



**Bittok v New Kenya Cooperative Creameries Limited (Cause 408 of 2017)
[2024] KEELRC 13421 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 408 OF 2017
DN NDERITU, J
DECEMBER 13, 2024**

BETWEEN

TOM BITTOK CLAIMANT

AND

NEW KENYA COOPERATIVE CREAMERIES LIMITED RESPONDENT

JUDGMENT

I. INTRODUCTION

1. In a memorandum of claim dated 21st September, 2017 filed in court on 22nd September, 2017 the Kenya Union of Commercial, Food and Allied Workers, a trade union filed a claim for and on behalf of the claimant praying for various remedies for alleged unfair and unlawful termination of the claimant by the respondent. As expected, the memorandum of claim was accompanied with a verifying affidavit, a list of witnesses, a written statement by the claimant, a list of documents and copies of the listed documents.
2. With the leave of the court on 2nd March, 2023 the claimant filed an amended memorandum of claim dated 1st March, 2023 through Kipng'eno & Associates Advocates. The amended memorandum of claim was accompanied with a verifying affidavit.
3. In the amended memorandum of claim the claimant is seeking the following reliefs –
 - a. A Declaration that the termination of the claimant's employment was in violation of Sections 41,45 and 46(a) of the *Employment Act,2007* and was therefore unlawful and unfair.
 - b. An order that the respondent do pay the claimant his entitlements in the sum of Kshs515,888.5 as particularized herein below;
 - i. One month's salary in lieu of notice @Kshs30,167=



- ii. Full gross payment for the period of hospitalization from 192014- 2592014=25 days gross salary =Kshs30,167= (basic salary) +Kshs7,368= (house allowance) =Kshs37,535= – 25 days gross salary, therefore is: 37,535 x 2530=Kshs31,219.20
 - iii. Payment in lieu of leave @4 days x Kshs30,167= Kshs4,022.30
 - iv. Compensation equivalent to 12 months' gross salary in accordance with section 49(1) (c) of the *Employment Act* = Kshs37,535= in(b) above x 12=Kshs450,420=.
- c. Costs of this suit.
 - d. Interests on the amount to be awarded at court rates
 - e. An order that the respondent do issue the claimant with a certificate of service.
 - f. lto grant in the circumstances.
4. The respondent entered appearance through Munyao Muthama & Kashindi Advocates on 19th October, 2017 and filed a memorandum of defence on 6th July, 2018 seeking that the entire cause be dismissed with costs for want of merit. Alongside the memorandum of defence the respondent filed a bundle of documents in support of the defence.
 5. On 13th April, 2023 the respondent filed a statement of response after the claimant filed an amended memorandum of claim.
 6. On 30th June, 2023 the claimant filed a response to the respondent's statement of response dated 16th June, 2023. The response was accompanied with the claimant's written statement dated 19th June, 2023 which he relied on as his evidence-in-chief, the claimant's list of documents, and copies of the listed documents. Subsequently, on 20th November, 2023 the claimant filed a list of supplementary documents and copies of the listed documents.
 7. On 3rd November, 2023 the respondent filed a list of documents, copies of the listed documents, and the written statement by Michael K. Mukopi (RW1).
 8. The claimant's case came up in court for hearing on 5th February, 2024 when the claimant (CW1) testified and closed his case.
 9. The defence was heard on 13th March, 2024 when RW1 testified and the respondent's case was closed.
 10. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Kipngeno, filed his submissions on 10th June, 2024 while the respondent's counsel, Miss Ngei, filed her submissions on 30th July, 2024.

II. THE CLAIMANT'S CASE**

11. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence tendered by the claimant, and the written submissions by his counsel.
12. In his testimony in court, the claimant adopted his filed witness statement on record dated 19th June, 2023 as his evidence-in-chief. He stated that the respondent engaged him as a temporary employee in March, 2005 as a machine operator. He was confirmed on permanent and pensionable terms on 1st December, 2010. He testified that he was dismissed on 24th September, 2014 effective from 1st September, 2014 on allegations that he had absconded duty from 1st September, 2014 to 18th September, 2014.



