



**Obachi v Mount Kenya University (Cause 44 of 2015)  
[2024] KEELRC 1623 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1623 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 44 OF 2015  
DN NDERITU, J  
JUNE 26, 2024**

**BETWEEN**

**KENNEDY OTIENO OBACHI ..... CLAIMANT**

**AND**

**MOUNT KENYA UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. Through Ndeda & Associates Advocates the claimant initiated this cause by way of a memorandum of claim dated 16<sup>th</sup> February, 2014, filed in court on 24<sup>th</sup> February, 2015. However, with the leave of the court, the claimant amended his memorandum of claim on 22<sup>nd</sup> July, 2019 and filed the same on even date, accompanied with a verifying affidavit sworn by the claimant.
2. Alongside the original memorandum of claim, the claimant filed a verifying affidavit, his written statement, and annexed copies of documents which he relied on and produced as exhibits during the trial. The claimant filed a further list of documents dated and filed on 19<sup>th</sup> September, 2017 and a bundle of copies of the listed documents.
3. In the amended memorandum of claim, the claimant is seeking the following reliefs –
  1. 1 month’s salary in lieu of notice Kshs. 11, 633.55/=
  2. Acting allowances Kshs.181, 000.00/=
  3. Reduced or deducted house allowance Kshs. 49,000/=
  4. Underpayment claims Kshs. 60, 515.65/=



5. Normal overtime claims Kshs.138, 173.20/=
6. Off duties/rest days Kshs. 27, 038.50/=
7. Public holiday (30 days) Kshs. 37, 351.90/=
8. Nine days worked in August 2014 Kshs. 3,501.90/=
9. Compensation for unfair

termination Kshs.211,602.60/=

TOTAL Kshs.719,817.40/=

4. The respondent, a private university, entered appearance through Mirugi Kariuki & Co. Advocates on 7<sup>th</sup> April, 2015. The respondent initially filed a response to the memorandum of claim on 22<sup>nd</sup> April, 2015. However, after the claimant amended his memorandum of claim as alluded to above, the respondent filed an amended response to the memorandum of claim on 12<sup>th</sup> September, 2019 seeking that the claim and the entire cause be dismissed with costs for lack of merits.
5. Alongside the original response to the claim, the respondent filed a bundle of documents which it relied on during the trial. On 13<sup>th</sup> May, 2015 the respondent filed a further list of documents and a bundle of copies of the listed documents.
6. The claimant filed a response to the respondent's amended response to the amended memorandum of claim on 29<sup>th</sup> October, 2019 reiterating the contents of the amended memorandum of claim and prayed for judgment against the respondent as per the amended memorandum of claim.
7. Counsel for both parties filed a statement of agreed issues on 17<sup>th</sup> February, 2017, listing the following issues for determination by the court –
  1. Whether the claimant was being paid salaries/wages as per the location of the school as compared to the Gazetted Minimum Wages Orders applicable for the area the claimant was working.
  2. Whether the claimant as an acting security officer was liable to and responsible for persons under this super-vision.
  3. Whether there was a misconduct on the part of the claimant or not.
  4. Whether the claimant was accorded a hearing before the disciplinary measures were taken.
  5. Who is top ay the costs of this suit.
8. This cause came up for hearing on 26<sup>th</sup> September, 2022 when the claimant (CW1) testified and closed his case. The defence was heard on 8<sup>th</sup> March, 2023 when JANET KAJWANG (RW1), the human resource officer, testified and the respondent closed its case.
9. Counsel for both parties, by consent, addressed the court by way of written submissions. Miss Awuor for the claimant filed her submissions on 20<sup>th</sup> April, 2023 while Mr. Kahiga for the respondent filed on 24<sup>th</sup> April, 2023.



