



**Odhiambo v B Braun Medical Kenya Ltd (Cause E433 of 2023)
[2024] KEELRC 13306 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13306 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E433 OF 2023
JK GAKERI, J
NOVEMBER 27, 2024**

BETWEEN

SAMUEL OMOTO ODHIAMBO APPLICANT

AND

B BRAUN MEDICAL KENYA LTD RESPONDENT

JUDGMENT

1. The Claimants initiated the instant suit by a statement of claim dated 22nd May 2023 filed on 27th May 2023 alleging unfair and unlawful termination of employment.
2. The Claimant avers that he joined the respondent as an employee on 1st November 2022 at a monthly salary of Kshs. 80,000.00 and performed his duties diligently until 11th April 2023 when he received a notice to show cause accusing him of five (5) charges, 4 months after the incidents, and vide letter dated 14th April 2023, was subsequently invited for a hearing by letter dated 18th April 2023, attended the hearing though allegedly unwell and was summarily dismissed vide letter dated 2nd May 2023.
3. The Claimant faults the termination of his employment on the grounds that no warning letter was issued as it was his first disciplinary matter, the decision had already been made and the employer did not show the validity of the grounds of termination of employment.

The Claimant prays for:

- i. A Declaration that the termination of his employment was unlawful, malicious and unfair.
- ii. Reinstatement to his former position as Product Specialist in the Western Region OR
- iii. In the alternative to (ii) above 12 months salary compensation Kshs. 960,000.
- iv. General damages for unlawful and unfair termination of employment and discrimination.
- v. Costs of the suit and



- vi. Interest on (@) above t court rates from date of filing until payment in full.

Respondent's case

4. Vide a statement of response and counter claim filed on 26th July 2023, the respondent admitted that the Claimant was its employee pursuant to a contract of employment dated 12th October 2022, as a Product Specialist, Western Region.
5. The Respondent states that the fact that this was the Claimant's first disciplinary matter did not preclude it from taking action as warranted by the allegations and the process was not arbitrary.
6. It is the respondent's case that the allegations outlined in the notice to show cause were valid and action was delayed on account of the officer responsible having been on maternity leave from December to April 2023 and the process commenced effective April 2023 with a notice to show cause and hearing followed on 26th April 2023.
7. It is the Respondent's case that it had engaged Mangrove Tree Tours & Travel Ltd. (Mangrove) to provide it with vehicles for use by employer on need basis and it hired vehicles for the duration needed and extensions could be arranged through the administrator who liaised with Mangrove for the extension or allocation of a new vehicle.
8. That the Claimant was scheduled to attend a CME at Kisumu Avenue Hospital on 10th December 2022 and the Respondent hired motor vehicle registration number KDD 733W from Mangrove for his use for one day, returnable on the same day.
9. That although the Claimant was released by the Supervisor, one Mr. Collins Alubukho at 4.00 p.m. to travel back to Eldoret to return the motor vehicle, he did not and eventually returned the motor vehicle on 12th December 2022, and submitted a claim for fuel reimbursement incurred on 12th December 2022, a fraudulent claim and the vehicle had been damaged, facts he admitted at the hearing on 26th April 2024.
That the claimant admitted that he was paying for the damage.
10. That the Claimant was away without authority on 15th March 2023 and application for leave was electronic through Dynamics 365 a fact the claimant was aware of.
11. That he proceeded on leave on 7th March 2023, due to return on 15th March 2023 but did not.
12. The Respondent denies that the Claimant was on emergency leave on 8th March 2023 as had not informed the supervisor or the reason but had notified the respondent's IT specialist Saidi Ramadhani on 15th March 2023 and thus had no authority to be away having not applied for leave.
13. It is the Respondent's case that the Claimant's conduct amounted to gross misconduct and the respondent had valid grounds to terminate the Claimant's employment.
14. The respondent's Counter-Claim is that the Claimant was issued with a laptop Latitude 5420/11th Generation 15-1145G7 Intel IriseXe valued at USD 1260 for work purposes but after termination of his employment, the Claimant without any just cause refused, failed or neglected to return the laptop requests to do so notwithstanding. The respondent claims the sum of USD 1,260 or set-off against any award made in favour of the Claimant.
15. The Respondent prays for:
 - i. USD 1260 being the value of the laptop.