13. The claimant's case is that he did not abscond duty as he had been admitted in a hospital, a position allegedly known to the respondent. He stated that robbers attacked him in the night of 31st August, 2014 while he was headed home from work and he was taken to hospital by a good Samaritan. He stated that while at the hospital, he requested the hospital to inform the respondent and a call was placed to the respondent's headquarters. He further stated that his medical bill was settled by the respondent's insurer, Britam. He stated that he was admitted in hospital from 31st August, 2014 to 25th September, 2014.
14. He stated that the above notwithstanding the respondent made no efforts to contact him and the show-cause letter dated 9th September, 2014 was not served upon him before he was dismissed.
15. The letter of dismissal dated 10th July, 2021 stated as follows –

‘Ref: NKCCPER.1309W21172014MKMsao

Mr. Tom Bitok-1309W

New KCC Ltd

DANDORA FACTORY

Dear Sir,

RE: DISMISSAL

Reference is made to the above mentioned subject.

It has been brought to our attention that you have absconded work from 1st September to 18th September, 2014 without informing your controlling manager. Efforts to communicate with you are fruitless.

You have also previously had indiscipline cases for being absent from duty on the 16th and 17th August, 2014. You have been asked on two occasions (9th September, 2014 and 19th August, 2014) show cause why disciplinary action should not be taken against you for absenteeism but you have not replied to the communication. Similarly, you were involved in a disciplinary case on 24th June, 2013 for over packing packets of strawberry yogurt and this led to your suspension on 6th June, 2013, you were given a benefit of doubt and warned to desist from any behaviour that may cast doubt on your integrity. You were reinstated on 24th July, 2013 and on 28th February, 2014 you were served with a show cause for negligence of duty, to which you never responded.

This letter therefore serves to advise you of your dismissal from employment with effect from 1st September, 2014 in accordance with the provision of CBA Clause 22 f(ii) for being absent without permission.

Yours faithfully,

For: NEW KENYA CO-OPERATIVE CREAMERIES LIMITED

MICHAEL MUKOPI

INDUSTRIAL RELATIONS MANAGER”

16. He further stated that he appealed the dismissal vide a letter dated 13th October, 2014 but the dismissal was upheld through a letter dated 18th March, 2015. The said letter of appeal produced as an exhibit by the claimant stated as follows –

“TOM K. BITTOK -13910W



BOX 30131
NRB- KENYA
MON- 13-10-2014
MICHAEL MUKOPI
INDUSTRIAL RELATION MANAGER
NEW KENYA CO-OPERATIVE CREAMERIES LIMITED

Dear SirMadam,

RE APPEAL

I am Tom. K. Bittok, Machine Operator Dandora Factory, packaging section from 2005 to 2014 and I am writing to appeal from my 1st September to 18th September, 2014 absconding duties.

On 30th October, I left work(Dandora)at 10. 20pm.at around 10:45pm I alighted from vehicle Tassia stage, after 200m from the road I was attacked by unknown people hit right hand which I had long fracture not heal since 2007 stolen my phone and disappeared. On 1st September I reported to hospital, I have enclosed the medical documents detailing my stay at Bristol Park Healthcare Centre. Therefor, the reason as to why I fail to communicate on time was due to my handset, I am not good in crumming numbers or saved them somewhere, but on 1st September Doctor communicated direct to HR Department about my condition. After period of time also communicated with my controlling manager, Mr. Justus Njenga, supervisor and shop steward. I feel that situation is not warranted because my sick sheet was signed on 6th September but due to my long period it was ignored.

The medical situation which prevented me from work or beyond my control since I got fracture. I do have 2-xrays one before operation and the other after operation, shows clearly my condition which I use to be. Am sure my controlling manager is happy about this, he used to tell me to go to hospital 3 years back and ne is back, I have done it. I have medical proof prior should be given the last chance; I would ask for to kindly grant me another opportunity. I look forward to meeting you. I appreciate the time that you have taken to read my appeal.

