Nyongesa v Longhorn Publishers PLC (Cause E373 of 2023)
[2024] KEELRC 2391 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2391 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E373 OF 2023

JK GAKERI, J

SEPTEMBER 30, 2024

BETWEEN

MARTIN NYONGESA ..... CLAIMANT

AND

LONGHORN PUBLISHERS PLC ..... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 16th May, 2023 claiming unfair and unlawful termination of employment, unpaid commission, field allowance, mileage and unpaid relocation allowance.

2. It is the Claimant's case that he was employed by the Respondent as a clerk in September 2008, rose to the position of Assistant Sales Representative in December 2009 and became an Assistant Manager, Nairobi Region in July 2013 at Kshs.61,932/= per month and sale commission dependent on achievement.

3. That in 2018, his commission of Kshs.115,000.00 was not paid as was the sum of Kshs.180,000.00 for special products in Kilifi.

4. The Claimant avers that in 2016, he was transferred to the Western Region and in July 2017 to the Coast and Eastern Region and in all cases was accorded 14 off-days to make the necessary arrangements subject to operational requirements.

5. It is the Claimant's case that he requested for a transfer to the Western Region effective 1st September, 2022 and the same was accepted and was thus entitled to 14 days off-duty in accordance with the Respondent's policy and one month's salary transfer allowance. That the relocation allowance was not paid.

6. That he was placed on a Performance Improvement Program (herein after P.I.P) effective 1st September, 2022 and after 14 days, he received a request for a Sales Performance Report for the Western Region, which he deemed unreasonable as he had not commenced work and was settling down and thus did not submit the performance report as required by the email dated 15th September, 2022 but reported to the office on 19th September, 2022 and gave reasons for the failure to submit the performance report and was issued with a notice to show cause for insubordination and a response was due by 2.00 pm on 21st September, 2022.

7. It is the Claimant's case that on 20th September, 2022 while enroute to Western, his Line Manager requested him to present his response to the notice to show cause in person, that the Claimant struggled and drove back to Nairobi and reported to the office on 21st September, 2022 at 12.00 noon but was called into an impromptu meeting attended by 4 other persons, namely; Irene Mwihaki, Alfred Muia, Kezia Waiganjo and Godwin Kilonzo and whose object he was unaware of and was accused of incorrect reporting on the Performance Review Form, an allegation that had not previously been brought to the Claimant's attention and was not accorded an opportunity to respond substantively.

8. That after the meeting, he was suspended for 7 days for purposes of investigation but was not recalled until he received a termination letter dated 29th September, 2022 and a verdict dated 27th September, 2022 from which he learnt that the meeting held on 21st September, 2022 was a disciplinary meeting.

9. That he appealed to the Managing Director of the Respondent but the dismissal was upheld.

10. The Claimant faults the dismissal for want of an invitation for the disciplinary hearing and time to respond to the new allegation.

11. The Claimant prays for;

    a. A declaration that termination of employment was unfair, wrongful and unlawful.

    b. A declaration that the Respondent violated the Claimant's right under Article 47 and 50 of *the Constitution* of Kenya,

        i. Damages for unlawful termination Kshs.743,184.00

        ii. One (1) month's salary in lieu of notice Kshs.61,932.00

        iii. Unpaid Commission Kshs.120,000.00

        iv. Unpaid Commission for special products Kshs.180,000.00

        v. Unpaid Field allowance for 25 months Kshs.750,000.00

        vi. Balance of mileage allowance Kshs.961,086.00

        vii. Unpaid Relocation allowance from Nairobi to Western Region Kshs.61,932.00

        viii. Unpaid relocation allowance from Coast Region to Western Region Kshs.61,932.00

        ix. Unpaid house allowance.

        x. Severance pay and accrued gratuity.

        xi. General damages.

    d. Costs of the suit.

    e. Interest on (c) and (d) above.