- ii. Interest on (i) above at court interest till payment in full.
- iii. Costs of the suit and counter claim

Claimant's evidence

- 16. On cross-examination the Claimant, Mr. Smuel Omoto Odhiambo confirmed that he joined the Respondent effective 1st November 2022 and was dismissed from employment in April 2023. He admitted that he was issued with a laptop and had the same to date though it had been requested for. He admitted having received a notice to show cause, responded and attended a hearing, having confirmed via email 24th April 2023 and the panel comprised Joyce Wanjiru HR, Robert Mayama and Collins Alubukho.
- 17. The Claimant admitted that on 10th December 2023 he was given a vehicle by Mangrove to proceed to Kisumu where he picked Collins Alubukho and was supposed to return the vehicle on the same day but returned it on 12th December 2022. That he called Mr. Mwanga of Mangrove who directed him to a driver who would communicate with him on where to leave the motor vehicle, but had no evidence of him having made any call to the driver. That he talked to the Supervisor on 10th December 2022 and 11th December 2022 (Sunday morning) and the driver and Mr. Mwanga who told him to return the motor vehicle on Monday.
- 18. The witness admitted having submitted a fuel reimbursement receipt dated 12th December 2022 of Kshs. 1530 from Eldoret to Kisumu and back to Eldoret.
- 19. That admitted that he had an accident, the rim was damaged but, changed the tyre and used the spare wheel but the vehicle was not damaged.
- 22. On leave the Claimant admitted that an employee could send an email to the Supervisor in cases of emergency or fill it out in the system (Dynamics 365).
- 23. That he took emergency leave on 8th March 2023 for 7 days and received a communication that leave had been extended via email by Said Ramadhani dated 15th March 2023.
- 24. The Claimant admitted that he did not apply for leave in the system and denied having been engaged in altercation with an Eldoret based staff, only admitting that there was a discussion.
- 25. The Claimant admitted having received the letter of summary dismissal from employment.
- 26. On re-examination, the Claimant testified that he wrote an email expressing his unwillingness to return the laptop as the termination of employment was unlawful but was willing to return it.
- 27. That he neither read nor sign the minutes of the disciplinary hearing. The Claimant admitted that he fuelled the motor vehicle on 12th Monday 2022 having arrived at night and the following day was a Sunday and the driver agreed that he retains the motor vehicle till the following day.
- 28. That his leave was approved by the Supervisor through one Pamela. That the Claimant's father was unwell and he wanted to take him to hospital.

Respondent's Evidence

- 29. On cross examination, RW1 Mr. Collins Alubukho confirmed that he was the Claimant's Supervisor and did not approve his leave.



30. That the claimant found him in Kisumu and took him to the hotel and the Claimant was answerable to him and the claimant did not inform him about the alleged accident but was called by the manager of Mangrove, and called the Claimant who informed him about the tyre burst and he did not believe the Claimant and did not see the car.
31. The witness maintained that the car was to be returned on 10th December 2022 not 12th December 2022. That he was supposed to return the car on Sunday but did not.
32. The witness admitted that he was a member of the panel and did not support the claim for reimbursement.
33. On Re-examination RW1 testified that the Claimant notified him of the accident after he called him himself at 11.00 on 11th December 2023.
34. RWII, Joyce Wanjiru confirmed that she was the respondent's Human Resource Specialist and information about the altercation was brought to her attention by Collins Alubukho and Robert, after she resumed duty from maternity leave.
35. The witness admitted that she issued the notice to show cause, received a response, invited the Claimant for a hearing and took him through the charges and did not give the claimant a warning.
36. The witness confirmed that the minutes indicated that the Claimant attended the hearing with no witness and was ready to proceed.
37. That the Managing Director refused to hear the appeal because the Claimant refused to return the laptop.
38. On Re-examination, RWII testified that hearing was postponed because the Claimant indicated that he was unwell and 21st April 2023 was declared a public holiday.
39. That the Claimant confirmed at the hearing that he was unable to procure a witness.
40. That when the incidences, occurred the witness was on maternity leave and addressed them when she reported back to the office. It was her testimony that the Managing Director was willing to hear the Claimant's appeal if he returned the laptop.
41. RWIII, Mr. Constantine Mwanga confirmed, on cross-examination, that he run car hire services and the Respondent hired vehicles occasionally as it did on 10th December 2022 and the motor vehicle was picked by the Claimant.
42. That his firm and the Respondent had written terms of engagement and the motor vehicle was to be returned in the evening of 10th December 2022 as it was hired for official duties in Kisumu and the Claimant picked it from Eldoret around 6.30 a.m. from one of the witness's employees.
43. The witness admitted having received a call from the Claimant on the same day about the damage to the vehicle at around 11.00 p.m. and referred him to one of his employees on how the motor vehicle would be delivered as he was out of town. That he delegated the function, though he remained responsible.
44. That the Claimant was to deliver the motor vehicle at Elgon View Estate at night.
45. The witness confirmed that the front left tyre of the motor vehicle was completely torn into pieces and the rim was damaged beyond repair and the wheel cap was missing, but it could be driven using the spare wheel.

