Odima v Maya Freight Limited (Cause 1876 of 2015)
[2024] KEELRC 1634 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1634 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1876 OF 2015

K OCHARO, J

JUNE 24, 2024

BETWEEN

SIMON ODIMA ..... CLAIMANT

AND

MAYA FREIGHT LIMITED ..... RESPONDENT

(Before Hon. Justice Ocharo Kebira on 24th June, 2024)

JUDGMENT

1. Through his amended memorandum of claim dated 11th November 2022, the Claimant seeks the following reliefs against the Respondent;
    a. A declaration that the Claimant's termination of service was unfair, illegal and unlawful.
    b. A declaration that the Claimant's employment was terminated wrongfully.
    c. The Claimant to be paid in full terminal benefits as set out under paragraph *12* hereinabove.
    d. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
    e. The Respondent to pay the costs of this claim.
    f. Interest on (c) and (e) above at court rates.
2. The Respondent resisted the claim through its memorandum of reply dated 4th March 2016.
3. This matter was heard intepartes on 14th February 2023, and 24th April, 2023, when the Claimant and the Respondent's witness testified, respectively.

The Claimant's Case

4. At the hearing the Claimant adopted his witness statements as his evidence in chief and tendered the documents that were filed under his list of documents dated 11th November 2022 as his documentary evidence.

5. It was the Claimant's case that he first came into the employment of the Respondent as an office supervisor, under a letter of appointment, in June 1992. Further, he rose through the ranks to the position of senior supervisor with a salary of KShs.49,800.00, excluding house allowance as at February 2015.

6. The Claimant stated that he worked for the Respondent with due diligence and faithfulness until on or about 5th February 2015 when the Respondent wrongly accused him of sabotaging shipment of fresh fruits namely 150 cartons of apples and 150 cartons of mangoes.

7. He stated that his team and him, were aware and had been warned that all shipment after 1430 hours would be considered offload. On the material day, the 150 cartons arrived at the airport at 1445 hours. He pleaded with the airline officials to accept the delivery despite the fact that it was out of time, which they did.

8. On the 5th February 2015 the Respondent issued him with a show cause letter. He in detail responded to the same, explaining with truth the happenings of the material day. Surprisingly, in the afternoon of the 5th February 2015, he was sent on compulsory leave.

9. Aggrieved by this act of the Respondent, which he considered ill treatment, he report the matter to his Union. The Union wrote to the Respondent raising concerns over the treatment.

10. While still on compulsory leave, the Respondent without any prior notice or payment in lieu of notice, terminated his employment, through an email circular dated 17th February, 2015 to the airport's authority informing them that he was no longer an employee of the Respondent.

11. The Claimant asserts that he was not issued with any termination letter addressed to him directly. After the email that was sent to the airport authority, the Respondent denied him access to its premises.

12. His Union's efforts to have the matter amicably resolved, did not bear a fruit.

13. According to him, the termination of his employment was unfair and unlawful. The Respondent unjustifiably refused and neglected to pay his terminal dues.

14. The Respondent failed to issue him with a certificate of service.

15. Cross-examined by counsel for the Respondent, the Claimant testified that the goods were delivered at the airport at 3.00 p.m. They were so delivered by a representative of a company called E.A. Growers, and not his colleague Alloys Okoth.

16. However, shown the statement by Alloys Okoth, the Claimant testified that in the statement, it has been indicated that Mr. Okoth delivered the goods to the airport and that the cut off time for such deliveries was 14.30 p.m.

17. The Claimant testified that contrary to what the statement indicates, according to him the cut off time was 13.30 hrs.

18. The letter putting him on compulsory leave, indicated that the leave was to run from 6th to 22nd February 2015. In the letter he was advised to report to the Human Resource office on 27th February

2015, for a disciplinary hearing. Further, it informed him of his right to be accompanied with a witness of his own choice at the hearing.

19. The Claimant testified that he attended the disciplinary hearing that took place on the 27th February 2015. After the disciplinary hearing he did not receive any summary dismissal letter.