Yours sincerely,

Tom K. Bittok”

17. He stated that he informed his union and a conciliation meeting was held and a recommendation was made under cover of a letter dated 12th April,2014 that either he be reinstated or compensated. The respondent, however, refused to comply with the recommendation.
18. On cross-examination, he stated that as at the time of dismissal his gross monthly salary was Kshs37,000=. He stated that despite the letter from the hospital indicating that he was admitted on 2nd September, 2014 he was actually admitted from 31st August, 2014 until 8th September, 2014 when he was discharged. However, he was re-admitted on 20th September, 2014 and discharged on 25th September, 2014. He testified that contrary to the indication by the hospital that he had been involved in a road traffic accident, he had been attacked by robbers. He stated that the contradiction in what had happened emanated from what the good Samaritan informed the hospital on the assumption that



he had been involved in a road accident. He conceded that there was no proof that he attempted to reach the respondent.

19. He stated that he was not served with the show-cause letter. He stated that he appealed the dismissal and admitted that he was invited for a hearing on the appeal.
20. He conceded that the letter from the union dated 14th May, 2015 also indicated that he was admitted to hospital on 2nd September, 2014 until 25th September, 2014. He testified that his colleagues visited him at the hospital but he did not name or call any of them as his witnesses. He insisted that the injury to his arm was from the attack by robbers and not from a road traffic accident. He denied that he was a habitual absentee from work and insisted that the letters produced by the respondent had not been served upon him and were purportedly only produced in court to deny him compensation.
21. It is on the basis of the foregoing that the claimant pleads and prays that the dismissal was wrongful and prays for the reliefs set out in the introductory part of this judgment.

III. THE RESPONDENT'S CASE

22. The respondent's case is contained in the statement of response to the amended statement of claim, the oral and documentary evidence adduced through RW1, the head of human resources, and the written submissions by its counsel.
23. In his testimony in court, RW1 stated that the claimant was dismissed for absenteeism from 1st to 18th September, 2014. He stated that a memo dated 9th September, 2014 (D-Exh-1) was issued as a show-cause letter but the claimant did not respond thereto, and the respondent could not reach him. He stated that the respondent's payroll was completed on 20th of each month and thus the claimant could not be paid for September, 2014.
24. He stated that the claimant was dismissed under Section 44 of the *Employment Act* (the Act) based on his absenteeism. He further stated that the claimant thereafter resurfaced and wrote an appeal dated 13th October, 2014. The claimant was invited to a hearing during which he appeared with his union representative on 19th February, 2015. He stated that the claimant brought medical records to the appeal hearing which contained contradictory information on how he had been injured. He stated that the claimant was allegedly attacked by robbers on 30th August, 2014 and taken to hospital by a good Samaritan while the medical reports indicated that he had been involved in a road traffic accident and taken to hospital by his spouse.
25. RW1 further stated that the claimant could not explain at what time he was admitted to hospital, whether it was at 10.45 pm or 2.00 am. He stated that no report was made to the police by the claimant or his spouse of a robbery. He stated that the claimant was admitted to hospital on 2nd September, 2014 and discharged on 8th September, 2014 as an outpatient. He further stated that the claimant's medical records indicated that he had been admitted on 20th September, 2014 and discharged on 25th September, 2014 but no discharge summary was availed. He stated that the claimant's account of events was full of contradictions and after the hearing of the appeal his dismissal was upheld. He further testified that the claimant had a poor disciplinary record and that on termination his terminal dues were paid in full.
26. In cross-examination, RW1 stated that he was not sure whether the show-cause letter was served upon the claimant. He further stated that he was in-charge of discipline and claims processing at the time of the claimant's dismissal and confirmed that the claimant worked as a machine operator. He stated that it is only after the claimant was dismissed that he claimed that he had been hospitalized. He stated that the name of the hospital Bristol Park Health Care Centre appearing on the letters provided by



the claimant was also contradictory in that the respondent's team investigated and allegedly confirmed that the said letters filed by the claimant were forgeries. He stated that no employee reported that the claimant had been hospitalized and he could not confirm if any of them had visited him in the hospital as alleged by the claimant. He stated that although an employee is entitled to 90 days' sick leave, the claimant was not on sick leave.

27. He claimed that the respondent complied with sections 41, 43,44 & 45 of the Act before dismissing the claimant. He claimed that the sick-sheet produced by the claimant was not an official document issued by the respondent.
28. In re-examination, RW1 insisted that the show-cause letter was issued to the claimant alongside the letter of invitation to the hearing, but claimant failed to acknowledge receipt thereof.
29. He stated that the report by the conciliator was biased in favour of the claimant and that is the reason why the respondent did not agree therewith.