That the witness replaced the damaged parts, wheel rim and wheel cap.



46. That Mangrove raised the issue with the Respondent immediately and Mangrove still hired motor vehicles to Respondent.
47. On re-examination the witness testified that any extension of hiring time was authorized by the Respondent and the vehicle was to be delivered to one of his Senior staff on 10th December 2024.
48. That according to him, the vehicle was driven with a punctured tyre for along period of time and it had a spare tyre.

Claimant's submissions

49. As to whether termination of the Claimant's employment was unfair, counsel for the Claimant submitted that it was on the ground that the reasons relied upon were neither valid nor justiciable. Reliance was made on the provisions of Section 41 of the *Employment Act* and the decisions in David Gichana Omayo V. Mombasa Maize Millers Ltd (2014) eKLR and Co-operative Bank of Kenya Ltd. V. Banking Insurance & Finance Union (2017) eKLR.
50. On procedural fairness, Counsel argued that the hearing was flawed without isolating the flaws and the appeal was not heard. Counsel urged the court to find that the Claimant was not subjected to a fair hearing.
51. Reliance was made on Janet Nyandiko V Kenya Commercial Bank Ltd (2017) eKLR; to urge that the respondent's unilateral decision was against the principles of natural Justice.
52. On reliefs, Counsel cited the decision in Co-operative Bank of Kenya Ltd V BIFU (Supra) to submit that the reliefs under Section 49 of the *Employment Act* were discretionary and their grant or refusal is dependent on the facts of each case based on the considerations under Section 49 (4) of the *Employment Act*.
53. Counsel submitted that the Claimant had hopped to remain in employment until he attained retirement age and in any case, the termination of employment was whimsical or arbitrary and he was entitled to the prayers sought.

Respondent's Submissions

54. Concerning the reasons for termination, Counsel for the respondent submitted that the respondent had valid reasons it genuinely believed to exist and which caused the termination of the Claimant's employment and cited the decision in CFC Stanbic Bank Ltd. V. Danson Mwashako Mwakuwana (2015) among others.
55. On leave without approval, Counsel urged that the evidence on record showed that the Claimant absented himself from the place of work without authority as the email dated 15th March 2023 was a notification not a request for leave and cited the decisions in Thomas Dzombo Kirunga V. Kurstalline Salt Ltd (2020) eKLR and Ismael Otieno Omollo V Oshwal Education and Relief Brawtha Oshwal Academy Mombasa to urge that in cases of sickness, the employee is obligated to inform the employer the reason for absence and seek permission for extension of his absence and cannot assume that the employer is aware of his or her predicament. That cases of emergency the Claimant was obligated to seek an extension of leave, did not and wrote to a person other than his supervisor or Human Resource.
56. On the fraudulent claim, Counsel argued that the Claim and the witness statement had different reasons as to why he did not return the motor vehicle on 10th December 2022, namely arriving late at night and permission by Mangrove's driver.