20. The witness testified further that he received an email dated 17th February 2015, terminating his employment. The email was circulated across. The email expressly indicated that he was no longer an employee of the Respondent.

21. The Claimant further testified that his monthly salary was inclusive of house allowance. Further, he was a member of the National Social Security Fund, Scheme.

22. He alleged that he used to work on public holidays.

23. In his evidence under re-examination, the claimant asserted that after the disciplinary hearing he was not issued with any correspondence. Further, the hearing was not concluded.

The Respondent's Case

24. The Respondent presented one witness, Vitalis Osolo to testify on its behalf. The witness adopted his witness statement as his evidence in chief.

25. The witness stated that at all material times, from June 1992, the Claimant was an employee of the Respondent as an office supervisor and his duties amongst others was working closely with customers, colleagues and third parties to ensure smooth operations and adherence to disciplines.

26. The witness stated that on 4th February 2015, the Respondent received a report from one of its customers by the name Gladys, to the effect that their cargo was for rejection by the airline were it not for her intervention to get the same weighed.

27. Following the report, on the 5th February 2015, the Claimant was issued with a show cause letter. In the show cause letter he was accused of having given false information regarding loading of shipments and cut off time. The Claimant responded to the letter denying the accusations.

28. The witness stated further that on the 5th February 2015, it received an explanation from Abraham Ratemo on the events of 4th February 2015. In the explanation, Mr. Ratemo indicated that though the subject goods arrived at the airport in time, the Claimant refused to accept delivery.

29. Due to the sensitivity of the matter, the Respondent issued the Claimant with a letter suspending him from his service for 14 days.

30. The Respondent carried out an investigation into the matter. The investigation revealed that the 150 cartons of apple mangoes were accepted at TF=F at 14:41, and the same was delivered by Alloys Okoth.

31. The witness states that on the 20th February 2015, the Respondent wrote to the Claimant's Union inviting the Claimant to a disciplinary hearing on 27th February 2015.

32. The witness asserted that during the meeting of 27th February 2015, the Union representatives indicated that they were not willing to participate in the hearing.

33. On March 2015, the Respondent issued a summary dismissal letter to the Claimant. The Claimant refused to sign the same in acknowledgement of its receipt. In the summary dismissal letter, he was informed that his terminal dues were payable, however, he refused to collect the same.

34. Contrary to his assertion, during the tenure of his employment, the Claimant proceeded on leave. Further, the Claimant was aware of the Respondent's policy that all earned leave days were to be utilized, and could only be accumulated with the authority of the Respondent.

35. Cross-examined by Counsel for the Claimant, the witness testified that he joined the Respondent's employment in 2017, way after the dismissal of the Claimant.

36. According to the witness, per the Respondent's records, the Claimant was accused of giving false information regarding loading of shipment and cut off time. The accusation was put forth on the show cause letter.

37. He responded to the letter, and as the response was not satisfactory, he was invited for a disciplinary hearing on 27th May 2015.

38. Prior to the disciplinary hearing, he had been suspended. The suspension was investigatory. The suspension came in after his response to the show cause letter.

39. According to the witness, the hearing was not concluded as the Union representatives gave some conditions which led to a stalement. Thereafter there was no further hearing conducted.

40. Subsequently the Claimant's employment was terminated. The termination flowed from this unconcluded hearing. This is evinced by the termination letter. Further, the minutes of the hearing do not disclose any conclusion that the Claimant was found guilty of what misconduct.

41. The Claimant's terminal dues set out in the termination letter were not paid to him as payment thereof, was subject to him clearing with the Respondent.

42. As at the date of termination of his employment, the Claimant had only nine (9) unutilized leave days.

The Claimant's Submissions

43. The Claimant identifies two issues for resolution, thus whether the termination of the Claimant's employment on 17th February 2015 and or 2nd March 2015 was lawful, for valid reason and or procedurally fair, and whether the Claimant is entitled to the remedies as prayed for in the memorandum of claim.

44. The Claimant's Counsel submits that there is no dispute that on 5th February 2015 the Claimant was issued with a show cause letter and a letter putting him under compulsory leave, both accusing him of giving false information that Triple F refused to accept the Respondent's shipment, accusations which he denied.