IV. SUBMISSIONS BY COUNSEL

30. On the one hand, the claimant's counsel submitted on three issues – Whether the claimant's dismissal was fair and lawful; Whether the claimant is entitled to any of the reliefs sought; and, Who shall pay the costs of this suit.
31. It is submitted that for termination to be deemed fair, an employer must prove that there was justifiable reason(s) to dismiss an employee under Sections 43 & 45 of the Act. It is submitted that RW1 conceded that the claimant was not served with a show-cause letter and the claimant was not accorded a chance to be heard contrary to the rules of natural justice -audi alteram partem- and Section 41 of the Act. Citing Linus Barasa Odhiambo V Wells Fargo Limited [2012] eKLR, Kudheisha Workers Union V Board of Governors, Kerugoya Boys Secondary School (2012) eKLR; and Shankar Saklani V DHL Global Forwarding (K) Limited (2012) eKLR, it is submitted that notice and a hearing are mandatory before an employee may be dismissed. It is submitted that the respondent denied the claimant an opportunity to be heard.
32. It is submitted that under Section 35 of the Act the respondent was obligated to issue a notice to the claimant before dismissal and accord him a hearing. It is submitted that failure to accord the claimant a hearing contravened Article 47 of *the Constitution* and amounts to unfair administrative action. To buttress this assertion counsel cited Kenneth Njiru Njorani v Dodhia Packing Limited (2012) eKLR. It is submitted that the respondent failed to reasonably exercise its mind before dismissing the claimant contrary to the rule of reasonableness enunciated in the Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223 quoted with approval in Shankar Saklani(supra).
33. It is submitted that the claimant was denied both substantive and procedural fairness. Counsel cited various decisions in this regard including Mary Chemweno V KPLC (Ltd) (2014) eKLR; Walter Ogal Anuro V TSC (2013) eKLR; Janet Nyandiko V KCB (2017) eKLR; Pamela Nelima Lutta V Mumias Sugar Co. Ltd (2017) eKLR; Hosea Akunga Ombworu v Bidco Oil Refineries Limited (2017) eKLR; and National Bank of Kenya V Anthony Njue (2019) eKLR.
34. Citing Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019(2021) KESC 12(KLR) it is submitted that the claimant was discriminated in contravention of Article 27 of *the Constitution* and Section 5 of the Act on medical grounds.
35. It is submitted that the claimant having fractured his arm and his phone having been stolen could not reach the respondent or his spouse and requested the doctor attending him to inform them. It is submitted that the contradictions in the claimant's medical documents are not his fault as



he had no control over that. It is submitted that the respondent failed to consider the claimant's medical documents before taking the disciplinary action and dismissal. It is further submitted that the respondent failed to invoke the Collective Bargaining Agreement(CBA) in place in considering that the claimant was on his sick leave, as he was entitled to 90 days' sick leave with full pay. He was absent for 18 days and hence had a balance of 72 days of sick leave. It is submitted that the respondent failed to produce minutes of the appeal hearing held on 19th February, 2015 for the court to consider and contextualize what transpired during that meeting.