57. That the Claimant's prayer for reimbursement for fuel purchased on 12th December 2022 was dishonest since the Claimant had the motor vehicle from 11th – 12th December 2022 while not in the course of his employment, thus breaching his employment contract.
58. Counsel submitted that the Claimant's recklessly handled a motor vehicle hired from Mangrove thereby exposing the respondent to potential liability as the Claimant admitted that he had a tyre burst and the tyre and rim were damaged and as confirmed by RW3, the damage in question could only arise if the vehicle was driven with a flat tyre for a long distance, yet it had a spare tyre which the claimant used to deliver the motor vehicle.
59. That the Head of Sales and Marketing had received a complaint from the respondent's distributor, Elobase of the Claimant's abusive altercation with a member of staff, and the Claimant admitted the same at the hearing and Mr. Collins Alubokho had to visit Elobase to offer an apology.
60. On procedure, Counsel submitted that the Claimant was taken through a fair process as he responded to the notice to show cause and participated in the hearing and the respondent was under no obligation to issue a warning letter.
61. On reliefs Counsel submitted that none had been proven and no exceptional circumstances had been shown for reinstatement to issue and cited the decisions in Kenya Airways Ltd V. Aviation & Allied Waken |Union Kenya & 3 Others (2014) eKLR and Joshua Rodney Manmbol V Kenya Revenue Authority (2021) eKLR.
62. On compensation, Counsel cited the decision in Rober Kimutai Rutto V Hotel Kathy Ltd (2015) eKLR and Benson Muraguri Maina V Kassam & Bosco Ltd (2016) eKLR to urge that if the termination of employment was found to be unfair, the Claimant was not entitled to any compensation or only nominally as he contributed to the termination of his employment.
63. That the remedy of general damages was unavailable in case of unfair termination.
64. On the Counter-claim, Counsel urged the court to enter Judgment against the Claimant for the laptop and if any award is made in favour of the Claimant, the sum of USD 1,260 be set off against it.

Analysis and determination

65. Having considered the Claim, response by the respondent, evidence by the parties and submissions by Counsel, the issues for determination are:-
 - i. Whether termination of the Claimant's employment by the respondent was unfair.
 - ii. Whether the Claimant is entitled to the relief sought.
 - iii. Whether the respondent is entitled to the Counter-claim.
66. As regards termination of the Claimant's employment, Counsels have adopted opposing positions citing different reasons. While the Claimant's Counsel urges that it was unfair for want of a valid reason (s) and fair procedure, Counsel for the Respondent submitted that it was fair as the respondent had valid reasons and invoked a fair procedure.
67. It is common ground that the Claimant was an employee of the Respondent effective 1st November 2022 under a written contract of employment dated 12th October 2022, as a Product Specialist Western Region, and served until his employment was terminated by the Respondent vide letter dated 2nd May 2023, 6 months later on various grounds amounted to gross misconduct.



68. It is trite that for a termination of employment to pass the fairness test as provided by Section 45 of the *Employment Act* there must have been a substantive justification for the termination and a fair procedure as held in *Walter Ogal Amuro V Teachers Service Commission* (20130 eKLR).
69. The Court of Appeal expressed similar sentiments in *Maima Khamis V. Oxford University Press (EA) Ltd.* (2017) eKLR.

Reason(s) for termination

70. The notice to show cause dated 11th April 2023 itemised 5 charges against the Claimant namely: -
- a. Lodging a fraudulent claim to the Supervisor for reimbursement on 12th December 2022 (Public holiday) for fuel yet he was not on official duty.
 - b. Damaging a vehicle belonging to Mangrove due to recklessness and exposing the respondent to liability.
 - c. Failure to return a vehicle to Mangrove on 10th December 2022 and kept it for an extra two days.
 - d. Proceeding on leave without approval of the immediate supervisor and without communication.
 - e. Abusive altercation with an employee of Eldobase.
71. In his response, the Claimant stated that he left Kisumu at 5:30 p.m., using Kisumu – Luanda Sabatia-Bungoma- Eldoret route and it was raining and stopped at Mumias at 7 p.m. for rains to subside, left at 8 pm had a tyre burst at Turbo, reported the same to the Supervisor and Mangrove, arrived late and requested and was allowed by an undisclosed person to deliver the car on 12th December 2022 and denied having been reckless. He stated that he had no intention to defraud the employer.
72. On leave, the Claimant stated that he took emergency leave on 8th March 2023 to attend to his ailing father and spoke to Mr. Said Ramadhani, the respondent’s IT specialist on 7th March 2023 to help him apply for leave on the Dynamics 365 system and took 7 days leave via email to resume on 17th March 2023 and his brother told him that Mr. Robert Mayama had extended leave, which he found strange.
73. On the altercation the Claimant stated that his directions to Ms. Saida were firm and she may have misunderstood him.
74. The response was silent on why the claim for reimbursement for fuel incurred on a non-working day, as 12th December 2022 was a public holiday.
75. On cross-examination, the claimant admitted that he had no evidence of having called the driver Mr. Mwanga referred him to or having called the supervisor on the alleged tyre burst and it was the Supervisor who called at around 11.00 p.m., after being informed by Mr Mwanga of Mangrove.
76. In his response to the notice to show cause, the Claimant is silent on the time when he arrived at Eldoret having left Mumias at 8 p.m. and the accident was at Turbo.
77. Similarly, RW1 testified that he released the Claimant at 4.00 p.m. as he notified him that he was not comfortable driving at night.
78. During the hearing, the Claimant testified that he arrived at Eldoret at 10.00 p.m. and notified Mr. Mwanga of the tyre burst. It is unclear to the court why the Claimant did not inform his supervisor about the tyre burst and the late arrival and explain to him the directions Mr. Mwanga had given him to keep him in the loop, including why he could not return the motor vehicle on 11th December 2022 and