## **II. The Claimant's Case**

10. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence tendered by the claimant, and the written submissions by his counsel. The same is summed up as hereunder.
11. The amended memorandum of claim is so poorly drafted and completely out of tune with professional drafting of pleadings as the same is full of allegations that should at best be adduced in evidence. Nonetheless, the claimant avers that he was employed by the respondent as a security guard on 22<sup>nd</sup> March, 2011 earning a salary of Kshs.7,200/= inclusive of overtime. He avers that he served the respondent diligently for three (3) years and five (5) months with a clean disciplinary record rising to the rank of acting security officer on 8<sup>th</sup> May, 2012.
12. The claimant avers that his salary was adjusted on 21<sup>st</sup> November, 2011, when he became the acting security, to Kshs.12,000/= which included basic salary (Kshs.5,720/=), house allowance (Kshs.5280/=), and travelling allowance (Kshs.1,000/=).
13. The claimant avers that on 25<sup>th</sup> September, 2013, the respondent introduced short-term contracts which set out terms and conditions and that the same were renewable after every two (2) years. He worked for the respondent as acting security officer until 9<sup>th</sup> August, 2014 when he was allegedly wrongfully dismissed.
14. The claimant alleges that he was dismissed at the instigation of the director of the respondent's Nakuru Campus for refusing to obey unlawful instructions and or directions from the said director who had allegedly instructed the claimant to aid him in stealing the property of the employer, the respondent, by removing building materials from a construction site at Milimani area within Nakuru Town, now city, to the home of the said director.
15. It is the claimant's case that even though he appealed the dismissal he was denied both substantive and procedural fairness and that the dismissal was wrongful, unfair, and unlawful to the extreme and most foul.
16. In paragraphs 87 of the amended memorandum of claim which runs for about seven (7) pages, the claimant provides the particulars of the various liquidated items that form the basis of the prayers as set out in the introductory part of this judgment.
17. In his testimony in court, the claimant reiterated the contents of the pleadings and his statement filed on 23<sup>rd</sup> August, 2021. He produced and adopted his bundle of documents attached to the original memorandum of claim filed on 24<sup>th</sup> February, 2015 marked as K.O.O I to K.O.O XVII (a) together with a further list of documents dated 19<sup>th</sup> September, 2017; he produced all the documents as exhibits 1 to 22.
18. He stated that he was employed by the respondent on 22<sup>nd</sup> March, 2011 as a night security guard and his starting gross monthly salary was Kshs.7,200/=. He further stated that he was informed of the other benefits such as loan and medical schemes.
19. He stated that on 8<sup>th</sup> May, 2012 he was appointed as acting security officer. The original letter of contract is dated 15<sup>th</sup> April, 2011 while the letter of appointment as acting security officer is dated 8<sup>th</sup> May, 2012.
20. He testified that he was dismissed on 9<sup>th</sup> August, 2014 and that he was not issued a show cause letter although he stated that he attended a disciplinary hearing. He stated that he did not understand the



- charge(s) preferred against him. He however stated that the charges against him were that he had neglected duty as a result of which iron sheets were lost. He claimed that he was not on duty when the iron sheets were lost as he was allegedly on leave and that it is another security officer who was on duty.
21. In any event, the claimant stated that nothing had been stolen as the allegedly stolen iron sheets were only removed from the construction site to a store in a different location within Nakuru and as such the respondent lost nothing. He stated that no minutes and or documents were availed to him or produced during the disciplinary hearing and no witness was called to testify against him for the respondent to prove the charges. He testified that he was neither supplied with the minutes of the disciplinary hearing nor did he sign the same.
  22. In cross-examination he admitted that he faced charges of neglect of duty. He admitted that he understood the charges and fully participated in the disciplinary hearing. He stated that he refused to act on directions from the director of Nakuru Campus to deliver iron sheets to his compound for the director's personal use. He stated that the iron sheets were removed from the construction site on 29<sup>th</sup> March, 2014 when he was away. He insisted that the hearing was not fair as his witnesses were not called and, in any event, no one testified for the respondent.
  23. In re-examination, the claimant insisted that he was not issued with a show-cause letter and therefore he was denied a fair hearing for lack of written particulars and details of the charges.
  24. Responding to a question by the court, the claimant insisted that the iron sheets allegedly stolen were only moved from the construction site to a store belonging to the respondent on the instructions of the director and as such he was neither negligent in performance of his duties nor was the property of the respondent lost or stolen.
  25. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the amended memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

### **III. The Respondent's Case**

26. The respondent's case is contained in the amended response to the memorandum of claim, the oral and documentary evidence adduced through RW1 and the written submissions by its counsel, as summarized hereunder.
27. The respondent denies the allegations made by the claimant in the amended memorandum of claim. It avers that the terms and conditions of the contracts between the claimant and the respondent were in line with the *Employment Act* and the law of contract. The respondent avers that the claimant was paid as per the location of the campus, Nakuru, and the basic minimum wage as per the time of his employment which he agreed to and the claimant is therefore estopped from claiming other sums of money beyond what was agreed in the contract.
28. The respondent denies the allegation that the claimant was wrongfully dismissed and avers that it is a stranger to the alleged differences between the claimant and the director of the Nakuru Campus.
29. The respondent avers that the claimant was subjected to due process and accorded a fair hearing. It is pleaded that the claimant was first given a warning letter and thereafter a committee was constituted to investigate and determine culpability of the claimant as per the charges. It is after a disciplinary hearing that a decision was taken to dismiss the claimant. It is pleaded that the claimant was accorded a chance to appeal against the dismissal but the dismissal was ultimately upheld.