Respondent's case

12. Vide its response to the claim filed on 16th June, 2023, the Respondent avers that it employed the Claimant as an Assistant Sales Representative on 7th January, 2011 at Kshs.10,000/= per month but earned the sum of Kshs.61,932.00 per month when he became the Research and Business Development Representative vide contract dated 7th October, 2013.

13. The Respondent denies owing the Claimant any compensation or terminal dues and the summary dismissal was justified and neither compensation, severance pay nor salary in lieu of notice was applicable to this case.

14. The Respondent admits having placed the Claimant on a P.I.P but denies that it did so before he settled down in the Western Region.

15. The Respondent avers that it notified the Claimant of the disciplinary hearing and that's why he presented himself to the Respondent's office on 21st September, 2022.

16. It is the Respondent's case that the notice to show cause was issued on 19th September, 2022, he responded and was suspended for 7 days for investigation and a dismissal letter followed.

17. It alleges that it followed a fair procedure before terminating the Claimant's employment as the Claimant responded to the notice to show cause and attended a disciplinary hearing on 21st September, 2022 and a decision was arrived at on 27th September, 2022 and he appealed the decision.

18. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

19. On cross-examination, the Claimant confirmed that he was an employee of the Respondent from September 2008 to September 2022.

20. The Claimant admitted that on 15th September, 2022, he was supposed to submit a Sales Performance Review Report and did so by word of mouth on 19th September, 2022 during a meeting with the Line Manager but had no evidence of the report. That he spoke to his Line Manager about the report.

21. That the letter dated 20th September, 2022 made no reference to an earlier meeting.

22. The witness confirmed that he requested for a transfer from the Coast Region to the Western Region as evidenced by email from Irene Miwhaki dated 29th August, 2022.

23. That it was a personal request.

24. That the transfer was not personal and instructions were in writing but not filed in Court.

25. The Claimant acknowledged having received a notice to show cause dated 19th September, 2022 and responded vide letter dated 20th September, 2022 but was not invited for a disciplinary hearing and had only been requested to present his response to the notice to show cause in person.

26. The Claimant confirmed that he provided a written response and explained it to those at the meeting.

27. The witness reiterated that his duties included handing in a performance review reports from the regional office and was aware of the requirement as per the Respondent's policy.

28. The witness confirmed that he had no evidence to show that he had applied for the unpaid commission and allowances.

29. On re-examination, the Claimant testified that he was familiar with the policy on transfer, i.e 14 days off-days.

30. That the email dated 15th September, 2022 required a response on the failure to send the report or communicate.

31. The witness reiterated that he was not served with a hearing notice of the meeting held on 21st September, 2022.

Respondent's witness

32. RWI, Keziah Njoki confirmed that she was the Respondent's Human Resource Manager since July 2020 and knew the Claimant as the Respondent's employee and was aware of his disability.

33. That the Respondent had a policy on transfer of staff and recommended that movement be undertaken during the weekends.

34. That the policy provided for a 14 days off-duty.

35. The witness confirmed that a transfer can be instituted by the employer or employee and in this case the Claimant did it as confirmed by the email on record from Irene Mwihaki and it would be reasonable to accord an employee time to move and change was effective 1st September, 2022 and the Line Manager requested for reports for the month of September as no disruption had been envisioned.

36. That the only charge was insubordination and the letter was silent on the effect of not reporting.

37. That a response was needed by 2.00 pm on 21st September, 2022 and 3 days were reasonable and the notice to show cause made no reference to a disciplinary hearing.

38. The witness confirmed that although paragraph 10 of the witness statement makes reference to an invitation of the Claimant to the disciplinary hearing, she could not trace the letter in her documents but recalled that the Claimant attended a meeting and she was a participant.

39. It was RWI's testimony that the Respondent did not have an Employee Relations Officer, Head of the Human Resource Section.

40. That the Claimant stated that he could proceed without a witness but the witness had no copy of the minutes to confirm.

41. That both charges were discussed at the meeting as the second one arose during the meeting and had not been given to the Claimant.

