



**Musili v Kenya Power and Lighting Company (Cause E310 of 2022)
[2024] KEELRC 2245 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E310 OF 2022
JK GAKERI, J
SEPTEMBER 19, 2024**

BETWEEN

MUSYOKI MUSILI CLAIMANT

AND

KENYA POWER AND LIGHTING COMPANY RESPONDENT

JUDGMENT

1. The Claimant filed the instant suit on 13th March, 2022 alleging unfair and unlawful termination of employment, failure to be accorded a fair hearing and breach of his constitutional rights.
2. The Claimant states that he joined the Respondent as a general worker in 1989 but rose to become an Artisan III and served the Respondent for 31 years and worked under supervision.
3. That on 26th April, 2018, he was given a reservation number to collect a transformer at Donholm and after the Clerk had verified the reservation in the system, he proceeded to the yard and the clerk identified the transformer via the print out from the system.
4. That the transformer had a company number and serial number unique to it, signed the store transaction form and received the 50KVA transformer and loaded it on the Hiab in the presence of security personnel who captured details of the transformer at the gate.
5. The transformer G No. was 98432 and Serial No. 328XXXX.
6. That security signed the store transaction form for the transformer to leave the store in the company of the Supervisor, Mr. Solomon Leting and one Mr. Kioko, a casual employee and the transformer was installed at South B Mosque after disconnecting the faulty transformer and loading it onto the lorry.
7. That the supervisor commissioned the transformer and confirmed it was working and the Engineer in charge of the Industrial Area confirmed by email that it was working on 26th April, 2018.



8. That on 27th April, 2018, he was directed to leave the faulty transformer in the yard for delivery to Roysambu.
9. According to the Claimant, trouble arose in 2019 when he was summoned by the auditors and responded to questions on the 50KVA transformer and gave them the Stores Transaction Form but at the site there was a different transformer and the one he had installed was installed in Kericho, a fact the Claimant was unaware of and stated as much in his statement.
10. The Claimant denied having installed a 630KAV TX at Plast Packaging Industries Ltd admitting he had only installed one on Wundanyi Road in February 2016 and at Kitengela EPZ on instructions of Henry Nzomo Ndambuki and Chief Engineer Richard Odhiambo Okoth.
11. The Claimant states that the Respondent Company had a structured process of collecting transformers.
12. That he was taken through a disciplinary process but no evidence connecting him to the 630KVA TX at Plast Packaging Industries Ltd was adduced.
13. The Claimant faults the dismissal on substantive justification and procedural fairness and prays for;
 - i. A declaration that termination of his services by the Respondent was unlawful and unfair.
 - ii. 12 months compensation Kshs.2,342,487.96.
 - iii. Four months' salary in lieu of notice Kshs.780,829.32.
 - iv. Leave pay for the year of termination Kshs.156,165.86.
 - v. Alternatively, reinstatement of the Claimant without loss of benefits.
 - vi. Damages for wrongful termination of employment.

Respondent's case

14. In its Statement of Response signed by Mr. Justus Odado Advocate, the Respondent admits that the Claimant was an Artisan until dismissal.
15. It denies that the Claimant had authority to collect a 50KVA transformer from Donholm or did so.
16. That the Claimant irregularly picked a transformer from the Respondent's store and installed it in unidentified locations.
17. That the who doubled up as an Artisan and Hiab Operator in Donholm Operations and Maintenance replaced a faulty transformer at Mitchellcotts with a 100 KVA transformer and the Claimant was involved in the change of a transformer at South B Mosque while an illegal 200 KVA transformer was installed in lieu of a 50 KVA the Claimant had picked from the store.
18. That the Claimant's acts were of a fraudulent nature contrary to the Respondent's Code of Conduct and Ethics and the CBA as he collected transformers without observing the Respondent's procedures.
19. That the Claimant was responsible for installation of the 630KVA TX at Plast Packaging Industries Ltd.
20. That the Claimant uprated a 50 KVA to 200 KVA irregularly and failed to account for GNo. 98432 picked from the Respondent's stores and was issued with a notice to show cause, responded, was invited



for a hearing and was summarily dismissed, appealed, was heard and the dismissal upheld and the dismissal was lawful.