36. For all the foregoing reasons the court is urged to find in favour of the claimant and award all the reliefs as prayed.
37. On the other hand, counsel for the respondent identified the following issues for determination – Whether the summary dismissal was substantively fair; and, Whether the claimant is entitled to the reliefs sought.
38. It is submitted that under Section 43(2) of the Act an employer may terminate an employee if the employer genuinely believes that reasonable grounds exist. Citing *British Leyland UK Ltd V Swift (1981) I.R.L.R 91* as cited in *Joseph Mwaniki Nganga V United Millers Limited (2022) eKLR*, it is submitted that the claimant was dismissed in accordance with the provisions of the CBA and the applicable law for being absent from work without permission. It is submitted that despite the respondent's efforts to reach the claimant through his listed contacts, the employer could not reach the claimant. It is submitted that absconding duty is one of the grounds for summary dismissal under Section 44 of the Act. It is submitted that the failure by the claimant to adduce evidence of his communication with the respondent on his whereabouts or sending a family member to report his sickness and hospitalization the claimant became liable for absconding duty and amenable to dismissal.
39. It is submitted that the claimant was issued with a show-cause letter dated 9th September, 2014 but he did not respond thereto. It is further submitted that the claimant was dismissed on 24th September, 2014 based on clause 24 of the CBA. It is submitted that the claimant appealed the dismissal vide the letter dated 13th October, 2014 and the respondent invited him to a hearing of the appeal on 19th February, 2015. It is submitted that the respondent found the claimant's explanation contradictory and the dismissal was upheld. It is submitted that the claimant availed no evidence that the hospital contacted the respondent or that he sent a relative to inform the respondent of the attack by the robbers and his hospitalization.
40. It is submitted that the sick-sheet availed by the claimant was not signed by any doctor and thus the reason for his termination was valid. It is submitted that the claimant's account of events leading to the accident was contradictory and he admitted in court that false information had been provided to the insurance company to facilitate settlement of a claim. It is submitted that the respondent's insurer covered all accidents and there was thus no need for dishonesty on the claimant's part.
41. It is submitted that the claimant applied for a review of the dismissal through letters dated 14th and 22nd May, 2015 before the claimant's union referred the dispute to the Ministry of Labour. It is submitted that based on Section 43 of the Act the reason for the claimant's dismissal was valid. It submitted that the respondent duly met procedural fairness in that the claimant was issued with a show-cause letter but he failed and or refused to respond. It is further submitted that after the claimant was dismissed on 24th September, 2014 he appealed and was invited to the hearing or the appeal on 19th February, 2014 but his dismissal was upheld and thereafter he was paid his terminal dues.
42. Citing *Richard Kiplimo Koech v Yuko Supermarket Ltd (2015) eKLR* where the court found that absenteeism from duty without permission amounted to gross misconduct, it is submitted that the



claimant's failure to communicate his whereabouts led to the presumption of his absenteeism. It is submitted that the claimant's reliance on contradictory evidence could have been remedied by calling the management of Bristol Park Hospital to confirm the truth on when he was admitted to the hospital and the cause of the injuries. The court is urged to ignore the contradictory documents and allegation by the claimant in that regard.

43. The court is urged to be persuaded by the reasoning in *Ismael Otieno Omollo v Oshwal Education and Relief Board ta Oshwal Academy Mombasa* (2021) eKLR where the decision in *Thomas Dzombo Kirunga v Krystalline Salt Limited*(2010) eKLR was quoted with approval and in *Banking Insurance And Finance Union(Kenya) v Barclays Bank Of Kenya Limited*(2014) eKLR and find that the claimant having been away from work was obligated to make all efforts to inform the respondent of his condition but he failed to do so.
44. It is submitted that it was the respondent who made efforts to find and trace the claimant and issued a show-cause letter to which the claimant did not respond. It is submitted that once the claimant failed to respond to the show-cause letter he squandered the opportunity to express himself through the internal disciplinary mechanism and thus he cannot allege that he was not given a hearing. To buttress this proposition counsel cited *Fridah Nyabonyi Abuya v Virtual HR Services Limited* (2021) eKLR where the court cited *Jackson Butina v Eastern Produce Kenya Limited* (industrial court case No. 355 of 2011).
45. It is submitted that the court should not supervise the internal disciplinary processes. Citing *Ismael Otieno Omollo V Oshwal Education and Relief board*(supra) it is further submitted that the claimant was accorded an opportunity to explain his unauthorised absence from work prior to dismissal and the respondent conducted the process reasonably. It is further submitted that after the claimant's previous misconduct on absenteeism on 16th and 17th April, 2014, and 18th June, 2014 he had been warned to follow the laid out procedure and always submit a sick-sheet before absenting himself from work.
46. The court is urged to find that the claimant's dismissal was lawful and dismiss the cause with costs to the respondent.

V. ISSUES FOR DETERMINATION

47. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence presented from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
 - a. Whether the claimant was wrongfully, unfairly, and unlawfully dismissed or terminated;
 - b. If (a) above is in the affirmative, is the claimant entitled to reliefs sought? and
 - c. What is the appropriate order on the costs of the cause?
48. What constitutes valid reason(s) for terminating an employee and the procedure to be followed in terminating or dismissing an employee is provided for under Sections 41 & 43 of the Act. Section 45(2) of the Act provides as follows –

“ A termination of employment by an employer is unfair if the employer fails to prove –

 - a. That the reason for termination is valid;
 - b. That the reason for the termination is fair reason –
 - i. Related to the employees conduct, capacity or compatibility; or



- ii. Based on the operation requirements of the employer; and
- iii. That the employment was terminated in accordance with fair procedure.”