42. Further, RWI confirmed that the Claimant was given an opportunity to respond to the findings of the investigation.

43. That the Claimant was entitled to commission if he met his targets and was entitled to mileage allowance at 44.10 per kilometer not exceeding 3,479 and was paid consistently but had no evidence of payment.

44. The witness confirmed that documents availed by the Respondent showed that the Claimant was on the 2023 list of persons to receive commission yet he left in 2022.

45. On re-examination, the witness testified that the Claimant's name was inserted on the list erroneously.

46. That the Claimant was notified of the reasons for dismissal, attended a disciplinary hearing and was notified of the outcome and did not raise the issue of commissions allegedly unpaid.

47. That during COVID-19 Pandemic, mileage was payable at 0.5% and the Claimant was paid Kshs.625,049.00.

48. That relocation allowance to Western was not paid.

Claimant's submissions

49. On dismissal, the Claimant's advocate relied on the provisions of the *Employment Act* and the sentiments of the Court in Hosea Akunga Ombwori V Bidco Oil Refineries Ltd (2017) eKLR, Rotich V Metkei Multi-Purpose Company Ltd (2021) KECA, Kenya Union of Commercial Food & Allied Workers Union V Meru North Farmers Sacco Ltd (2013) eKLR, Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR, Alvin Obuya Odima V One Acre Fund (2021) eKLR, Alba Petroleum Ltd V Jackson Kivilu (2018) eKLR, Benjamin Mwendwa Nduati & 4 others V East African Portland Cement Company Ltd (2016) eKLR, Osire V Mega Park (K) Ltd (2023) KEELRC 1504, Lilian Muchungi V Green Belt Movement (2022) eKLR and Kiilu V Isinya Resorts Ltd (2022) KEELRC 13240 (KLR) to urge that the summary dismissal of the Claimant was unfair for want of compliance with the provisions of Section 41 of the *Employment Act*, in particular invitation for the disciplinary hearing, entitlement of the Claimant to an employee of his choice or shop floor representative, clarity of the notice to show cause, minutes of the disciplinary hearing, fair hearing, inadequate time to respond to the notice to show cause and introduction of a new ground of termination without notice.

50. Counsel further urged that the disciplinary committee was irregularly constituted as the affected Head of Department is not supposed to be part of the decision making, as one Irene Mwihaki was the Chairperson of the meeting and was the H.O.D of the affected department.

51. On substantive justification of the dismissal, counsel submits that the Claimant was not accorded 14 days off as per the Respondent's manual and had not commenced sales in the Western Region by 15th September, 2022.

52. Counsel urges that the Respondent acted unreasonably and cites the decisions in Gichuru V Package Insurance Brokers Ltd (2021) KESC 12 KLR, Yeager V R.J Hastings Ltd (185) WWR 2018 and Kenya Engineering Workers Union V Eldoret Steel Mills Ltd (2003) eKLR to urge that for conduct to constitute a misconduct under the provisions of the *Employment Act*, the elements of wilfulness or intentional or deliberate is essential.

53. Counsel further urges that the Claimant's failure to submit the Sales Performance Report was neither wilful nor deliberate and in any case he informed the immediate supervisor.

54. As regards the reliefs sought, counsel submits that the Claimant is entitled to all of them as pleaded.

55. Finally, counsel submits that from 1st April, 2019 to 24th March, 2020, the Claimant was entitled to Kshs.1,601,086/= but was only paid Kshs.640,000/= and was thus owed Kshs.961,086.00.

Respondent's submissions

56. On dismissal, counsel relies on the provisions of Section 44 of the *Employment Act* and sentiments of the Court in Palluci Home Depot (PTY) Ltd V Herskowitz & others (2014) ZALAC 81 cited in Christopher Komen Chebet V Brinks Security Services Ltd (2019) eKLR as well as Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd to submit that the Respondent had both a substantive justification to terminate the Claimant's employment and did so fairly as evidenced by the disciplinary proceedings, the Claimant participated, and an investigation was conducted after which the Claimant's employment was terminated.