21. By a Reply to the Respondent's statement of response dated 16th March, 2023, the Claimant denies the Respondent's averments and maintains that the dismissal was unlawful.
22. That the Respondent had no evidence to show that the Claimant irregularly installed the 630 KVA transformer at Plast Packaging Industries Ltd.

Claimant's evidence

23. In his evidence-in-chief, the Claimant testified that he was not given the audit report before the disciplinary hearing and his duties included replacement of faulty transformers and was not the only designated Hiab driver but the only one in Operations and Maintenance (O&MT) with only one Hiab vehicle.
24. He admitted that the notice to show cause had 2 charges on 50 KVA and 630 KVA.
25. He admitted having worked with Mr. Peter Muriu Nganga on the Wundanyi Road transformer.
26. On cross-examination, the Claimant re-affirmed his duties as a Hiab Operator and replacement of faulty transformers among other duties and the Hiab was used in replacing transformers and he was part of the O&M team
27. That an audit was conducted on the transformers on Lokitaung and South B.
28. The Claimant confirmed that he was part of a team in O&M and worked with Mr. Solomon Letting as supervisor and Peter Muriu.
29. That the audit team interviewed him and he recorded a statement but was unaware of other invitees and employees were dismissed on the basis of the report.
30. The Claimant testified that the Respondent had not been fair to him and the amount payable to him vide letter dated 2nd September, 2020 was conditional upon completion of the clearance form but the Certificate of Service was availed to the Claimant.
31. That the reason for dismissal was the irregular installation of a 630 KVA transformer at Plast Packaging Industries Ltd along Lokitaung Road.
32. That prior to dismissal, his total salary was Kshs.195,207.33.
33. On re-examination, the Claimant admitted that he was invited for a disciplinary hearing after the audit was concluded and Mr. Peter Muriu Ng'ang'a did not attend the meeting and the report had no date as to when the 630 KVA transformer was collected.
34. That the Conciliator recommended reinstatement of the Claimant.

Respondent's evidence

35. RWI, Mr. Argwings Kodhek confirmed that the GNo. of the 50KVA transformer was 98492 but the Claimant collected one whose GNo. was 98432.
36. The witness confirmed that he conducted the Audit and the notice to show cause was based on the audit report but was unsure whether a copy of the report was forwarded to the Claimant.



37. RWI confirmed that there were transformers outside the store and all had serial numbers and the witness had not provided the date of collection of the transformer but the Respondent had a transformer collection procedure.
38. That the 200 KVA was not returned to the store but left outside and could be collected and installed elsewhere.
39. The witness confirmed that as per the investigation report, the customer at Plast Packaging Industries Ltd did not name the Claimant or Mr. Peter Ng'ang'a as involved in the installation of the illegal 630 KVA.
40. That he conducted investigations and prepared the report dated 27th July, 2020.
41. That the transformer was illegally installed by KPLC staff.
42. On re-examination, the witness testified that the transformers in question were 50KVA, 200KVA, 630KVA and 1000KVA and the Claimant was implicated in relation to the 50KVA, 200KVA and the 630KVA and the investigation was based on interviews, the review of documents and from the system and on the 630KVA the witness relied on statements and site visit and Mr. Peter Ng'ang'a was not compelled to provide information and had installed only one transformer in the company of the Claimant.
43. RWII, Hellen Nganga confirmed that the notice to show cause sent to the Claimant was on 98492 not 98432 as per the investigators but the allegation on the 50 KVA GNo. 98492 was settled at the disciplinary hearing.
44. The witness further confirmed that the investigation report stated that one Winfred Wanjiku constructed the illegal H-Pole at the Kipkelion Monastery in Kericho County and installed the irregularly acquired 50 KVA transformer secured from the Nairobi Southern Region.
45. The witness testified that she had no evidence to show that Winfred Wanjiku was in contact with the Claimant.
46. That the notice to show cause was based on the investigation report and it was not given to the Claimant but Cyprian (the Claimant's witness) was given the same for perusal in 5 minutes at the hearing.
47. That the Claimant responded to the notice to show cause and accorded an opportunity to be heard.
48. That an employee must have authority to collect a transformer and all have a GNo. and serial number.
49. That the letter of dismissal was based on the recommendations of the disciplinary committee.
50. That Mr. Peter Muriu Ng'ang'a mentioned the Claimant as having been involved in the installation of the 630 KVA transformer on Lokitaung Road (Plast Packaging Industries Ltd).
51. That she relied on the statement of Peter Muriu Nga'ng'a though a signed copy of the same was not filed.
52. That Mr. Muriu Ng'ang'a did not state who gave out the transformer or the GNo. or serial number, or date or time or the Hiab used.
53. That Mr. Paul Wangaruro did not mention the Claimant and the Claimant was dismissed on account of the 630 KVA.



