His (Claimant) matter on acting by vote will be addressed by 30th June, 2017 as per HR commitment".
125. RWI confirmed that acting allowance was payable by subscription of a claim but the Claimant did not ostensibly because he had no letter of appointment.



126. From the supervisor's comment on 26th May, 2017, the issue of the Claimant's acting had not been addressed by Human Resource.
127. The letter sets out the terms and conditions of the appointment and the duration unless it is open ended which is not uncommon. The acting allowance payable is also expressly provided.
128. Similarly, the communication typically comes from Human Resource or the Chief Executive Officer's Office not the Head of Department.
129. To buttress his case as regards acting, the Claimant attached a Handover Report by one Burton dated 11th June, 2016 where Mr. Burton Asanga identifies the Claimant as the Manager Facilities Management and Supervisor.
130. The foregoing would appear to suggest that by this date and as confirmed by RWI on cross-examination, the Claimant was indeed acting, the absence of a formal notification notwithstanding.
131. The Claimant's testimony to the investigation committee also reveals that he was appointed acting Manager Facilities Management but in 2017, the structure changed as Facilities and Motor Transport were combined and the Manager's position remained vacant until Mr. Michael Bor was appointed.
132. In the court's view, there is overwhelming evidence to show that the Claimant acted as the Manager Facilities Management at the instigation of the Finance Director but for undisclosed reasons the Respondent's Human Resource Department did not act on it till the Claimant's dismissal from employment in early 2019.
133. It is discernible that there were reasons that neither party was willing to disclose to the court. However, having admitted that the Claimant acted in the particular position, it behooves the Respondent to demonstrate why it did not pay him acting allowance.
134. As regards the duration of acting, the Claimant's evidence is clear that the restructuring in November 2017, facilities was combined with Motor Transport and a new role was created, Manager Facilities and Motor Transport, but he was not considered for the position even after an interview.
135. From the evidence adduced by the Respondent, it is difficult to tell when the Claimant stopped acting after the restructuring in November 2017 as the position of Manager Facilities Management was retained and the position of Manager Facilities Development was done away with, a fact the Claimant admitted in evidence but since he was acting as Manager Facilities Management, he remained in employment, albeit in limbo as his substantive position did not exist.
136. The foregoing facts reveal a regrettable state of affairs where internal disagreements or lack of cohesion and direction negatively impacted on the Claimant as he was requested to act in a particular position by his supervisor but the Human Resource Department of the Respondent refused, failed and/or neglected to formalise the appointment by way of a letter of appointment to enable the Claimant claim acting allowance.
137. The testimony that there was no formal appointment letter cannot avail the Respondent as it was fully aware that the Claimant was acting and by its conduct acquiesced the same and is arguably estopped from alleging otherwise. (See *Combe V Combe* (1951) 2 KB 215).
138. Owing to the Respondent's default or inaction, the Claimant rendered services but was not paid.
139. It is an unfair labour practice for an employer to keep an employee in an acting position for more than the duration prescribed by its policies or manual.



140. In the circumstances, it is the view of the court that the Claimant is entitled to an acting allowance for the duration served, computed in accordance with the Respondent's Human Resources Manual or Procedures.
141. Having awarded acting allowance, the alternative prayer falls by the way side as it is grounded on the court considering the Claimant as having been confirmed which is the employer's discretion.
142. Typically, vacant positions are subjected to competition be it internally or externally and courts seldom interfere.

i. Employers contribution to the Pension Fund Kshs.326,016.46

143. Pension contributions and payments are governed by the Deed between the employer and employee. The Fund Managers pension due to an employee are payable in accordance with the terms of the Deed not pursuant to court orders.
144. The Claimant tendered no evidence to prove that the scheme administrator has acted in contravention of the Deed between the parties.
145. The claim is dismissed.

ii. Salary for 232 months, employer's contribution to the Provident Fund and medical allowance till retirement age Kshs.88,509,866.06

146. The three combined claims relate to the amount the Claimant would have earned till retirement at the age of 60 years.
147. In a nutshell, there are claims for anticipatory earnings.
148. Regrettably, the Claimant adduced no evidence to demonstrate the factual basis of the three claims and why the Respondent should be held liable.
149. First, the Claimant did not avail a copy of the entire contract of employment dated 5th March, 2014, neither did the Respondent. Both parties availed page 1 of the contract up to paragraph 6. The signature page is also missing.
150. None of the documents on record provide that the Claimant's employment was permanent or that he would remain in the Respondent's employment until attaining the age of 60 years and the contract had no exit clause by either party.
151. In the absence of a guarantee by the Respondent that the Claimant's employment would subsist until he attained retirement age, the claim for salary and other claims after termination are patently unsustainable.
152. Typically, contracts have exit clauses which provide for termination of either party giving the other requisite notice.
153. The Court of Appeal has consistently held that after termination of employment, an employee ought to move on and not await anticipatory earnings and are not supposed to "replicate employment wrongs and multiply remedies."
154. (See Elizabeth Wakanyi Kibe V Telkom Kenya Ltd (2014) eKLR, D.K. Njagi Marete V Teachers Service Commission (2020) eKLR and National Social Security Fund V Grace Kasungu & another (2018) eKLR).



155. In *D.K. Njagi Marete V Teachers Service Commission* (Supra), the Court of Appeal held that the claim for anticipatory earnings had no legal anchorage.
156. In the instance case, the Claimant's prayer for anticipatory earnings, pension and medical allowances lacks merit and is accordingly dismissed.

c. Compensation

157. Although the Claimant has not specifically prayed for compensation having found that termination of employment was procedurally flawed, the Claimant is entitled to compensation under the provisions of Section 49(1)(c) of the *Employment Act*, 2007.
158. The court has taken into consideration the fact that the Claimant was an employee of the Respondent for 4 years and 9 months which is not long. Second, the Claimant had no previous misconduct or disciplinary issues. Third, the Claimant expressed his wish to continue in the employment of the Respondent by appealing the decision of the Respondent. Fourth, the Claimant substantively contributed to the termination of employment by approving the recruitment of an Office Assistant without seeking approval.
159. In the circumstances, the court is satisfied that the equivalent of one (1) month's salary is fair.
160. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of employment was unfair.
 - b. Acting allowance for the duration served, 42 months and 12 days.
 - c. Equivalent of one (1) month's salary.
161. In the circumstances, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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.

DR. JACOB GAKERI

JUDGE