57. On the reliefs sought, counsel submits that as the reliefs are prayed for as specific damages, the same must be pleaded and proved as held in Regent Management Ltd V Wilberforce Ojiambo Oundo (2018) eKLR.

58. That no compensation was due as the termination was fair and if found to be procedurally unfair, the Court be guided by the provisions of Section 49(4) of the *Employment Act*.

59. That one month's salary was paid and the commission and field allowance and mileage were not proved evidentiary.

60. That the transfer to the Western Region was personal and no relocation allowance was payable.

61. According to the Respondent's counsel, gross salary includes house allowance and severance pay was unavailable as this is not a case of redundancy.

Analysis and determination

62. Based on the documentary evidence on record, it is discernible that the Claimant joined the Respondent as an Assistant Sales Representative effective 1st January, 2010 and the contract was continuously extended until 10th January, 2011 when he was appointed a Sales Representative at Kshs.10,000/= per month and the contract was extended consistently until 1st July, 2013 when he was appointed as a Research and Business Development Representative at Kshs.12,835/= per month and confirmed on 1st October, 2013 and by March 2018, the Claimant's salary had risen to Kshs.61,932.00 per month.

63. It is also not in contest that the Claimant was entitled to target based commission, Kshs.30,000/= float per month, Kshs.1,000/= or Kshs.2,000/= per day if working in a residential area or outside respectively, and mileage at Kshs.44.10 per kilometer but not exceeding 3,479 kilometers.

64. Documents availed by the Claimant reveal that he was paid a bonus in December 2014, salary was reviewed upwards to Kshs.76,191.00 effective 1st January, 2016, bonus in January, 2019 but the salary was reduced by 7.5% with his consent vide letter dated 21st April, 2020 effective 1st May, 2020 and 31st July, 2020.

65. The Claimant signed the letter on 29th April, 2020.

66. The Claimant's uncontroverted evidence is that he was transferred to the Western Region sometime in 2016 and in July 2017 to the Coast and Western Region until August 2019 when the Claimant requested for a transfer to the Western Region.

67. However, from the email of Irene Mwihaki to the Claimant and one Abednego dated 29th August, 2022, it is discernible that this was an exchange or swap initiated by the Claimant and his colleague for personal reasons, a fact the Claimant did not contest.

68. A plain reading of the email leaves no doubt that the Head of Department merely confirmed the swap and not a transfer of neither the Claimant nor Abednego.

69. This is decipherable from the terms of the swap or exchange as dictated by the Head of Department which is atypical of transfers which is generally an employer's prerogative.

70. It is instructive to note that the exchange of regions between the Claimant and Abednego culminated in the termination of the Claimant's employment.

71. The bone of contention is whether termination of the Claimant's employment was unfair and the ensuing consequences.

72. After careful consideration of the pleadings, evidence and submissions by counsel, the issues for determination are;

    i. Whether termination of the Claimant's employment was unfair or unlawful.

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

73. As to whether termination of the Claimant's employment was unfair, parties have adopted opposing positions with the Respondent submitting that it was fair. The Claimant, on the other hand maintains that it was substantively and procedurally unfair.

74. Under the provisions of Section 45 of the *Employment Act*, a termination of employment is unfair unless it is proved that;

    i. the employer had a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the employer and

    ii. the termination was conducted in accordance with a fair procedure.

75. Put in alternative terms, there must be a substantive justification for the termination and procedural fairness as held by the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR.

Reason for termination

76. The notice to show cause dated 19th September, 2022 accuses the Claimant of failure to respond to the Head of Marketing and Communications email requesting for the Sales Performance Review on 15th September, 2022.

77. The letter accuses the Claimant of ignoring the request and was thus insubordinate and a written explanation was required by 2.00 pm on 21st September, 2022.