54. That the customer at Plast Packaging Industries Ltd did not mention the Claimant as being involved in the installation of the transformer.
55. That the Committee relying on the audit report found that the customer disclosed that the installation of the 630 KVA was by John Kennedy and Grace Karuiru.
56. That the movement of a transformer required a Hiab and the Claimant was the driver.
57. The witness confirmed that when the Claimant was asked about having been to Plast Packaging Industries Ltd, his answer was in the negative and Mr. Peter Ng'ang'a was not at the hearing.
58. That the witness had no evidence to show that the sum of Kshs.11,000/= received by Mr. Mulati was shared with the Claimant and Solomon Letting and each employee had his area of operation.
59. That according to the investigation report, Nairobi Control had no record of the employees they permitted to work on HT network after isolation.
60. The witness confirmed that she had no evidence to show that the Claimant had utilized all his leave days though the system provided reports.
61. On re-examination, the witness testified that the Claimant's dismissal was based on the 630 KVA transformer at Plast Packaging Industries Ltd.
62. That the Claimant did not comply with the procedure of collection of transformers and was the Hiab driver used in the transfer of transformers.
63. That the Claimant had not specified the number of outstanding leave days.

Claimant's submissions

64. On whether termination of the Claimant's employment was unfair and unlawful, counsel submits that it was in that the Claimant denied having installed the 630 KVA transformer and admitted having previously worked with Peter Muriu Nganga, whose evidence was relied upon by the Committee yet he was not a witness at the hearing and he had neither the date of collection of the transformer, time or when it was installed and the customer at Plast Packaging Industries Ltd named other employees of the Respondent as having installed the transformer and neither Mr. Peter Muriu Nganga nor the Claimant mentioned Mr. John Kennedy and Engineer Grace Wanjiru.
65. Reliance was made on Walter Ogal Anuro V Teachers Service Commission (2013) eKLR on the essentials of a fair termination of employment as were the sentiments of the Court in Mereru V Tata Chemicals Magadi Ltd (2023) KEELRC 2632 (KLR) on due process, to urge that the Claimant was not supplied with the investigation report which impeded his defence at the hearing and was only accorded 5 minute to peruse the document.
66. Reliance was made on the sentiments of the Court of Appeal in Ol Pejeta Ranching Ltd V David Wanjau Muhoro (2017) eKLR on availment of a report to the employee.
67. That the union's letter was not responded to and the process was flawed.
68. On substantive justification, counsel submits that although the Claimant faced three charges, termination of employment was justified on the 630 KVA transformer at Plast Packaging Industries Ltd on Lokitaung Road allegedly installed illegally.
69. Counsel submitted that RWI, Mr. Kodhek confirmed that he was unaware of whether his report was given to the Claimant.



70. Counsel submits that the committee's observation on the culpability of the Claimant was based on the fact that the Claimant was named by another employee as the Hiab driver involved in the installation of the 630 KVA transformer and the said employee did not attend the disciplinary hearing and the Customer/CEO of Plast Packaging Industries Ltd did not name the Claimant as one of the member of staff involved in the installation of the transformer.
71. That the customer mentioned neither the Claimant nor Mr. Peter Muriu Nganga.
72. Counsel submits that the investigation found that it was possible for another Hiab driver to collect a transformer from the Nairobi South Region as demonstrated by the case of Peter Mutisya Mwaka who though based at Mlolongo depot collected a transformer and altered details of the TX on the STF and could not tell where he installed the transformer.
73. That the Claimant was not incharge of security of transformers.
74. That the 50 KVA TX installed in Nairobi South B was installed elsewhere by a private contractor and the STF form saved the Claimant on the allegation made against him.
75. Counsel further submits since the Claimant booked mileage of the Hiab he drove, it was unclear why the Respondent could not avail such evidence to demonstrate his movement.
76. Counsel further relied on the sentiments of the Court in *BATUK Unit Kenya V Mutahi (2023) KECA 1417 (KLR)* on the absence of the Claimant's accusers for cross-examination.
77. That the Respondent had no reason or evidence to justify the Claimant's dismissal required by Section 43 of the *Employment Act*.
78. Reliance was also made on the sentiments of the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*.
79. On reliefs, counsel submits that the Claimant was a member of the union as evidenced by his payslips for July and August 2020 and under the CBA 2017/2020, he was entitled to four (4) months pay in lieu of notice as he was dismissed on 2nd September, 2020, Kshs.649,419.72 for having served for more than 30 years.
80. That the Claimant was entitled to all other reliefs as prayed for.