45. Counsel submitted that section 43 of the *Employment Act* places a burden on the employer to demonstrate and prove the reason for termination. The reasons must be based on facts, matters, and circumstances that existed at the time of termination. Counsel argued that the reason given by the Respondent for commencing the disciplinary process was giving false information to an unidentified entity.

46. It was further submitted that the law enjoins an employer to in giving the reason for termination, clearly state the infraction committed and its elements. To buttress this submissions he placed reliance on the judicial decision in the case of *Abubakar Aslam Shikolo vs. Savannah Cement (EPZ) Ltd Cause No. 685 of 2013*.

47. The Respondent failed to provide a clear statement of the exact offence(s) for which the disciplinary action against the Claimant was taken and therefore it failed to prove the reason for termination.

48. On the 17th February 2015, while the Claimant was still on the compulsory leave, the Respondent issued a circular to Kenya Airport Authority to the effect that the Claimant was no longer its employee. Clearly, the Respondent had terminated the Claimant's employment at this date without engaging due process. This amounted to constructive dismissal which was unfair, unlawful, and contrary to the tenets of natural justice.

49. It was argued that at the disciplinary hearing the Claimant was never accorded a fair hearing as contemplated under section 41 and 45 of the *Employment Act*, Articles 35, 41, 47, 50 and 236 of *the constitution* allegations against him were not brought forth, he was not called upon to explain anything, and the hearing ended prematurely without being found guilty of any misconduct to warrant dismissal from employment.

50. It was further submitted that the union representatives demanded for certain documents to use at the hearing pursuant to the provisions of Article 35 of *the Constitution*. The Respondent terminated the hearing on account of the demand without any finding. Indeed, the Respondent's witness admitted that the hearing of 27th February 2015, did not proceed to conclusion.

51. Counsel submitted further that section 45 (2) of the *Employment Act*, enjoins an employer to prove the validity and fairness of the reason for termination. The Claimant's employment was terminated on the ground of giving false information to unidentified persons. The reason for dismissal was based on unsubstantiated rumors, innuendos, untruths and hearsay. It cannot be stated therefore that the reason was fair and valid.

52. To buttress the submission on the employer's duty under section 45(2), Counsel cited the case of Pius Machafu Isindu vs. Lavington Security Guards Ltd (2017) eKLR.

53. It was further submitted that the Claimant's claim for notice pay was neither challenged by the Respondent in its pleadings nor through its witness's evidence. Further, there is no doubt that the Claimant's employment was terminated without the notice contemplated under section 35(1) of the *Employment Act*. In the premises, the relief should be availed to the Claimant.

54. Further, the claim for unpaid salary for February 2015 was not in any manner contested by the Respondent. In any event the Respondent admitted owing the salary in its letter of 2nd March 2015.

55. The Claimant's Counsel further submitted that the Clamant was not a member of the National Social Security Fund. He was a member of a trade Union which had a CBA with the Respondent. The CBA provided for gratuity payment. The Claimant should be awarded kshs.1,149,400.00 under this head. The CBA provided the computational formula for the service pay as 1 month salary for each completed year upon termination.

56. The Claimant worked for 23 years for the Respondent. He had a legitimate expectation to work and earn salary until retirement age of 60 years. The expectation was cut short by the wrongful termination. The Claimant should be granted a compensatory relief to the maximum extent (twelve month's gross salary) contemplated under section 49 (1) (c) of the *Employment Act*.

57. It was further argued that the Claimant's claim for compensation for public holidays worked but not paid for was not challenged either in the Respondent's pleadings or through its witness's evidence. He should be awarded KShs.763,000/=, therefore. To support this point, Counsel placed reliance on the case of Evans Katiezo Aligulah vs. Eldomatt Wholesale and Supermarket Ltd, Case No. 6 of 2021, Kisumu ELRC.