49. Going by the evidence on record, it is not in dispute that the claimant was an employee of the respondent. The evidence presented by the respondent indicates that the claimant was engaged in March, 2005 and appointed on permanent and pensionable basis on 16th December, 2010. The permanent appointment was confirmed vide a letter dated 26th January, 2011.
50. RW1 testified that he was not sure whether the claimant was served with the show-cause letter. RW1 further testified that the claimant absconded duty and after failing to respond to the show-cause letter he was dismissed. Further, RW1 stated that since the claimant made no efforts to get in touch with the respondent to inform of his hospitalization, the respondent was reasonable in presuming that he had absconded duty.
51. RW1 further testified that the claimant appealed the dismissal and he was accorded an opportunity to argue his appeal on 19th February, 2015. RW1 further stated that upon due consideration of the appeal the claimant’s account of events was found to be contradictory and the dismissal was upheld.
52. However, there are many a decision on what amounts to unfair termination or dismissal – see *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
53. The bottom-line in due process is that an employer should have a lawful reason and adopt a proper and lawful procedure before terminating or dismissing an employee.
54. It is in the context of the foregoing that the facts and evidence in this cause shall be weighed in determining whether the dismissal of the claimant by the respondent was substantially and procedurally fair and lawful.
55. The show-cause letter was issued through an internal memo dated 9th September, 2014. There is no evidence that the same was served and received by the claimant. Further, no disciplinary hearing was conducted whereby the claimant had a right to appear with a fellow employee, union member, or officer of his choice.
56. While the alleged charge against the claimant was serious to warrant summary dismissal under Section 44 of the Act, the claimant was equally entitled to fair hearing (due process) before, during, and after the disciplinary hearing.
57. RW1 conceded that he could not confirm that the claimant had been served and received the show-cause letter. This position was confirmed in the letter of dismissal which indicated that efforts to communicate with the claimant were fruitless.
58. This court has held in the past, and even now, that a disciplinary hearing is not expected to meet the standards of a trial in a court of law as the courts are subject to strict rules of law, evidence, and procedure. However, rules of natural justice apply in disciplinary hearings in that no one may be condemned unheard; an employee has a right to all information and particulars of charges before the hearing; and an employee has a right to test the evidence by way of cross-examination. An employer has to establish a prima facie case against an employee for the hearing to meet the minimum threshold for fair hearing as envisaged under Article 47 of *the Constitution* and the various provisions of the *Fair Administrative Action Act*.



59. It is in the considered opinion of this court that while the respondent may have had grounds in taking disciplinary action against the claimant based on the alleged absenteeism, such grounds needed to be substantiated and notified to the claimant and a notification of the disciplinary hearing issued to the claimant. There was no disciplinary hearing conducted where evidence could have been adduced in support of the allegations. The respondent ought to have summoned and invited the claimant for a disciplinary hearing after serving him with a show-cause letter, and if the claimant failed to show up minutes should have been taken to confirm so. The evidence on record does not confirm that the claimant was served with the show-cause letter.
60. During the hearing in court, evidence confirmed that indeed the claimant did not inform the respondent of his hospitalization. The claimant conceded in cross-examination that he had asked a doctor to call the respondent's manager but no proof that the call was actually made was availed.
61. The evidence on record demonstrates that indeed the claimant failed to inform the respondent that his absence from work was based on medical grounds. While the absence from work may have been genuine, the respondent could not be expected to have known that the claimant was hospitalized as the claimant did not make any efforts to convey that information to the respondent. The claimant testified that he had lost his phone and could not recall any of the contacts and thus the only effort he could have made was to send someone to inform the respondent of his hospitalization. In the circumstances, the respondent had a genuine, reasonable, and or probable ground upon which to initiate disciplinary action against the claimant as envisaged under Section 43(2) of the Act.
62. However, the respondent failed to demonstrate that indeed the claimant was informed of the said allegations, accusations, and charges against him for absconding duty as the show-cause letter was not served upon him. This miscalculation by the respondent violated Section 41 of the Act.
63. On procedural fairness, it is not disputed that no disciplinary hearing was conducted as envisaged under Section 41(2) of the Act. The evidence on record confirms that no hearing was conducted before the claimant was dismissed, even if in his absence. The only hearing that the claimant was allegedly accorded was an appeal after he had already been dismissed. Even so, no minutes were availed in court for the said hearing and only the decision upholding the dismissal was availed.
64. In the circumstances, the court finds and holds that the claimant was denied procedural fairness and to that extent the dismissal was wrongful, unfair, and unlawful.