Respondent's submissions

81. By 9th September, 2024 when the Court retired to prepare this judgment, the Respondent had not filed submissions.
82. The Claimant filed submissions on 12th August, 2024.

Analysis and determination

83. It is common ground that the Claimant joined the Respondent in 1989 as a General Worker and rose to Artisan III and was a Hiab driver and could replace faulty transformers as instructed by the Supervisor, Mr. Solomon Letting.
84. It is also not in contest that sometime in 2020, the Respondent's Internal Audit department conducted an investigation on irregular installation of transformers in Nairobi South Region and the investigators made several recommendations most of which were systems related but also recommended disciplinary action against 8 persons including the Claimant for various infractions.



85. The Claimant was accused of;
- i. Upgrading a 50 KVA transformer at South B Mosque to 200 KVA irregularly.
 - ii. Failure to account of transformer GNo. 98492 he had picked from the stores for installation at South B Mosque.
 - iii. Irregularly installed a 630 KVA transformer at Plast Packaging Industries Ltd along Lokitaung Road, Industrial Area.
86. The findings of the investigation formed the basis of the notice to show cause dated 4th August, 2020 which accorded the Claimant 72 hours to file a response and the Claimant responded on the following day stating that his duties did not include upgrading of transformers. That he picked the 50 KVA on instructions of Mr. Solomon Leting, the Supervisor under Reservation No. 752XXXX and the GNo. of the 50 KVA was 98432, serial number 328XXXX and the installation was conducted on 26th August 20- (unclear).
87. The Claimant stated that he had no knowledge on the 630 KVA.
88. It is equally not in dispute that by letter dated 11th August, 2020, the Respondent invited the Claimant for a disciplinary hearing scheduled for 18th August, 2020 at 11.00 am at the Boardroom (Electricity House) – 8th floor.
89. The invitation set out the allegations the Claimant was to face. Notably, the charge of upgrading of a transformer appear to have fallen by the wayside.
90. The Claimant was informed of his right to produce evidence and call witnesses and hearing took place on 18th August, 2020 and the Claimant had two (2) witnesses and responded to each of the allegations in detail as the minutes of the meeting reveals.
91. The Committee requested for and the Claimant availed the Incidence Number for transformer 98432.
92. The Claimant denied having been in Plast Packaging Industries Ltd prior to going there together with the security, auditors and the team from Nairobi South and was the only one with a Hiab in O&M for the region.
93. He confirmed having installed the 50 KVA transformer GNo. 98432 and signed the minutes.
94. Puzzlingly, the Investigation Report, Notice to Show Cause and the Invitation to the hearing make reference to a 50 KVA transformer GNo. 98492 with no serial number yet the 50 KVA, the Claimant referred to and installed at the South B Mosque and for which he had an Incidence Number was GNo. 98432 serial number 328XXXX.
95. The 50 KVA transformer GNo. 98492 had no serial number.
96. The different GNo. was important as both RWI and RWII confirmed on cross-examination that all the Respondent's transformers had unique GNo. and serial numbers.
97. The disciplinary committee was satisfied with the Claimant's explanation about the 50 KVA transformer installed at the South B Mosque. However, the 630 KVA remained outstanding and was the basis on which the Claimant's employment by the Respondent for over 30 years came to a sudden end vide letter dated 2nd September, 2020, effective 4th September, 2020.
98. The Claimant faults the dismissal variously.