58. On the relief sought for unpaid house allowance, Counsel submitted that it was duty upon the Respondent to place material before this court to demonstrate either that the Claimant was being paid house allowance or accommodated during his tenure with the Respondent. This the Respondent did not do. Therefore, the claim remains uncontested. That the Respondent was under duty to demonstrate payment of the allowance, reliance was placed on Kisumu ELRC Cause No. 60 of 2022 – Clifford Sosi Nyabuto vs. Board of Governors Sighsaba Hursery Primary. Consequently, he should be granted the KShs. 72,000/= sought.

The Respondent's Submissions

59. The Respondent's Counsel submitted on two questions, whether the Claimant's termination was fair and lawful, and whether the Claimant is entitled to the prayers sought.

60. According to Counsel, the Claimant's services were terminated on 2nd March, 2023 on grounds of insubordination and acting contrary to company policies when he gave inaccurate information with the intent to sabotage operations.

61. Counsel further submitted that leading up to his summary dismissal, the Claimant was asked to explain his actions of 4th February 2015. He had been accused of giving, false information regarding the loading of shipments and the cut off time, and instructions not to off load produce for shipping. He responded to the show cause letter and denied the allegations. To support his denial, he attached an email from Kenya Airways purporting that it had a cut off time of 1430 hours for refusal of shipment brought in late.

62. In the real sense, the email did not have any deadline. The Claimant therefore created his own deadlines to the detriment of his employer and acted on it to refuse to facilitate the delivery and receipt of goods to the airport.

63. It was submitted that the Respondent engaged the mandatory process contemplated under section 41 of the *Employment Act*. Thus the termination was procedurally fair. It issued the Claimant with a show cause letter which contained the allegations against him and required him to respond. He did respond, on the 5th February 2015 he was suspended to allow investigations, and through a letter dated 23rd February 2015 invited for a disciplinary hearing. The suspension letter explained to him, his prerogative to have a representative at the hearing and he engaged the Union which involved itself in the matter as his representative.

64. Therefore, there can be no doubt that the process undertaken by the Respondent embodied all the ingredients contemplated in the above stated provision, and as elaborated in the case of Antony Mkala Chivati vs. Malindi Water & Sewage Company Ltd (2013) eKLR.

65. Counsel submitted that the parties had an engagement which was jeopardized by the Claimant's lack of preparedness together with his Union representatives. He declined to engage any further in the disciplinary proceedings. The Claimant cannot be heard to complain that he was not heard. To buttress this point, reliance was placed on the case of Jackson Butiya vs. Eastern Produce NBI ELRC Cause No. 2181 of 2015, and – JANET KATALI KALANI VS. EAST AFRICA GROWERS LTD, where the court held;

> " An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to court and say, "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the court to supervise the internal

grievance handling processes between employers and employees. The role of the court is to ensure that such processes are undertaken within the law."

66. Counsel submitted further that to prove substantive justification, an employer is required to prove that the reason leading to an employee's termination was fair and valid. The employer must substantiate the allegations against an employee through evidence, so as to justify fairness of validity of the reasons that resulted in the termination.

67. It was asserted that the material placed before this court overwhelmingly and sufficiently demonstrate that the Claimant gave misleading information, which if acted upon could have costed the Respondent losses and loss of clients. The Claimant's acts amounted to gross misconduct, and the sanction of summary dismissal against him was justified.

68. The Claimant was supposed to act in good faith to advance the interests of his employer not the opposite where an employee acts without good faith so as to sabotage an employer's operations, thus the employer is justified to take disciplinary action against the said employee. To buttress this submissions, Counsel placed reliance on the case of Kenya Union of Domestic Hotels Education Institution, Hospital vs. Pwani University College (2013) eKLR.

69. The termination was substantively justified.

70. Submitting on the reliefs sought, Counsel argued that as the Claimant was justifiably summarily dismissed, he was not entitled to notice pay by dint of the provisions of section 44 of the *Employment Act*, which allows dismissal without notice.

71. As regards the claim for unpaid salary for the month of February 2015, Counsel submitted that the Claimant's KRA P9 form for the year 2015 tendered in evidence by the Respondent shows that the Claimant was still an employee of the Respondent at the time of suspension and was paid his salary for that month.