78. Contrary to the Claimant's counsel's submission that the notice to show cause was not as clear as it ought, the notice is sufficiently clear and if the Claimant felt that he required any clarity on the matter, nothing prevented him from seeking the same from the Respondent.

79. The clarity of the notice to show cause is exemplified by the Claimant's response dated 20th September, 2022 which is unambiguous that the Claimant understood the charge and was cognizant of his obligation as per the request by the Head of Department and apologises for the delay.

80. The Claimant did not deny that he ignored the request but denies being insubordinate which is a contradiction in terms as he adduced no evidence of having called, texted or emailed the Head of Department on the issue.

81. In the court's view, a five days delay in responding to an email from the Head of Department without making any effort to respond and only doing so at the instigation of the HOD, creates the impression of being insubordinate.

82. The third paragraph of the Claimant's response to the notice to show cause ought to have been the immediate response to the H.O.D's request and preferably, on the same day as it is evident that the Claimant received the communication on the day it was sent and did not cite any impediments. The fact that he had not achieved much cannot be the justification why he ignored the communication.

83. The letter of summary dismissal dated 29th September, 2022 identified two (2) charges, the basis on which the Claimant's employment was terminated by the Respondent.

84. The grounds were insubordination and incorrect reporting.

85. The second charge, which the Respondent's witness admitted had not been previously made to the Claimant for a response ought not to have been included as a ground for the summary dismissal and is of no consequence for purposes of this judgment

86. It is trite that an employee ought not be dismissed or terminated from employment on a charge whose particulars have not been put to the employee for a response.

87. On whether the Claimant's failure to respond to the H.O.D's communication was intentional or deliberate, it is essential to examine the circumstances of the case.

88. Owing to the nature of the Respondent's business, and the Claimant's position, it is clear that communication was for the most part through email or phone calls.

89. From the record, it is clear that when the H.O.D confirmed the exchange of regions between the Claimant and one Abednego, she articulated the essentials of the confirmation in five bullet points in her email dated 29th August, 2022 at 9.02 am and two items stand out as they are very specific namely;

    i. The Claimant and Abednego were to manage the transition on their own without affecting business operations of either region and

    ii. The claimant and the colleague were in charge of their new regions targets effective 1st September, 2022 and performance would be measured on that basis.

90. The Claimant adduced no evidence of having responded to this email or raised any concerns.

91. Clearly, the Claimant was aware that his targets for the Western Region were effective 1st September, 2022.

92. As mentioned elsewhere in this judgment, the exchange of region between the Claimant and Mr. Abednego was a personal choice the two of them made, and in the Court's view could not be regarded as a normal transfer of an employee which is always evidenced by a letter of transfer.

93. The Claimant admitted that it was a personal request and the H.O.D's email is categorical on the same.

94. Is it unfair for an employer to treat an employee's request to change work station and an ordinary transfer differently?

95. Typically, transfer of employees is dictated by numerous factors, including; exigencies of business, unavailability of staff owing to indisposition, resignation or termination among others and it is the employer's prerogative as it takes into consideration the interests of the organization.

96. An employee's request to change the work station is personal in nature and the employer may accept or decline the same.

97. An acceptance by the employer constitutes an accommodation of the employee, a gesture an employee ought to reciprocate.

98. In the Court's view, it was not unfair for the Respondent to treat the swapping of regions between the Claimant and Mr. Abednego, a personal choice as opposed to a transfer and thus could not claim entitlement to 14 days off-duty under the Respondent's manual in cases of an ordinary transfer.

99. The absence of a letter of transfer leaves no doubt that the swap was not a normal transfer.

100. In sum, the Claimant ought to have acted in consonance with the H.O.D's email dated 29th August, 2022 which he did not respond to.

101. It therefore follows that the Claimant was aware of the H.O.D's expectations on the performance review and should have acted accordingly when he received the H.O.D's request for a sales performance review report.