99. The issues for determination are;
- i. Whether termination of the Claimant's employment by the Respondent was unfair and unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
100. As regards the 1st issue, it is common ground that for a termination of employment or dismissal to pass the fairness test, it must be proved that the employer had not only a valid and fair reason to do so but also employed a fair procedure.
101. The provisions of Sections 41, 43, 44, 45(7) and 46 provide for the two elements of a fair termination of employment aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (Supra)* cited by the Claimant's counsel as substantive justification and procedural fairness as follows;
- “ . . . However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness”.
102. Whereas the substantive justification refers to the reason(s) or justification for the termination of employment, procedural fairness is concerned with the procedure employed in the termination of employment.
103. See also *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*.

Reason for termination

104. Although the notice to show cause identified three charges against the Claimant, only two found their way to the notice of invitation for the disciplinary hearing and only one was relied upon as the reason for termination of the Claimant's employment.
105. The letter of dismissal dated 2nd September, 2020 states in part;
- “ This is to advise you that your explanation has been found unacceptable. You are therefore dismissed from the company services with effect from 4th September, 2020 under Clause 25.0 of 2017/2020 CBA for the following reasons:
- Your irregularly installed a 630 KVA transformer at Plast Packaging Industries Ltd along Lokitaung Road, Industrial Area illegally . . .
- Note that you have room to appeal to MD & CEO against this decision within 90 days from the receipt of the letter.
106. It is trite law that in a termination of employment, it is incumbent upon the employer to prove on a balance of probabilities that it had a valid and fair reason to terminate the employee's employment.
107. The Respondent's witnesses Mr. Kodhek and Hellen Nganga were categorical that the Audit Report was the basis of the notice to show cause and the Claimant's dismissal.
108. RWI confirmed on cross-examination that the investigation involved interviewing of employees and witnesses, visiting of the sites and review of documents.
109. The report reveals that the auditors interviewed about 17 employees and 5 customers.



110. As regards the customers, the only relevant witness was Paul Wangaruro, the Group Chairman & CEO of Plast Packaging Industries Ltd whose premises was associated with the 630 KVA transformer which led to the Claimant's dismissal.
111. Mr. Wangaruro told the auditors that he had a 200 KVA installed irregularly and uprated to 630 KVA irregularly. The second transformer was uprated to 630 KVA and the 3rd was uprated to 1 MVA, all activities undertaken by the Respondent's staff.
112. That Mr. J.F. Kennedy of Tel. 0722 241 123 uprated the transformers to 300 KVA and later to 630 KVA, a transformer the customer had at the time of the investigation.
113. Mr. Wangaruro told the auditors that he gave a token of appreciation to one J.F. Kennedy and Engineer Grace Tel. 0721XXXX.
114. Significantly, customer did not mention the Claimant's name and RWI and RWII confirmed as much on cross-examination.
115. On the other hand, two employees of the Respondent mentioned the Claimant's name.
116. Mr. David Owuor Oduor S/No. 16645 talked of a discussion he had had on telephone with the Claimant on how the Claimant had been requested by Engineer Grace Karuiru to take a transformer from Lokitaung Road but the Claimant declined and realized it had been moved by a Mr. Mutisya, a Hiab driver from Mlolongo and the discussion was around May – September 2018.
117. Did the statement of Mr. David Owuor Oduor implicate the Claimant in wrong doing? The plain answer is no.
118. The only witness who appeared to implicate the Claimant is one Peter Muriu Ng'ang'a S/N 10976 who told the auditors that they had collected the 630 KVA transformer from Nairobi South and installed the same on Lokitaung Road. That they met another Respondent's foreman Michael Oduor Omondi S/N 08355 who showed them the customer's premises.
119. The report notes that Mr. Michael Oduor Omondi was dismissed from employment in 2016 and did not record a witness statement.
120. According to Mr. Peter Muriu Ng'ang'a, the 630 KVA was installed in 2017.
121. Notably, the statement of Mr. Paul Muriu Ng'ang'a was not attached as annexure to the Audit Report nor were those of other witnesses.
122. The alleged statement of Mr. Peter Muriu Nganga lacks particulars of the 630 KVA transfer in terms of GNo. and serial number.
123. Indeed, the Audit Report has no GNo. or serial number of the transformer.
124. Similarly, the statement lacks dates and time the alleged activity took place which implicates its credibility.
125. It is unfathomable how Mr. Michael Oduor Omondi could have been a foreman of the Respondent in 2017 yet the report is explicit that his employment was terminated in 2016.
126. Noteworthy, the Claimant admitted having worked with Mr. Peter Muriu Ng'ang'a and in fact installed a transformer (630 KVA) on Wundanyi Road on instructions of the supervisor, Mr. Samuel Bosire and Peter Muriu Ng'ang'a was the team leader (STF No. 85000XXXX).