why he had to fuel it on a public holiday, if he was already in Eldoret at 10.00 p.m. on 10th December 2022 when the handover was supposed to happen.

79. Intriguingly, the Claimant's written statement dated 22nd May 2023 makes no attempt to rebut the allegations made against him which was by design and the only evidence attributable to him on the allegations is what emerged during cross-examination, re-examination, response to the notice to show cause and the hearing.
80. From the evidence on record, it is clear that on the 10th December 2022, the Claimant was given a motor vehicle by Mangrove in Eldoret for an official engagement in Kisumu and the motor vehicle was to be returned on the same day but it was not.
81. Having been given at the behest of the employer any retention beyond 10th December 2022 ought to have been authorised by the employer as it was the respondent who had contracted for the motor vehicle for a single day.
82. The Claimant neither alerted his Supervisor about the late arrival or tyre burst at Turbo or anywhere else and his Supervisor had to learn about it from a 3rd party.
83. It follows that the Claimant retained the motor vehicle belonging to Mangrove beyond the duration contracted by the employer without the employer's approval which was necessary as confirmed by RWIII, on re-examination.
84. Closely related to the failure or refusal to return the motor vehicle to Mangrove as instructed by the respondent, the Claimant returned a damaged motor vehicle as the tyre and rim were damaged beyond repair, and a missing wheel cap, facts he did not controvert.
85. It is common ground that a tyre burst could occasion an accident if the motor vehicle is speeding as it is abrupt and unexpected, and the motor vehicle cannot move properly as it loses its balance.
86. A typical tyre burst does not shred the tyre or destroy the rim as some air is still left and the motor vehicle can move for a few meters.
87. As testified by RWIII, a tyre burst or loss of tyre air can only occasion the shredding of the tyre and unreparable damage to the rim if the motor vehicle is driven for a long distance, which appear to have been the case in this instance.
88. It is common knowledge that a typical tyre burst does not damage the rim or occasion the loss of the wheel cap. Similarly, a motor vehicle with a flat tyre is uncomfortable to drive and a reasonable driver ought to know that there is a problem and stop to check.
89. Evidence on record reveal that Mangrove had to buy a wheel, rim and wheel cap to replace the damaged wheel and rim and the misplaced wheel cap.
90. RWIII testified that Mangrove raised the issue with the Respondent immediately.
91. The Claimant was evidentiary unable to exculpate himself from having handled the motor vehicle carelessly and recklessly, thus exposing the employer to potential liability.
92. On leave without authority the Claimant admitted having taken emergency leave on 8th March 2023 for 7 days to resume on 15th March 2023 but neither notified his Supervisor nor fill in the same on Dynamics 365, which was the normal method of seeking leave.



93. By email dated 15th March 2023 at 8.48 a.m. to one Mr. Saidi Ramadhani Ogada the respondent's IT specialist the Claimant states

“Following our discussion yesterday, I have taken an EMERGENCY LEAVE to attend urgent personal matters. I will fill the forms in Dynamics before mid-day.

Thank you.”

94. This email is clear that the Claimant had taken emergency leave, whether the Supervisor was aware or not or would not have approved it. It is merely copied to him for information. Regrettably, the Claimant did not actualize the promise to fill in the forms in the system or call the supervisor or Human Resource.

95. Worthy of mention, the email was merely conforming that leave had been taken though no dates were mentioned.

96. The Claimant took the leave on 8th March 2023 and appear to have talked to Mr. Saidi Ramadhani, in an endeavour to regularise the leave, but on the date he was due back.