102. A plain reading of the notice to show cause reveals that the insubordination the Claimant was accused of and which led to the summary dismissal was not the failure to submit the sales performance review but the fact that he ignored the communication until he received the notice to show cause 5 days later and having been aware of his reporting responsibilities, his conduct would appear to suggest wilfulness.

103. Section 43(2) of the *Employment Act* 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.

104. In Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) eKLR, the Court of Appeal stated 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 claimant's services. That is a partly subjective test".

105. See also Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR where B.O. Manani J. stated that;

> " . . . All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists".

106. The foregoing sentiments are consistent with the so called range or band of reasonable responses test popularised by the sentiments of Lord Denning in British Leyland (UK) Ltd V Swift (1981) I.R.L.R 91 as follows;

> " 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 would have dismissed him the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view".

107. The circumstances in which the Claimant ignored the H.O.D's request to avail the Sales Performance Review Report by close of business 15th September, 2022 leave no doubt that it was deliberate and intention as no response was worth coming until the Claimant was prompted by the notice to show cause.

108. For the foregoing reasons, it is the finding of the Court that the Respondent has demonstrated that it had a valid and fair reason to dismiss the Claimant from employment.

Procedure

109. As held in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, the procedural precepts prescribed by the provisions of Section 41 of the *Employment Act*, 2007 are mandatory for a termination of employment to pass muster.

110. The specific elements of procedural fairness have been enumerated in legions of decisions including by the Court of Appeal in Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR and include; explanation of grounds of termination in a language understood by the employee, presence of another employee chosen by the employee or shop floor representative, the reasons for which the employer is considering termination and hearing and considering any representation by the employee and the person chosen by the employee.

111. The Claimant's counsel faults the procedure employed by the Respondent on the premises that the relevant particulars of the insubordination were not disclosed, inadequate notice to defend himself and the disciplinary committee was irregularly constituted.

112. On contents of the notice to show cause and as adverted to elsewhere in this judgement, paragraph I of the letter is unambiguous on what the Claimant did not do with specific dates.

113. Most likely, the H.O.D could not have issued a notice to show cause if the Claimant responded to the communication either seeking an extension in light of the swap pins of the regions with Abednego or explain why he had "not achieved much to report" as his response to the notice to show cause reads.

114. This ground lacks merit.

115. As regards adequacy of the time availed to the Claimant to defend himself, counsel's submissions on the issue are patently sustainable in that;

116. First, the notice to show cause is dated 19th September, 2022 and a response was required by 2.00 pm on 20th September, 2022, about 24 hours.

117. Although the Claimant did not apply for an extension, the Respondent ought to have accorded him a few days to respond.

118. Second, the Claimant was not invited for a disciplinary hearing and RWI confirmed that she had no evidence of any invitation to the Claimant.

119. More significantly, the Claimant's evidence that he was called by the Supervisor while on his way to the Western Region and directed to hand over his response to the notice to show cause in person is uncontroverted.

120. The Claimant, however, admitted having attended a meeting on 21st September, 2022 and explained his response to the notice to show cause.

121. Even assuming that the meeting was a disciplinary hearing and those present constituted the Disciplinary Committee, it cannot pass muster as the Respondent failed to prove that it invited the Claimant for the hearing setting out its agenda and the Claimant's right to be accompanied by another employee of his choice coupled with the right to adduce evidence and cross-examine witnesses, if any.

122. Third, and as correctly submitted, the Respondent's Human Resource Manual provide for a 4 member panel comprising Chairman/Directors-GMD or appointed representative, Head of Human Resource and Administration as convener and Secretary, affected Department H.O.D and Employee Relations Officer.

123. The manual is explicit that the affected H.O.D ought not to be part of the decision making.

124. RWI confirmed that the Committee comprised Irene Mwihaki as the Chairperson, Keziah Njoki, Alfred Muia and Denis Okoti (Line Manager) and Irene Mwihaki was the complainant.

125. The Committee's verdict is dated 27th September, 2022 and all participants signed it including the Claimant's H.O.D.