127. Being the only person who implicated the Claimant in wrong doing, the statement of Mr. Peter Muriu Ng'ang'a was so critical that the auditors ought to have attached it including those of other witnesses and his presence was necessary at the disciplinary hearing for purposes of cross-examination by the Claimant as he was the principal witness.
128. Strangely, the Respondent had no evidence as to the particulars of the 630 KVA transformer and how it was accounted for. For instance by whom and when was it collected under what reservation number and where was it supposed to be installed as the case of 50 KVA transformer which the Claimant installed but miraculously found its way to a Monastery in Kericho County. The trial was well documented, which shows that the Claimant complied with the Respondent's procedures on collection of transformers which the Respondent's witness confirmed existed.
129. Although as captured, the statement by Mr. Peter Muriu Ng'ang'a makes reference to "the 630 KVA transformer" which would suggest it was a particular transformer, no particulars were supplied by Mr. Peter Muriu Ng'ang'a or any other witness.
130. Significantly, the Claimant filed copies of Store Transaction Forms duly authorised in respect of the transformer he collected such as 50 KVA 11/042 KVD on 26th April, 2018 (No. 96001XXXX), 630 KVA 11/0433 KVD on 24th April, 2019 (No. 97000XXXX), 630 KVA 11/0/42 KVD on 18th February, 2016 (No. 85000XXXX).
131. It behooves the Respondent to show that the Claimant collected a 630 KVA transformer on a particular date without documentation and installed it at Plast Packaging Industries Ltd.
132. The Respondent ought to have availed credible evidence connecting the Claimant to 630 KVA on Lokitaung Road as Mr. Peter Muriu Ng'ang'a's statement was not tested nor was he availed for cross examination.
133. For unexplained reasons, the statement is reticent on compliance with formalities or a background to the transaction.
134. Section 43(2) of the [Employment Act](#), 2007 provides that;
The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
135. In *Galgalo Jillo Jarso V Agricultural Finance Corporation* (2021) eKLR, B.O. Manani J. held that;
"In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists".
136. Clearly, the employer must have a reasonable basis for the genuine belief that it has a reason to terminate an employee's employment.
137. In the instant case, the Respondent relied on the Auditor's Report hook, line and sinker in the charging, prosecution and conviction of the Claimant based on the fact that he was the Hiab driver based in the Nairobi South Region and Hiabs are used to transport transformers for installation. But more significantly, he was mentioned by one Mr. Peter Muriu Ng'ang'a, a former colleague whose statement as captured by the auditors lack specificity on the 630 KVA transformer and also names one Mr. Michael Omondi as the foreman who directed them to the site in 2017 yet he had long ceased to be an employee of the Respondent.



138. Relatedly, the auditor's report found that the Respondent's systems on transformers had numerous shortcomings and replaced transformers were left in the yard as opposed to being returned to the store and lacked documentation on transformers.
139. The auditors found a shambolic system lacking in control and accountability mechanisms where any person could collect and install a transformer anywhere without records.
140. The case of the 200 KVA transformer GNo. 118268 serial number 2119058 which was to be collected by the Claimant attracts attention as it was collected by one Mr. Peter Mutisya Mwaka, a Hiab Operator based at Mlolongo outside the Nairobi South Region without authority to do so.
141. In sum, the Respondent had no credible evidence to show that the Claimant collected, handled or installed a 630 KVA at Plast Packaging Industries Ltd on Lokitaung Road.
142. In the Court's view, the untested statements of Mr. Paul Muriu Ng'ang'a was not a reasonable basis for the Respondent to genuinely believe that it had a reason to terminate the Claimant's employment.
143. The totality of the foregoing is that it is the finding of the Court that the Respondent has failed to evidentiary demonstrate that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