97. The Supervisor's email of even date at 10.10 am to the Claimant and Said Ramadhani Ogada merely communicates what he had been informed by one Pamela who passed over the information to him.

It is clearly not an approval of leave or approval of an extension.

98. Having admitted that he took 7 days leave via email (a copy of what was not filed) and had no verifiable extension from the Supervisor or indeed anyone, the Claimant absented himself from duty without authority of the Supervisor or human resource.

99. The alleged extension from one Robert Mayama is unverifiable and the Claimant never testified about who informed him that his leave had been extended by whom and at whose instigation as he did not apply for any extension.

100. On the alleged altercation with a member of staff of Eldobase, the Claimant admitted that a “discussion” took place between the two and the question is why an employee would complaint about a discussion with another employee of a different company.

101. From the records, it is discernible that the claimant was harsh and rude to Ms. Saida and apologised at the hearing.

102. Finally, as regards the fraudulent claim for reimbursement, the court is persuaded that the claim may have been irregular but not intended to defraud the company.

103. The Claimant simply spent the cash on 12th December 2022 yet he ought to have spent the same on 10th December 2022 thus misrepresenting the claim.

104. The respondent could not evidentiary demonstrate that the Claimant intended to defraud it.

105. In determining this issue the court is additionally guided by the provisions of section 43 (2) of the [*Employment Act*](#) which provides.

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

See also *Naima Khamis V Oxford University Press (EA) Ltd. (Supa)*.



106. In *Galgalo Jarso Jiilo V. Agricultural Finance Corporation* (2021) eKLR B.O. Manani had this to say:
- “... All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.”
107. Finally, in *Kenya Revenue Authority V. Reuwell Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal stated:
- “The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee’s services.
- That is a partly subjective test.”
108. The foregoing is fortified by the *Halsbury’s Laws of England* (4th Edition) Vol. 16 (1B) Para 642 on the range of reasonable responses test as applied by Lord Denning in *British Leyland (UK) Ltd V. Swift* (1981) IR. L.R al as follows:
- “...The correct test is; was is reasonable for the employer to dismiss him, if no reasonable employer would have dismissed him, the dismissal was unfair.
- But if a reasonable employer might reasonably have dismissed him, 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; another quite a different view...
- If it was quite reasonable to dismiss (him) then the dismissal must be upheld as fair though some other employer may not have dismissed him.”
109. Guided by the foregoing provisions and propositions of law, the court is satisfied that the respondent has provided sufficient evidence to prove that the Claimant’s conduct in relation to the handling of the motor vehicle hired out to the respondent, failure to return the same on 10th December 2022 as required and proceeding on leave without notifying the Supervisor and extending it without authority amounted to gross misconduct which entitled the respondent to take the step of summarily dismissing the Claimant from employment.

Procedure

110. It is common ground that the procedural tenets of termination of employment are those prescribed by the provisions of Section 41 of the *Employment Act*, and are mandatory as held by the Court of Appeal in *Pius Machafu Isindu V. Lovington Security Guards Ltd* (2017) eKLR.
111. Both the Employment and Labour Relations Court and the Court of Appeal have variously isolated the elements of Section 41 of the *Employment Act* to include grounds of termination, explanation of the grounds in a language understood by the employee, entitlement of the employee to the presence of a colleague during the explanation and hearing and considering any representations made by the employee and the colleague.
- See *Postal Corporation of Kenya V. Andrew K. Tanui* (2019) eKLR.
112. In the instant case, it is common ground that the respondent issued, and the Claimant responded to notice to show cause which catalogued five (5) charges and by letter dated 18th April 2023 he was invited for a disciplinary hearing schedule for 21st April 2023 at 10.00 a.m. at the respondent’s office at Crater