30. It is pleaded that the respondent carried out meticulous investigation into the matter which involved talking to witnesses, gathering relevant documents, and drafting the appropriate charges against the claimant based on the established misconduct. It is averred that the claimant faced specific and particular charges concerning neglect of his duties as a result whereof the respondent's property was stolen, lost, or misplaced.
31. The respondent avers that the claimant was the acting security officer responsible for the property that was lost or stolen under his watch. The respondent avers that the claimant was negligent, careless, and or reckless in performance of his duties which amounted to gross misconduct under Section 44 (4) (c) of the Employment Act (the Act).
32. RW1 adopted the written statement of Mr. Dio Ongoya the former human resource director dated 29<sup>th</sup> November, 2021 as her evidence in-chief. She produced the respondent's filed documents as exhibits 1 to 7.
33. She testified that the terms of employment of the claimant are contained in his letter of appointment as he was an employee on a contract of two years, renewable. She stated that the claimant served his initial two years and he was then offered a second two-year contract but the terms of his engagement remained the same. The second contract was to commence from 1<sup>st</sup> November, 2013 and expire on 31<sup>st</sup> October, 2015. According to RW1 the second contract did not last as disciplinary issues arose concerning the conduct of the claimant as a result of which the claimant was subjected to disciplinary process alluded to in the foregoing paragraphs.
34. She stated that the respondent lost 150 iron sheets from its facility in Milimani Estate in Nakuru Town where construction was on-going. She stated that the records did not show how, when, and by whom the said iron sheets were taken out. She stated that it is the claimant who allowed or conspired with the guards to remove the said property, resulting in the loss of the same alongside other building materials.
35. She testified that during the proceedings before the disciplinary committee, the claimant and a fellow guard named Mr. Chelule were held and found culpable of gross misconduct. She stated that the loss and or theft was investigated by an independent committee which prepared a report. She stated that the claimant was given an opportunity to defend himself but he was dismissed in the face of overwhelming evidence that he was involved in the theft and or he was negligent in performance of his duties as a security officer. She stated that the claimant was accorded due process and even heard on appeal but he was ultimately dismissed.
36. She stated that the claimant was not underpaid at any point but that he was overpaid as per minimum wage guidelines. She contended that the claimant's house allowance was paid in full and that no unlawful deductions were made from the salary or wages of the claimant.
37. In cross-examination, she stated that she had worked as a human resource officer with the respondent since August, 2014. She further stated that the records indicated that the claimant was a security guard and that nothing indicated that he was promoted beyond that position. However, she conceded that the claimant at some point acted as a security officer but he was again demoted to a security guard. From one of the claimant's exhibits marked K.O.O III, she confirmed that the claimant was recommended for promotion but was not promoted as that was just a recommendation.
38. She admitted that there was no evidence that the claimant was served with a notice or show-cause letter before he appeared for the disciplinary hearing. She stated that an investigation was carried out on the missing iron sheets and other materials but she had not seen the investigation report. She stated that the claimant did not attend the disciplinary hearing meeting of 12<sup>th</sup> June, 2014 and also did not sign



the minutes thereof. She further conceded that there is no evidence that the claimant cross-examined the witnesses named in the minutes, and that there are no minutes of any other disciplinary hearing. She admitted that the iron sheets and other materials, the property of the respondent, went missing but there is no evidence to show that they were stolen. She also informed that the claimant was not charged in a criminal court and that there are no such criminal proceedings pending in any court.

39. RW1 stated that she was not aware that the claimant was not on duty on 30<sup>th</sup> March, 2014 and that since it was on a Sunday there was a possibility that the claimant could have been off-duty. She stated that she did not know if any action was taken against whoever was on duty on that particular day. She admitted that a gate pass was issued and signed by a Mr. Mwangi who allowed-in motor vehicle KXG 432 to pick the said properties of the respondent. She stated that the motor vehicle belonged to a contractor who was working for the respondent and that the driver thereof was not an employee of the respondent and so no action could have been taken against him by the respondent.
40. She alleged that she did not know the person who gave the instructions for the removal of the iron sheets and the other materials and she admitted that the investigation report indicated in the findings that there were no clear management guidelines on how to manage construction sites. She stated that the claimant lost his job for failure to report the removal or loss of the respondent's said property in a timely manner as the claimant reported the matter to his supervisor on 5<sup>th</sup> April, 2014, when he was supposed to have communicated on the matter during or immediately after the incident on 29<sup>th</sup> March, 2014.
41. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

#### **IV. Submissions by counsel**

42. On the one hand, the claimant's counsel identified two issues for determination – Whether the dismissal of the claimant was wrongful and unlawful; and, Whether the claimant is entitled to the reliefs sought.
43. On the first issue, counsel submitted that the claimant was dismissed vide a letter dated 9<sup>th</sup> August, 2014. It is submitted that the respondent failed to comply with Section 41 of the Act since no show-cause letter or notice was served upon the claimant. It is submitted that this procedural violation denied the claimant the chance and opportunity to defend himself against any charges against him as this denied him the benefit of the particulars and details of the alleged misconduct.
44. It is submitted that during the hearing in court RW1 admitted that there is no evidence confirming that indeed the claimant was informed of his right to come along with a co-worker or call any witnesses or his union representative during the disciplinary hearing.
45. It is submitted that the respondent also violated Section 4 of the Fair Administrative Actions Act not only for the foregoing reasons but also for the reason that he was invited and attended a disciplinary hearing devoid of both substantive and procedural fairness. Besides, no witnesses were called to testify against the claimant, no oral or documentary evidence was tendered against him, and he was not given an opportunity for cross-examining and testing the veracity of the evidence against him or for him to tender his evidence and that of his witnesses, if any.
46. It is submitted that the evidence on record establishes that the claimant was not on duty when the alleged theft or loss of the properties of the respondent occurred. It is also submitted that the



construction site from where the properties were lost was in the hands of an independent contractor who should have been held to account for the alleged loss or theft.

47. However, it is submitted that no property was lost or stolen as the same properties were only moved to a store in a different location. It is submitted that this explains why the claimant was not charged in court over the subject matter. It is submitted that no negligence, carelessness, or recklessness was established against the claimant in performance of his duties.
48. It is submitted that in consideration of the entire evidence and circumstances of this cause, the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful. The submission on the reliefs shall be considered in a succeeding part of this judgment.
49. On the other hand, counsel for the respondent identified four issues of determination- Whether the termination of the claimant's employment was lawful, procedural, and fair; Whether the claimant should be reinstated back to his position; Whether the claimant is entitled to reliefs sought; and, Who should meet the costs of the cause.
50. On the issue of termination, it is submitted that the same was fair and lawful. It is submitted that the claimant was rightly found guilty of gross misconduct due to neglect of duty and dismissed under Section 44 of the Act. It is submitted that the gross misconduct on the part of the claimant resulted in loss and or theft of the property of the respondent.
51. It is submitted that the claimant's disciplinary record was bad and that he had been warned for misconduct prior to dismissal. It is further submitted that no notice was due to the claimant as he was dismissed and not terminated in any other way. It is submitted that the claimant was given a fair hearing both in substance and procedure, including a right to file and hearing on appeal. Counsel has cited Joshua Rodney Marimbah V Kenya Revenue Authority (2021) eKLR which quoted from Kenya Power & Lighting Company Limited V Aggrey Wasike (2017) eKLR arguing that the respondent has demonstrated substantive and procedural fairness in the dismissal of the claimant. It is submitted that the claimant did not demonstrate that the dismissal was wrongful. It is submitted that the gross misconduct by the claimant resulted in grave detriment to the property of the respondent as a result of which the property was stolen or lost due to the negligence on the part of the claimant.
52. Counsel has cited Pheoby Aloo Inyanga V Stockwell One Homes Management Limited & Another (2022) eKLR insisting that in the entire circumstances of the cause the claimant was fairly and lawfully dismissed. The court is urged not to meddle with the internal disciplinary process undertaken by the respondent but rather to consider the legality and reasonableness of the action. Counsel has cited Evans Kamadi Misango V Barclays Bank of Kenya Limited (2015) eKLR in firming up that argument.
53. The submission by counsel on the reliefs shall be considered in a succeeding part of this judgment alongside that of claimant's counsel in that regard.

## **V. Issues for Determination**

54. Counsel for both parties filed a list of agreed issues dated and filed in court on 17<sup>th</sup> February, 2017. To a large extent, the issues identified by counsel in their respective written submissions revolve around and about the agreed issues only that they are worded or phrased differently. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The court identifies the following issues for determination -
  - a. Was the dismissal of the claimant by the respondent wrongful, unfair and unlawful?



- b. If the answer to (a) above is in the affirmative, is the claimant entitled to the reliefs sought
- c. Who should bear the costs of the suit?

## **VI. The Dismissal**

- 55. The claimant was employed as a security guard by the respondent via a letter of appointment dated 15<sup>th</sup> April, 2014 on the terms and conditions set out therein. Subject to satisfactory probationary review of three months, running from 22<sup>nd</sup> March to 21<sup>st</sup> June, 2011, the letter of appointment indicates that the claimant was engaged on permanent and pensionable basis.
- 56. However, unilaterally and without any consultation or consensus whatsoever, vide a letter dated 21<sup>st</sup> November, 2011 the respondent changed the terms of service from permanent and pensionable to a term contract of two years. The claimant's duties as a security guard are spelt out in that letter of appointment. His starting gross monthly salary is stated to be Kshs.12,000/= and he was based at the respondent's Nakuru Campus.
- 57. Vide a letter/internal memo dated 8<sup>th</sup> May, 2012 the claimant was recommended for appointment as an acting security officer and it was promised that his letter of appointment as such was to be prepared and delivered through the director of human resources (HR). It is the claimant's case that the promised letter of appointment was not issued. However, there is a letter on record dated 21<sup>st</sup> November, 2011 purportedly appointing the claimant to an acting security officer. Evidently and clearly, this letter creates confusion as it appears to have come way ahead of the one of recommendation which is dated 8<sup>th</sup> May, 2012, as stated above.
- 58. On 25<sup>th</sup> September, 2013 the claimant's bi-annual contract was renewed in his position as a security guard. The letter of renewal stated that his terms and conditions of service remained as provided for in a letter of appointment dated 1<sup>st</sup> November, 2011, yet the only letter of appointment for the claimant is the one dated 21<sup>st</sup> November, 2011 alluded to above. Again, this causes even more confusion as to whether the respondent kept genuine and authentic records of employment of the claimant.
- 59. In the circumstances, it is the finding and holding of the court that the claimant was indeed appointed as an acting security officer, as alluded to above, and he was indeed issued with a letter of appointment dated 21<sup>st</sup> November, 2011 which spelt out his duties and indicated his gross monthly pay as Kshs.20,000/=, made of basic salary Kshs.9,256/=, house allowance Kshs.8,544/=, and travelling allowance of Kshs.2,200/=. The court shall revisit this issue when dealing with reliefs.
- 60. Suffice to state here that the evidence on record is that the claimant was dismissed vide a letter dated 9<sup>th</sup> August, 2014 which stated as follows –

MKU00/HRD/026/2014/190 9<sup>th</sup> August, 2014

KENNEDY OBACH

SECURITY OFFICER

Dear Sir,

RE: DISMISSAL LETTER

Following receipt of a report in which the University lost decra iron sheet at Milimani construction site and a subsequent formation of a taskforce to investigate the disappearance of the same.



On 30<sup>th</sup> June 2014 you appeared before the University taskforce Committee. The taskforce committee confirmed that there was negligence on your part and as a result of the University lost the building materials.

The University Schedule X on terms and conditions of service for staff classify this as gross misconduct which attracts dismissal.

Pursuant to the University Schedule (2.7d) and on behalf of the University Council. You are hereby dismissed from serving as Mount Kenya University employee with immediate effect.

Please note that you have a right to appeal against the dismissal. The appeal may be done within fourteen days from the date of this letter.

I wish you success in your future endeavors.

Thanks

Yours sincerely,

Mr. Muthoga Njuru

HUMAN RESOURCE DIRECTOR

COPY: VICE-CHANCELLOR

DVC-FAP

DVC-CCC&C

CHIER SECURITY OFFICE

DIRECTOR NAKURU CAMPUS

FINANCE DIRECTOR

61. The above letter is categorical that the claimant was dismissed due to neglect of duty allegedly manifested in the loss and or theft of the property of the respondent stated as Decra iron-sheets. The letter reads that the claimant attended a disciplinary hearing on 30<sup>th</sup> June, 2014. The claimant appealed the dismissal but the same was upheld vide a letter dated 3<sup>rd</sup> November, 2014.
62. The crux of the events leading to the dismissal of the claimant is that on or about 30<sup>th</sup> March, 2014 some iron-sheets, according to the claimant about 150 pieces, were removed from a construction site belonging to the respondent in the Milimani area of Nakuru Town, now city. According to the claimant, the director of the respondent's Nakuru Campus had directed him to have the said property moved to his home in Kiamunyi within Nakuru area but the claimant refused to act on what he considered to be unlawful directions, which according to him would have amounted to conversion or theft of the respondent's properties by the said director. It is the claimant's case that his refusal to act as directed formed the basis for his dismissal.
63. The claimant's evidence on record is that the construction site was in the hands and control of an independent contractor and the record shows that the subject property was moved from the site by the constructor to a store also owned by the respondent. According to the claimant no property was stolen or lost.
64. The respondent did not avail or adduce evidence to the contrary as to rebut the foregoing evidence by the claimant. The respondent did not report any theft and or loss to the police, neither the claimant nor any other person was charged with the alleged loss or theft, and the court in those circumstances, for lack of any evidence from the respondent to the contrary, believes the events as described by the



- claimant. The claimant availed a gate pass indicating that of 30<sup>th</sup> March, 2014, when the iron-sheets were carried out in motor vehicle KXG 432, it is a security guard by the name of Samuel Mwangi who was on duty and he duly signed for the same alongside the driver of the said vehicle. No evidence has been availed by the respondent as to whether the above guard and the driver were pursued for the alleged loss and or theft and to what extent.
65. The court holds that the respondent failed to demonstrate that it had genuine and or reasonable grounds or believe for taking disciplinary action against the claimant in the standard set out in Section 43 of the Act.
  66. As far as substantive fairness is concerned the court finds and holds that the respondent lacked lawful basis for taking the action that it did without carrying out substantive investigation and establishing, prima facie, that indeed the claimant was culpable. No evidence was either way availed to confirm that the claimant was on duty on the material day and or that he authorized the carrying away or removal of the respondent's property as was done. On what basis or grounds, then, did the respondent proceed with the disciplinary action against the claimant?
  67. On procedure, which is cumulative to the substance or reason or ground for the disciplinary action, the evidence on record is that the claimant was not issued with a show-cause letter or notice. What this means is that at no point was the claimant informed in writing, with details and particulars, of the charges that he was facing. He was also not informed of his rights prior, during, and after the disciplinary hearing. For example, the claimant was not supplied with the investigation report or the evidence that had been gathered against him and he was not informed of his right to come along with a co-worker or witness to the hearing or his trade union representative. Such a procedure is neither reasonable nor fair and this court, inasmuch as it is not the duty of the court to micromanage employers in their internal disciplinary actions, has a legal duty and an obligation to intervene in such circumstances and stop or remedy the unlawful action.
  68. Either way, the evidence on record is that no witnesses were called during the hearing, the claimant was not allowed to examine the evidence against him, he was not allowed to cross-examine the respondent's witnesses, as none were called, and he was not informed of his right to call his own witnesses. The court is cognizant of the fact that disciplinary hearings are not court cases whereby technical rules of procedure apply. However, disciplinary proceedings ought to abide with the basic tenets of natural justice as capsulated and propagated in various provisions of *the Constitution*, to wit, Articles 40, 41, & 50, Section 4 of the Fair Administrative Actions Act, and various provisions of the *Employment Act*, some of them cited in the foregoing parts of this judgment.
  69. In any event, the court having found that the respondent had no substantive basis upon which to found the disciplinary action, it matters little as to how elaborate or otherwise the procedure applied was or may have been.
  70. This court (ELRC) has over and over again decided on what constitutes unfair and unlawful termination or dismissal and, on the converse, what amounts to fair and lawful termination or dismissal – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
  71. It is the finding and holding of the court that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful both in substance and procedure.