126. RWI's retort that the H.O.D was not part of the decision making cannot avail the Respondent as she was the Chair of the Committee and signed its verdict dated 2 days after the meeting.

127. For the above stated reasons, it is the finding of the Court that the Committee was irregularly constituted by having the Claimant's H.O.D as the Chairperson and thus one of the decision makers.

128. Finally, the Respondent did not avail a copy of the minutes of the meeting to show what transpired at the alleged hearing and in particular, whether the charge(s) were read out to the Claimant, he was given time to state his case and cross-examine witnesses.

129. In sum, the absence of a letter inviting the Claimant for a disciplinary hearing and evidence that he was notified of the charge(s) he was to face at the hearing, his rights and was accorded adequate time to prepare for his defence, it is clear that the Respondent denied the Claimant the constitutionally ordained right to fair hearing.

130. As held in Postal Corporation of Kenya V Andrew K. Tanui (Supra), any hearing not conducted in consonance with the provisions of Section 41 of the *Employment Act*, 2007 is irregular.

131. It is trite law that an employee facing a disciplinary hearing must be given reasonable time as held in Benjamin Mwendwa Nduati & 4 others V East African Portland Cement Company Ltd (Supra) V Lilian Muchungi V Green Belt Movement (Supra) and Osire V Mega Park Ltd (Supra).

132. For the foregoing reasons, it is the finding of the Court that the procedure adopted by the Respondent in dismissing the Claimant from employment did not meet the threshold prescribed by Section 41 of the *Employment Act* and thus rendered the summary dismissal unfair within the meaning of Section 45 of the *Employment Act*.

133. As regards the reliefs sought, the Court proceeds as follows;

Declaration on violation of rights

134. Having found that the procedure employed by the Respondent in dismissing the Claimant was flawed, a declaration that the Claimant's right to fair hearing was violated is merited.

Declaration

135. Having found that termination of the Claimant's employment by the Respondent was procedurally flawed and thus unfair, a declaration to that effect is merited.

One month's salary in lieu of notice

136. Having found that the Respondent had a substantive justification to terminate the Claimant's employment, the prayer for salary in lieu of notice is unmerited and is declined.

Unpaid Commission for sale of special products Kshs.180,000.00

137. From the Claimant's witness statement dated 9th May, 2022, it is unclear whether that sum of Kshs.180,000.00 was due to the Claimant.

138. Assuming that the Commission was due and payable in 2019, and no action was taken to ensure its recovery, and the suit herein was filed on 10th May, 2023, the claim is statute barred by virtue of Section 90 of the *Employment Act*, 2007 and is rejected.

Unpaid commission for exceeding sales target Kshs.120,000.00

139. From the Claimant's witness statement, it is discernible that the Claimant exceeded the sales target by 154% in 2018 and was entitled to Kshs.115,000.00 as commission.

140. It is unclear whether this is the amount claimed as Kshs.120,000.00.

141. If the sum was due and payable in 2018, it is irrecoverable by virtue of Section 90 of the *Employment Act* and is declined.

Unpaid 25 months field allowance

142. Although the contract of employment provided for payment of field allowance, a fact the Respondent acknowledges. The claim lacks specificity and particularity.

143. Although the witness statement makes reference to the period 1st April, 2020 to May 2022, it is a matter of public notoriety that for a better *part of 2020* and 2021, the COVID-19 restrictions reduced movement and physical meetings and the claim does not appear to have considered that reality.

144. But more significantly, the Claimant is praying reimbursement for having used his money to transact the Respondent's business.

145. However, such a claim is only sustainable if supported by evidence that the amount claimed as reimbursement was actually spent. The Claimant availed no evidence to prove the amount spent and when.

146. In the absence of such evidence, the claim remains unproven and is declined.

Balance of mileage Kshs.961,086/=

147. It is common ground that the Claimant was entitled to mileage at a define rate per kilometre and the maximum number of kilometers was caped and was claimable whenever an employee used his or her private vehicle.