- Automobiles Buildings in Nairobi to address the notice to show cause and was notified of the night to be accompanied by a colleague.
113. Email communication reveal that hearing could not proceed on 21st April 2023 as the Claimant was unwell and the day was declared a public holiday. Hearing was slated for 26th April 2023 at the same venue and took place and the Claimant explained that he was unable to secure a representative, an issue he adverted in his email to the Human Resource Specialist dated 24th April 2024 which expressed his readiness for the hearing.
 114. During the meeting, the Claimant authorised the committee to proceed in the absence of a colleague and the Human Resource specialist read out all the charges to the Claimant.
 115. The Claimant was also given a chance to respond and thanked the respondent for the opportunity to work for it and was prepared for any decision but did not sign the minutes.
 116. The Claimant admitted in evidence that Human Resource recorded the minutes but he neither read nor signed them.
 117. RWII did not testify why the Claimant was not given a copy of the minutes or the raw draft to go through and sign.
 118. The minutes could also have assisted him in lodging the appeal which was a contractual term under Clause 13.1 of the Employment Contract and the Managing Directors decision was final.
 119. The Claimant faulted the process that he was neither allowed to appear with a witness nor an advocate and was not given a copy of the minutes to confirm whether they were a fair reflection of the proceedings.
 120. Intriguingly, the Claimant maintained that he had made it clear that he would only return the laptop if he felt that he had been accorded a fair trial and it was safe.
 121. It is common ground that the Respondent's Managing Director declined to entertain the claimant's appeal because he had not handed over the respondent's laptop.
 122. While the laptop was and remains the respondent's property and the Claimant was holding it as an employee, it be hooved, the claimant to return it as promised vide email to Human Resource. However, the respondent could not use the Claimant's refusal to handover the laptop as a justification to deny him due process in the termination of his employment.
 123. Having invoked the appellate process in his contract of employment, it was incumbent upon the respondent's Managing Director to determine it and communicate the outcome to the Claimant. That, in the courts view, would have accorded the respondent an unassailable position in the demand for the laptop as it would have no outstanding obligations to the Claimant.
 124. However, in the circumstances, the respondent did not conclude the entire disciplinary proves as ordained by the contract of employment between it and the respondent, which in the court's view, vitiated the process procedurally as the right to a fair hearing extends to the appellate process and it is a constitutional imperative.
 125. The Claimant's argument that he was denied the right to be accompanied by a witness is, in the court's view an afterthought and made in bad faith as at no point did not indicate in his email communication with the Human Resource on 18th, 20th and 24th April 2023, though he had indicated his desire to be accompanied by an advocate who is not a witness, but an advocate.



126. In sum, the respondent's disciplinary process can only be faulted on the premise that it failed or refused to give the Claimant the draft minutes to confirm and sign the same, having attended the meeting, which is important as the proceedings were about him and affected him directly.

127. Secondly, the failure or refusal by the Respondent's Managing Director to hear and determine the appeal denied the claimant the right to be heard at the appellate stage as embodied in the employment contract.

Section 45 (4) of the *Employment Act* provided that:

A termination of employment shall be unfair for the purposes of this Part where—

- (a) the termination is for one of the reasons specified in section 46; or
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

128. In addition, Section 45 (5) of the *Employment Act* provides that:

In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

- a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision, among other considerations including conduct and capability of the employee before termination, compliance with statutory requirements previous practice of the employer in such circumstances and any previous warning letters.

129. The provisions of Section 45 (4) and (5) of the *Employment Act* are couched in mandatory terms and the court must therefore consider the parameters set out in Section 45 (5) of the Act.

130. In the instant case although the procedure adopted by the Respondent generally met the requirements of Section 41 of the *Employment Act*, its handling of the appeal fell short the requisite threshold and being a term of the contract of employment, it vitiated the procedure rendering the termination of the Claimant's employment procedurally unfair and the court so finds and holds.

a. Appropriate Reliefs

131. Having found that the termination of the Claimant's employment was procedurally wanting for non-availment of minutes of the disciplinary hearing and hearing and determination of the appeal, the declaration that the termination of employment was procedurally unfair is merited.

b. Reinstatement;

132. This is one of the reliefs under Section 12 (3) (viii) of the *Employment and Labour Relations Court Act*, read with Section 49 (3) (a) of the *Employment Act*.

133. Analogous to other reliefs under Section 49 of the *Employment Act*, the remedy of reinstatement is discretionary as held by Maraga JA (as he then was) in *Kenya Airways Ltd V. Aviation and Allied Workers union & 3 others* (supra).

134. In determining whether or not to award any relief under section 49 of the *Employment Act*, the court is enjoined to take in consideration all the relevant factors set out under Section 49 (4) of the *Employment Act*.



Act such as wishes of the employee, circumstances in which termination of employment took place including the extent, if any to which the employee contributed, practicability of reinstatement, length of service, exceptional nature of the circumstances, expectations of the employees length of service, opportunities available to the employee for securing comparable or suitable employment, value of any severance pay among others.