72. On gratuity sought, it was submitted that the Claimant's crave for the same offends the provisions of section 35 of the *Employment Act* which exempts payment of service pay to persons who are members of the National Social Security Fund (NSSF). The Respondent remitted the Claimant's NSSF dues throughout the tenure of his employment. Additionally, he did not move the court for the claim of gratuity.

73. Having failed to prove his case of unfair, termination, the compensatory relief contemplated under section 49 of the *Employment Act* cannot be availed to the Claimant.

74. The Claimant has not specifically pleaded those holidays he claims to have worked. He cannot be awarded the relief upon basis of the generalized claim.

75. Lastly, the Claimant's claim for compensation for earned but unutilized leave days is unfounded. The application forms produced in evidence by the Respondent sufficiently discounts his position. The forms are a testament that at various times, he proceeded for his paid leave.

Analysis and Determination

76. I have carefully considered the parties' pleadings, evidence and submissions, and the following issues emerge for determination, thus;

    a. Whether the termination of the Claimant's employment was fair.

    b. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's employment was fair

77. There is no doubt that the Claimant's employment was terminated by the Respondent. Further, undoubtedly the termination was by way of summary dismissal. Section 44 of the *Employment Act*, addresses summary dismissal. The Section provides;

> "(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
>
> (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
>
> (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
>
> (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
>
> (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
>
> (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
>
> (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
>
> (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."

78. Called upon to interrogate fairness or otherwise in termination of an employee's employment or summary dismissal from employment of an employee, the court gets enjoined to consider two statutory aspects, procedural fairness and substantive justification. Elaborating on these considerable aspects, the Court of Appeal in the Case of Pius Machafu Isindu vs. Lavington Security Guards Limited (2017) eKLR, the Court stated;

> " There can be no doubt that the Act, which was enacted in 2007, places heavy obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (Section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous, and generous to the employee."

79. It is trite law that section 41 of the *Employment Act* provides a mandatory procedure that an employer contemplating terminating an employee's employment must adhere to. This court has held before that the provision speaks to procedural fairness and that procedural fairness embodies three components. The notification component, the employer must notify the affected employee of its intention and the grounds forming the basis thereof. Second, the hearing component, he/she must accord the employee an adequate opportunity to prepare and make a representation on the grounds. Conjoined with the hearing component is the employer's obligation to allow the employee to exercise his or her right of accompaniment, to be accompanied by a colleague of his or her on choice, or a Union representative, if he/she is a member of a union. Lastly, the employer must consider the representation by the employee before taking a decision to terminate the employee's employment.

80. Using the lens, I now turn to consider whether there was absence of procedural fairness in the dismissal of the Claimant's employment as he asserted.

81. It was common cause that on the 5th February 2015, the Respondent issued the Claimant with a show cause letter requiring him to explain incidences of 4th February 2015. Undeniably, the letter did put forth elaborately, accusations against him. The Claimant in compliance with the instructions given in the letter, responded to the show cause letter.

82. This court notes that through its letter dated 5th February 2015, the Respondent placed the Claimant under compulsory leave. Through the same letter, the Claimant was invited for a hearing that was slated for Monday 23rd February, 2015. He was informed to attend with a witness.

83. This court has not lost sight of the fact that on the 17th February 2015, the Respondent wrote an email to several people, the email read;

> " Dear SN team

Kindly note that Mr. Simon Odima of ID Number 9016679, is no longer an employee of Maya Freight Ltd and is therefore not authorized to transact on behalf of Maya Ltd in any capacity."

In my view, the Respondent as at this date had made a decision to terminate and had indeed terminated the Claimant's employment. The email dated same day by Fred Gitonga, reinforces this view. It clearly suggests that the email declaring the Claimant no longer an employee of the Respondent was written under the directive of the Managing Director.

84. At this point I will conclude that the decision to terminate the Claimant's employment was made before the disciplinary hearing that had been set for 23rd May 2015. Therefore, a decision that was not preceded by an opportunity to defend himself. By reason of this premises, I come to a clear view that the process that was undertaken was cosmetic, geared only to sanitize, an unprocedurally taken decision.