VI. RELIEFS

65. Having held that the respondent wrongfully, unfairly, and unlawfully dismissed the claimant by failing to accord him procedural fairness the court shall consider each of the reliefs sought as set out in the introductory part of this judgment.
66. Prayer (a) is for a declaration that the claimant's termination was unlawful and unjustified as the same was not within the ambits of the Act and other laws. The court has found and held that the claimant's dismissal was unfair and unlawful for lack of procedural fairness and hence a declaration to that effect is hereby proclaimed and issued.
51. Prayer (b) (i) is for one month's pay in lieu of notice in the sum of Kshs30,167=. Section 36 of the Act provides as follows –

“ Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would



have been earned by that other party; or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”

51. Since the court has found and held that the claimant was wrongfully dismissed this prayer is allowed as prayed in the sum of Kshs30,167=.
52. Prayer (b)(ii) is for full payment of salary during hospitalization of the claimant from 1st to 25th September, 2014 of Kshs31,279.20. No evidence was adduced by the claimant that the respondent was informed of his hospitalization. The claimant testified that he asked the doctor to call the respondent’s headquarters to report on his hospitalization. The claimant was not at work and no logical reason was available to the respondent for his absence. Subject to Section 17(1) of the Act an employer is only obligated to pay wages earned and payable to an employee in respect of work done by the employee in pursuance to a contract of service. The claimant did not work from 1st September, 2014 until he was dismissed. He is not entitled to the award for the days not worked.
53. Prayer (b)(iii) is for payment in lieu of leave of Kshs4,022.30. No particulars were given of the year that the leave was payable. The same prayer was abandoned by the claimant in his submissions for want of particulars. The claim fails.
54. Prayer (b)(iv) is for compensation equivalent to 12 months’ gross pay under Section 49 of the Act in the sum of Kshs450,420=. The claimant worked for the respondent for about 9 years. There was no indication of whether he has obtained alternative employment since the dismissal.
55. The court reiterates that compensation is intended to remedy the loss or damage that an employee suffers upon unfair and unlawful termination or wrongful dismissal in the loss of the income or earnings that should have been due and payable to him/her were it not for the termination. It is not intended for undue enrichment. Having failed to inform the respondent of his hospitalization, the reason(s) for the claimant’s dismissal was valid only that the respondent failed to adhere to procedural fairness. The court finds that the cause is not one suitable for the award of the maximum compensation and awards the claimant six months’ gross salary in compensation as follows – Kshs34,436= * 10= Kshs206,616=.
56. This award is based on the last pay-slip availed for May, 2014.
57. Prayer (e) is for issuance of a certificate of service. In law the issuance of the same is unconditional and the court orders that the certificate of service be issued by the respondent in the claimant’s name and that the same be delivered to his counsel on record within 30 days of this judgment.

VII. COSTS

51. The claimant is awarded costs of this cause.

VIII. DISPOSAL

51. The court issues the following orders –
 - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful for lack of procedural fairness.
 - b. The claimant is awarded a total of Kshs236,783= made of –
 - i. One month’s gross salary in lieu of notice.....Kshs30,167=



ii. Compensation for wrongful and unlawful dismissal.....Kshs206,616=
Total.....Kshs236,783=

This amount is subject to statutory deductions.

c. Certificate of service be issued by the respondent to the claimant and the same be delivered to his counsel on record within 30 days of this judgement.

d. The claimant is awarded costs of this cause together with interest.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 13TH DAY OF DECEMBER, 2024

DAVID NDERITU

JUDGE