148. Strangely, the Claimant is claiming and seeks a court order for recovery of mileage allowance due and payable from April 2019 to April 2020, the sum of Kshs.1,601,086/= less Kshs.640,000/= without a single document on the total sum or what was paid.

149. In the absence of any verifiable evidence to show that the number of kilometers for which payment is prayed were actually travelled on the Respondent's business, the Court lacks a basis on which to award the claim.

150. Documentary evidence of a claim for mileage having been made to the company would have demonstrated that indeed the claim had been made but was unpaid.

151. The Claimant confirmed on cross-examination that he had no evidence to show that he had claimed for payment by the Respondent.

152. The claim lacks supportive evidence and is declined.

Unpaid relocation allowance Nairobi Region to Western Region Kshs.61,932.00

153. The Claimant's witness statement states that he was transferred to Western Region sometime in 2016.

154. It is unclear whether the transfer allowance claimed is for this transfer or another one.

155. The Claimant tendered no evidence to show that he claimed the allowance since 2016, 6 years before the instant suit was filed.

156. The claim lacks particulars, is statute barred and is declined.

Unpaid relocation allowance from Coast Region to Western Region, Kshs.61,932.00

157. Having found that the alleged transfer was indeed a swap of regions between the Claimant and Mr. Abednego at their instigation and the H.O.D confirmed the same, it would be unfair to burden the employer with an allowance it was not spending on exigencies of business but on personal choices of employees, a fact the Claimant admitted on cross-examination.

The claim is declined.

x. Unpaid house allowance

158. The Claimant's counsel did not submit on this claim and the same is for an unspecified sum.

159. A copy of the Claimant's contract of employment which he signed on 1st March, 2018 provides that the sum of Kshs.61,932.00 paid as gross salary included the amount usable to secure reasonable accommodation.

160. In other words, the Claimant's salary was consolidated and no house allowance was due to him.

161. Noteworthy, all the earlier contracts of employment were explicit that the Claimant's salary was consolidated.

162. It is unclear as to when the Claimant's house allowance was not paid.

The claim is declined.

Severance pay and accrued gratuity for the remaining term of the contract of employment

163. Even assuming that two claims relate to the duration the Claimant was in employment, none of them is merited on account that Claimant was not declared redundant for severance payment to be paid under the Provisions of Section 40(1) of the *Employment Act*.

164. Similarly, gratuity is, as the name suggest a gratuitous amount paid by the employer in appreciation of the services rendered by the employee and is either embodied in the contract of employment or the Collective Bargaining Agreement.

165. In the instance case, the Claimant tendered no evidence of entitlement to gratuity.

166. However, it is not lost to the Court that the claim relates to prospective earnings and the Claimant has not provided a factual or legal basis to justify their award.

167. The claims are rejected and as was held in D.K. Njagi Marete V Teachers Service Commission (2020) eKLR, a claim for anticipatory earnings in employment contracts lack legal anchorage.

General damages

168. This claim lacks the relevant anchorage and is declined.

169. General damages are awarded to remedy a wrong by the offending party and are intended to compensate or assuage the wronged party.

170. General damages are not available for breach of a contract of employment.

171. The prayer is rejected.

12 months' salary compensation

172. Having found and held that the termination of the Claimant's employment by the Respondent was unfair for want of procedural propriety, the Claimant is entitled to compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act* read with Section 49(4) of the Act.

173. In determining the quantum of compensation, the Court has taken into consideration the following;The Claimant was an employee of the Respondent from 1st January, 2009 to 29th September, 2022, about 14 years which is long.The Claimant had no recorded case of misconduct or indiscipline.The Claimant appealed the decision to terminate his employment.The Claimant substantially contributed to the termination of his employment by ignoring the H.O.D's request to send the Sales Performance Review Report until he was issued with a notice to show cause.

174. In the circumstances, the Court is satisfied that the equivalent of 3 months gross salary is fair, Kshs.185,796.00.

175. In the circumstances of this case, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 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.