144. It requires no belabouring that the procedure of termination of employment prescribed by Section 41 of the *Employment Act* is mandatory. See Pius Machafu Isindu V Lavington Security Guards Ltd (Supra).
145. The specific tenets of Section 41 have been isolated in a catena of decisions including Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR and include explaining the reason(s) for termination in a language understood by the employee and in the presence of another employee of his choice or shop floor representative; employees right to adduce evidence and cross-examine witness in addition to making representations, and the employer's duty to hear and consider the representations of the employee or the person chosen by the employer.
146. It is common ground that the Respondent attempted to comply with the requirements of Section 41 of the *Employment Act* as evidenced by the notice to show cause, Claimant's response, invitation for a disciplinary hearing with attendant rights to call witnesses and be accompanied to the hearing and sufficient time was provided. That he appealed the decision, was heard and a decision communicated.
147. However, the Claimant maintains that he was not accorded a fair hearing as the document or evidence relied upon by the Respondent to charge, prosecute and convict him, was not availed to him save for 5 minutes during the hearing which the Claimant deemed insufficient.
148. Both RWI and RWII confirmed on cross-examination that the Auditor's Report was not availed to the Claimant.
149. As correctly contended by the by the Claimant's counsel, an employee against whom charges have been levelled by the employer, is entitled to be provided with the charges and the evidence the employer intends to rely on at the hearing to enable the employee adequately prepare for the hearing.
150. Section 4(3)(g) of the *Fair Administrative Action Act*, 2015 provides that;
Where an administrative action is likely to adversely affect the rights or fundamental freedoms as of any person, the administrator shall give the person affected by the decision information, materials and evidence to be relied upon in making the decision or taking the administration action.



151. In other words, all relevant materials in possession of the employer must be given to the employee to enable such employee mount an effective defense.
152. The sentiments of the Court in *Mereru V Tata Chemicals Magadi Ltd (Supra)* cited by the Claimant’s counsel judicious.
153. Needless to emphasize, the availment of such materials and evidence is an integral part of the right to fair hearing which is a constitutional imperative.
154. For unexplained reasons, the Respondent denied the Claimant the most critical document it had in its possession, the Audit Report dated 27th July, 2020.
155. In determining this issue, the Court is guided by the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui (Supra)* as follows;

“The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictments which could torpedo his entire career and destroy his future . . .”
156. These sentiments apply on all fours to the facts in the instant case.
157. The few minutes the disciplinary committee accorded the Claimant and his witnesses to peruse the Audit Report cannot avail the Respondent as the law requires that such material be forwarded to the employee and be accorded time to prepare for his or her defence.
158. The foregoing is fortified by the sentiments of the Court of Appeal in *Regent Management V Wilberforce Ojiambo Oundo (2018) eKLR* as follows;

“We are at a loss as to why the appellant refused to grant the Respondent certified copies of the documents requested even at his own expense. In our view, these documents were integral to the Respondent preparing his defence. By only availing the documents for his perusal at its premises for a number of hours was not adequate . . .”
159. The Claimant and his witnesses were accorded 5 minutes to peruses and understand a 38 page document with three (3) annexures.
160. It was patently inadequate to enable the Claimant put forward an effective rebuttal.
161. In the Court’s view, the non-availment of the Audit Report impeded the Claimant’s right to defend himself against the allegation made against him and thus denied him the right to fair hearing, a fundamental precept of justice.
162. Finally, the Claimant’s right to fair hearing was curtailed by the non-availment of witnesses for cross-examination.
163. Since the Respondent did not avail a copy of the Auditor’s Report and neither the Internal Auditor nor the witnesses relied upon in the report were present and not even their authenticated statements were produced, it is clear that no evidence was adduced by the Respondent at the hearing save for the Audit Report which the Claimant had not interacted with previously.
164. Mr. Peter Muriu Ng’ang’a, the only witness who implicated the Claimant in wrong doing ought to have been availed for cross-examination to determine the veracity of his evidence.



165. By not availing him, the Respondent charged, prosecuted, convicted and sentenced the Claimant on the basis of untested averments by Mr. Peter Muriu Ng'ang'a thus stifling the Claimant's right to fair hearing.