85. This action by the Respondent cannot meet any other description other than one that was actuated by bad faith and that in fact, it amounted to an unfair labour practice.

86. The Respondent's bad faith was not only manifested through the above stated action but also the compulsory leave letter. The letter had been preceded by a show cause letter. I have not lost sight. The compulsory leave letter stated in part:

> " .....As a result of the above the management is advised to send you on compulsory annual leave with effect from, 06th February, 2005 for a period of fourteen (14) days upto and including 22nd February 2015, where it shall conduct an in depth investigation on the matters stipulated on your show cause letter thereof...."
>
> You are thus advised to report to the Human Resource Office on Monday 23rd February, 2015, at 1100 hours without fail for a fair hearing, you are also advised to bring along a witness of your choice."

87. The way I know it, and as common sense will dictate, investigations precede any invitation for a disciplinary hearing. Not unless an employer has a predetermined mind that the employee affected committed the infraction(s) alleged against him, and if that were the situation, then, the whole essence of an investigation will be obliviated.

88. The act of the Respondent placing the Claimant under an investigatory leave, and simultaneously invite him for a disciplinary hearing paints it as an employer who was in a rush to release the Claimant.

89. The Respondent's witness testified that the summary dismissal flowed from a disciplinary hearing conducted on 27th February 2015. I have carefully considered the minutes of the day, tendered as evidence by the Respondent, and the following vital issues emerge;

    a. That the Union representatives urged that the circular of 17th February 2015 that had been circulated to international and local airlines indicating that the Claimant was no longer an employee be recalled, or the Respondent's position as indicated therein stand, and the Claimant be paid his terminal benefits in line with the parties Collective Bargaining Agreement.

    b. Apparently, the Respondent didn't agree with the position, arguing that the circular had not been tabled before the meeting and in any event the Claimant was on compulsory leave pending investigation and subsequent disciplinary action after "fair hearing scheduled for 27th February 2015."

c. The Union promised to produce the circular after two days.

d. The meeting ended at around 01:30 p.m.

90. In the context of the process contemplated under section 41 of the *Employment Act*, it will not be difficult to conclude that on this day there was no hearing.

91. In view of the circular whose authorship and authenticity the Respondent's witness did not dispute, I hesitate not to conclude that the point that the Union raised was not an idle point. Any reasonable employer could like to have it settled first, to pave way for any further proceedings.

92. The Counsel for the Respondent argued that the Claimant was given an opportunity to be heard but deliberately refused to seize the opportunity and that therefore he cannot be heard to claim that he was not heard. I am not persuaded with this argument for two reasons. First, the meeting was adjourned to enable the Union produce the circular within two days of the date of the hearing. Second, there is no suggestion from the minutes that a direction was given by the Respondent that the hearing could proceed notwithstanding the position taken by the Union, and the Claimant refused to participate. The meeting in my view did not end acrimoniously as the Respondent's attempted to suggest.

93. In the circumstances, the decision in Jackson Batiya vs. Eastern Produce (supra) cited by Counsel for the Respondent is clearly distinguishable from the instant matter.

94. As a result of the foregoing premises, I hold that the dismissal was destitute of procedural fairness.

95. Substantive justification is normally interwoven with procedural fairness. Time and again this court has held that the reasons for termination of an employee's employment must be clearly seen to flow from disciplinary proceedings, where the employer contends that there were. The disciplinary proceeding's minutes must expressly show a determination following the hearing embodying the reason(s) for the action to be taken against the employee, absent of this, there cannot be any basis for one to hold that there was a reason(s) for the action and that the reason(s) was fair and valid.

96. As this was the situation in the instant matter, I hold that the Respondent has failed to prove the reason(s) for the summary dismissal, and or that there was a fair and valid reason, as required under sections 43 and 45 of the Act, respectively.

97. An employment relationship is one whose bloodline is good faith, trust and confidence. The actions by the parties to the relationship must at all material times reflect this. To dismiss an employee from employment purportedly as a result of disciplinary hearing, which clearly was not concluded but adjourned for a reason, cannot be said to be in accord with the employer's duty to act in good faith. Further, it amounts to a breach of the duty of trust and confidence.