## **VII. Reliefs**

72. Having found and held that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness, the court shall now consider the reliefs sought as hereunder.
73. Prayer (i) is for a declaration that the dismissal was wrongful and therefore unfair and unlawful. The court has found as much in the foregoing part of this judgment and hence a declaration is hereby proclaimed accordingly.
74. Prayer (ii) is for an order of reinstatement of the claimant to his former job and employment. Neither of the parties has expressed interest in re-engagement or reinstatement. In any event the period of three years within which the court may order reinstatement is long gone – See Section 12(3)(vii) of the *Employment and Labour Relations Court Act*. This relief is therefore not available to the claimant and is thus denied.
75. Prayer (iii) is for compensation for salary or wages for the period that the claimant has been out of work. In my understanding, this request is made on the assumption that the court shall issue or has issued an order for reinstatement. However, the court has denied the relief for reinstatement above and as such the court has to consider what compensation the claimant may otherwise be entitled to under the law. This is so because the claimant was on a two-year contract that was to run from 1<sup>st</sup> November, 2013 to 30<sup>th</sup> October, 2015. As noted above, the claimant was wrongfully dismissed on 9<sup>th</sup> August, 2014, exactly 15 months to the conclusion of his bi-annual contract. Neither of the counsel for the parties herein submitted on this issue.
76. In my considered view, the loss or damage that the claimant suffered from the wrongful dismissal is that he was denied the opportunity to work till the expiry of his contract through effluxion of time. The compensation that is awardable should be commensurate with the gross salary that the claimant ought to have earned for the 15 months that he did not serve to complete his contract.
77. The evidence on record is that the claimant was an acting security officer and that his gross monthly pay was Kshs.20,000/= and for the 15 months he ought to have earned Kshs.300,000/=. This is the amount awarded to the claimant under this head, subject to statutory deductions.
78. Prayer (iv) is for reinstatement and payment of acting allowance. Reinstatement has already been denied for the reasons stated and given above. On the acting allowance, or pay difference, the court has alluded to the letter dated 21<sup>st</sup> November, 2011 appointing the claimant to the position of a security officer purportedly based on a recommendation made by the respondent on 8<sup>th</sup> May, 2012. The court has also seen various correspondences in which the claimant has signed as acting security officer and described himself as such with no corresponding rebuttal, rebuke, denial, or retraction by the respondent. All those documents were produced in court without any objection from the respondent, and as such, notwithstanding the anomalies in the dates in the two documents cited above, the court finds and holds that indeed the claimant served as an acting security officer and that forms the basis upon which he has made the claim for acting allowance or the salary differential between the promised gross monthly salary of Kshs.20,000/= and what was actually paid.
79. The sum of Kshs.181,000/= claimed under this head is hereby allowed.
80. Under prayer (v) the claimant prays for one month's salary in lieu of notice and the same is hereby granted at Kshs.20,000/=. The claimant is also awarded Kshs.109,575.55 for unpaid house allowance and Kshs.107,361.25 for underpayment of wages for the periods stated in the claim. The respondent did not avail any records to rebut these claims.



81. However, the claim for overtime in the sum of Kshs.138,173.20 is denied as the same is not supported with any evidence. There are no particulars of the dates and the hours worked beyond the normal time pleaded so as to shift the burden to the respondent to provide records of those dates. For the same reasons the claim for rest days and public holidays is denied. The claim for pay for nine days worked in August, 2014 in the sum of Kshs.3,501 is denied as pay for the entire of that month is taken care of in the award of salary for 15 months awarded as compensation for the balance of the contract period above.
82. The respondent is ordered to unconditionally issue and deliver a certificate of service to the claimant within 30 days of this judgment.
83. On costs, the claimant is awarded costs of the cause.

#### **VIII. Orders**

84. Judgment be and hereby entered in favour of the claimant against the respondent in the following terms:
  - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
  - b. The claimant is awarded as follows:
    - i. Payment in lieu of notice Kshs.20,000.00
    - ii. Salary differential/arrears Kshs.181,000.00
    - iii. House allowance in arrears Kshs.109,575.55
    - iv. Underpayments Kshs.107,361.25
    - v. Compensation for unfair *termination equivalent to the remainder of the contract term* **Kshs.300,000.00 Grand total Kshs.717,936.80**
  - c. The award above is subject to statutory deductions.
  - d. The respondent shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.
  - e. The claimant is awarded costs of the cause and interest on the amount awarded at court rates till payment in full
  - f. All the other claims are denied and dismissed.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26<sup>TH</sup> DAY OF JUNE, 2024.

.....

**DAVID NDERITU**

**JUDGE**

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