135. In the instant case, it is clear that the Claimant substantially contributed to the termination of his employment by engaging in discreditable conduct, such as careless handling of Mangroves motor vehicle, failure to return the motor vehicle on 10th December 2022 as he was supposed to as it was hired for a single day and proceeding on leave without the supervisor's knowledge or approval.
136. Equally, the Claimant adduced no evidence of how he had endeavoured to mitigate the loss of employment but appealed to summary dismissal from employment and sought reinstatement.
137. Although Counsel submitted that the Claimant expected to remain in the employment of the Respondent till retirement, the Claimant did not state so in his evidence.
138. The Claimant had served for only six (6) months which is too short.
139. As regards practicability of reinstatement the court is guided by the sentiments of the Newzealand Court of Appeal in Newzealand Educational Institute V. Board of Trustees of Auckland Normal Intermediate School (1994) 2 ERN2 414 (CA) cited with approval by the Court of Appeal in Kenya Airways Ltd. Case (Supra).

“Whether... it would not be practicable to reinstate (the employee) involves a balancing of the interests of the parties and the Justices of their cases with regard not only to the past but more particularly to the future.

It is not uncommon for this court or its predecessor having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship, practicability is capability of being carried out in action feasibility or the potential for reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences.”

140. The court is in agreement with these sentiments.
141. Guided by the interests of the parties and the justices of their cases both present and future, the court is not persuaded that reinstatement of the Claimant is the most appropriate relief in the circumstances and it is accordingly disallowed.

c. Compensation

140. This remedy is alternative to reinstatement.

Having found that the summary dismissal of the Claimant was procedurally flawed in certain respects, the claim for compensation under Section 49 (1) (c) of the Employment Act is merit.

Relying on the parameters under Section 49 (4) of the Act considered above, the court is satisfied that equivalent of two (2) months gross salary is fair Kshs. 160,000.00.

d. General damages for unlawful termination of employment and discrimination.

141. The claimant did not allege or demonstrate entitlement to general damages for anything and in what circumstances.



Moreover, case law is unambiguous that general damages are not available for unfair or unlawful termination of employment as submitted by the Respondent's counsel.

See *George Onyango Akun V. G4S Security Services Ltd* (2013) eKLR.

The claim lacks merit and it is dismissed.

Counter claim

142. In its counter claim the respondent alleged that it issued the claimant with a laptop valued at USD 1260 and prays for the sum of USD 1260 as its value.
143. The claimant admitted on cross-examination that he is in possession of the laptop and had admitted same in his appeal and vowed not to release it unless satisfied that he was accorded a fair trial.
144. Analogous to the Respondent's Managing Director who declined to hear and determine the Claimant's appeal on the ground that the Claimant had retained the respondent's laptop, the Claimant had no Justification to retain the laptop. It belonged and still belongs to the Respondent. It was a part of the Claimant's tools kit in the performance of his duties as the Respondent's employee and his possessory rights were extinguished when his employment was terminated and he is obligated to return it unconditionally.
145. To its credit the respondent availed a purchase order dated 4th July 2022 as the date of delivery.
146. Although the Respondent prays for USD 1260 as the value of the laptop since it was purchased in July 2022 its value cannot be USD 1260 in November 2024, more than two (2) years later, as its value has depreciated owing to its limited useful lifespan which is not more than 3 years due to rapid obsolescence.
147. Regrettably, the respondent did not disclose its policy on depreciation and the estimated salvage value of the laptop as using the cost model, the depreciable value of the laptop is obtained by subtracting the estimated salvage value from the cost of the laptop and the depreciable value is then divided by the economic useful life of the laptop.
148. Assuming that the laptop has no salvage value and is more than 2 years since it was purchased and depreciated at the same rate throughout the 3 years, only one third of the value of the laptop is remaining USD 420.
149. However, granted that the laptop was life by the Claimant for six (6) months only, the sum of USD 500 is reasonable
150. The upshot of the foregoing is that both the Claimant's claim and the Respondent's counter-claim are successful and are awarded as follows:-

Claimant

- (a) Declaration that termination of employment was procedurally unfair.
- (b) Equivalent of two (2) months gross salary, Kshs. 160,000.

Respondent

USD 500 to be set-off against the Claimant's award herein above.

Parties shall bear their own costs.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF NOVEMBER, 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