166. The foregoing is fortified by the sentiments of the Court of Appeal in *BATUK Unit Kenya V Mutahi* (Supra) as follows;

“ . . . The witnesses were nonetheless not availed. It is clear that the Respondent was not given the opportunity to question his accusers at any point. The veracity of the statements used to terminate his long career was never tested. There was no proof that the said statements had been made by actual persons who had genuine grievances against him. The possibility that the entire process could have been choreographed by malicious persons who wanted the Respondent sacked, was therefore not ruled out.

The rules of natural justice apply at any level where a person's fundamental rights are likely to be violated. The Respondent was put through a process that was to determine whether his right to earn a livelihood would be taken away from him, yet he was not given an opportunity to face his accusers at the disciplinary hearing.

The decision to terminate him was arrived at in total disregard of his right to due process. In view of this we are persuaded that the reasons for the termination was not proved to be valid. We further find that the process followed to arrive at that decision was unprocedural and unfair . . . ”

167. In the instant case, no statements or other evidence was availed to the Claimant prior to the hearing and no witnesses were availed.

168. For the foregoing reasons, it is the finding of the Court that process employed by the Respondent in the termination of the Claimant's employment was flawed and far from fair within the meaning of Section 45 of the *Employment Act*.

Appropriate Relief

a. Declaration

169. Having found as above, a declaration that termination of the Claimant's employment by the Respondent was unfair and unlawful is merited.

b. Four (4) months' salary in lieu of notice

170. Having found that termination of the Claimant's employment was unfair for want of a valid and fair reason and procedural fairness, and the Claimant was a member of the Kenya Electrical Trades & Allied Workers Union, which had a CBA with the Respondent 2017-2020, a fact the Respondent indirectly admits in the dismissal letter dated 2nd September, 2020, the Claimant is awarded four (4) months' salary in lieu of notice by virtue of Clause 3.9 of the CBA Kshs.649,419.72.

c. Leave pay for year of termination Kshs.156,165.86

171. Neither the Claimant's written witness statement dated 9th May, 2022 nor the oral evidence adduced in Court contain particulars of the outstanding or untaken leave days as at the date of termination of employment. It is unclear to the Court how the sum of Kshs.156,165.86 was arrived at.

The prayer lacks particulars and is declined.



d. 12 months compensation Kshs.2,342,487.96

172. Having found the termination of the Claimant's employment was unfair within the meaning of Section 45 of the Employment Act, the Claimant is entitled to compensation under Section 49(1)(c) of the Employment Act subject to the provisions of Section 49(4) of the Act.

173. The Court has taken into consideration the following;

- i. The Claimant was an employee of the Respondent since 1989, a period of over 30 years which is long by any standards and wished to continue serving as evidenced by the appeal against the dismissal and the prayer for reinstatement.
- ii. The Claimant did not contribute to the termination of employment.
- iii. The Claimant had a caution dated 13th February, 1995 for leaving the place of work and a notice to show cause for which he was blamed by the Investigation Report.

As regards the accident at Kitulu Primary School in Machakos County, the Claimant was given the benefit of doubt as evidenced by letter dated 9th October, 2019.

Other than these 3 incidents which the Claimant admitted and a disciplinary hearing, he had no other recorded complaint.

174. In the circumstances, the Court is satisfied that the equivalent of 9 months gross salary is fair compensation, Kshs.1,461,194.37.

Total award Kshs.2,110,614.09

e. Damages for wrongful termination

175. The Claimant alleges that his right to fair labour practices were violated and prays for Kshs.2 million.

176. The Claimant tendered no scintilla of evidence to justify this claim and the same is dismissed.

177. The Claimant did not pray for costs and none is awarded.

f. As an alternative, the Claimant prayed for reinstatement, a remedy the Claimant's counsel appear to have abandoned and did not submit on. This is perhaps because it has been overtaken by events by dint of the provisions of Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011.

The prayer is unavailable since the Claimant's dismissal took place on 4th September, 2020, more than 3 years ago.

178. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. Four (4) months' salary in lieu of notice Kshs.649,419.72.
- c. Equivalent of 9 months' gross salary Kshs.1,461,194.37.

Total Kshs.2,110,614.09

179. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH 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.

DR. JACOB GAKERI

JUDGE

DRAFT

JUDGMENT Nairobi ELRC Cause No. E310 of 2022 Page 21 of 21