98. In the upshot, I find that the dismissal of the Claimant from employment was without substantive justification.

Whether the Claimant is entitled to the reliefs sought

99. The Claimant sought for one month's salary in lieu of notice KShs.49,800. The Claimant's employment was one terminable with a minimum of twenty eight days notice per section 35 of the *Employment Act*. No doubt the notice was not issued. Having found, as I have hereinabove that the summary dismissal was wrongful and unfair, I direct that he is entitled to notice pay KShs.49,800/=.

100. The Claimant further sought for unpaid salary for part of the month of February 2015. The Respondent contended that it paid him the salary for the period. The Respondent tendered in evidence a form prepared for purposes of the tax authority to support this assertion. In my view the form cannot

be held to be sufficient proof for the payment. Secondly one could expect, a document where the Claimant signed in acknowledgment of the payment, or one to show that the salary was transferred into his account, if he was receiving his salary through a bank account. As a result, I am not convinced that the payment was made. I grant the Claimant salary for February 2015, KShs.28,220.

101. The Claimant alleged that under the CBA between his Union and the Respondent, he was entitled to service gratuity at the rate of 1 month pay for each year worked, KShs.1,145,400. The court notes that as much as the agreement was not placed before this court, it was common cause that the claimant was a member of the Union. I have carefully considered the Respondent's memorandum. In reply, though it expressly denied the Claimant's entitlement to the other reliefs sought, there was no express or implied denial of the Claimant's claim for service gratuity upon basis of a stipulation in the agreement. Further, the Respondent did not deny his entitlement through the evidence of its witness. As such, I hold that the claim was admitted and grant him the KShs.1,145.400/= sought in the amended statement of claim.

102. I note the Respondent's Counsel's submission that by didn't of the provisions of section 35 of the *Employment Act*, this is a relief that should not be granted to the Claimant. This submission is one, with great respect that is premised on ignorance on the fact that there is a whole difference between the benefit of service pay under section 35 of the Act and gratuity. The service pay is a creature of statute, while gratuity is of a contractual term.

103. Section 49 (1) (c) of the *Employment Act* bestows upon this court the power to grant a compensatory relief for unfair termination to a maximum of the affected employee's twelve month's gross salary. However, it is important to state that exercise of the power is probationary. The grant of the relief depends on the circumstances of each case.

104. I have carefully considered the Respondent's actions leading to the Claimant's dismissal which in my view easily pass for unfair labour practices, the casual disregard of the statutory cannons of substantive and procedural fairness by the Respondent, the length of time that the Claimant was in its service and the fact that the Claimant did not in any proved manner contribute to the termination, and conclude that the Claimant is entitled to the remedy and to the extent of 10 month's gross salary, KShs.498,000/=.

105. The Claimant sought for compensation for unutilized 81 leave days. He does not specifically state earned within which period. This was very necessary for him to do, owing to the fact that the Respondent vehemently opposed the claim and tendered documents (leave application forms) before this court showing that at various times he applied for and proceeded on leave. He therefore failed to prove entitlement to this relief. It is hereby declined.

106. I have carefully considered the letter of appointment of the claimant. Under clause 5, it provided for both salary per a month and a house allowance as separate items. The Claimant in my view does not allege that in the salaries that he earned the contractual amount for house allowance was not paid, if not paid he needed to specify for which period. I will without much ado conclude that this is a claim that was just thrown to court, and that stood on sinking ground. It is hereby rejected.

107. In the upshot, judgment is hereby entered for the Claimant in the following terms:

    a. Pay in lieu of notice ----------KShs.49,800.00

    b. Gratuity ----------KShs. 1,145,400.00

    c. Compensation for unfair termination ---KShs. 498,000.00

    d. Salary for the month of February 2015 --KShs.28,220.00

e. Interest at court rates on the awarded sums, from the date of this judgment, till full payment.

f. Costs of this suit.

READ, SIGNED AND DELIVERED THIS 24TH DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Opiyo for the Respondent

No appearance for Claimant

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 **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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE