



Kenya Plantation & Agricultural Workers Union v Shalimar Flowers Ltd (Cause 57 of 2021) [2024] KEELRC 13439 (KLR) (13 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13439 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 57 OF 2021
DN NDERITU, J
DECEMBER 13, 2024**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
SHALIMAR FLOWERS LTD RESPONDENT**

JUDGMENT

I. Introduction

1. In a memorandum of claim dated 7th October, 2021 filed in court on 10th October, 2021 the claimant herein (a trade union) filed a claim for and on behalf of Maurice Simiyu Wanjala (the grievant) praying for various reliefs arising from an alleged unfair and unlawful termination of the said grievant by the respondent. As expected, the memorandum of claim was accompanied with a verifying affidavit, the claimant’s list of witnesses, a written statement by the grievant, a list of documents, and copies of the listed documents.
2. By consent, on 31st August, 2023 the claimant filed an amended memorandum of claim dated 25th August, 2023 through Eshiwani Ashubwe & Company 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. Declaration that the claimant’s services were unprocedurally, unlawfully, and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues as outlined below –
 - i. 12 months’ compensation for unfair termination.....13,839 x 12= 166,068/
=.



- ii. Salary in lieu of notice as provided for in the memorandum of understanding.....
Kshs12,836 x 2 months=27,678/=.
 - iii. Salary arrears for all days worked based on gross pay.
 - iv. Pay gratuity for period of 9 years.....24 x9 x 440=95,040/=.
 - v. Pay leave traveling allowance for the period of dismissal till judgment as per the CBA.
- b. Costs of the suit.
 - c. Interests on (a) and (b) at court rates from the time of filing the suit until payment in full.
 - d. Any other relief the Honourable court may deem just and fit to grant.
4. The respondent entered appearance through the Agricultural Employers' Association on 19th November, 2021 and filed a memorandum of defence on 17th January, 2022 urging that the entire cause be dismissed with costs for want of merit.
 5. Alongside the memorandum of defence, the respondent filed a list of witnesses, a written statement by Charles Omondi, a list of documents, and copies of the listed documents, all in support of the defence. Charles Omondi was later substituted as a witness with Vitalis Osodo (RW1) whose written statement was filed on 12th April, 2023.
 6. The respondent filed an amended memorandum of defence on 6th November, 2023 after the claimant filed an amended memorandum of claim. Alongside the amended memorandum of defence, the respondent filed an amended list of documents and copies of the listed documents.
 7. The claimant's case came up in court for hearing on 21st November, 2023 when the grievant testified and closed his case.
 8. The defence was heard on the same day with RW1 testifying and the respondent's case was closed.
 9. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Muimi, filed his submissions on 4th March, 2024 while the respondent's counsel, Miss Wachira, filed her submissions on 8th March, 2024.

II. The Claimant's Case

10. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence tendered by CW1, and the written submissions by his counsel.
11. In his testimony in court, the claimant adopted his filed witness statement on record as his evidence-in-chief and stated that the respondent engaged him as a recorder from December, 2012 until his termination on 10th July, 2021. He testified that he was earning Kshs13,839/= as at the time of the termination. He stated that he was elected as a shop steward on 20th November, 2020 to represent employees and relay their grievances to the respondent. He stated that he was summoned on 12th June, 2021 by the human resources officer and questioned about his absence from duty on 29th and 30th April, 2021. He stated that he was on a 30 days leave from 3rd April, 2021 to 2nd May, 2021 and was informed to go back to work. He stated that in computing his 30 days' leave, the respondent failed to consider that Easter Monday holiday and Labour Day were to be exempted.
12. He stated that he was not given a leave form by his supervisor when he proceeded on leave, and the issue was raised on 12th June, 2021, yet he had reported back on 2nd May, 2021. He stated that he was never



issued with the show-cause letter dated 12th June, 2021, as he only saw it in court. He however conceded having seen the show-cause letters dated 14th and 28th June, 2021. He stated that he responded vide his letter of 14th June, 2021. He testified that he was suspended from duty on 16th June, 2021, and on 22nd June, 2021 a disciplinary hearing was conducted, although he never signed the minutes as there was a disagreement on the contents thereof. He testified that he was served with a further suspension letter and another show-cause letter dated 28th June, 2021 and he responded thereto on the same date. He testified that a further disciplinary hearing was conducted on 1st July, 2021 after which he was summarily dismissed on 10th July, 2021.

13. The letter of dismissal dated 10th July, 2021 stated as follows –

July 10, 2021

Maurice Simiyu

Payroll No. xxxx

ID. NO. xxxxxx

Recorder

Shalimar Flowers-Naivasha

Dear Maurice

Re: Summary Dismissal

You are hereby summarily dismissed from employment for the below offences.

Absenteeism without permission on 29th and 30th April, 2021 Failing to obey lawful instructions by not and acknowledging receipt of the show cause letter dated 12th June, 2021 and responding to it in writing as required. Showing a high level of indiscipline and arrogance towards your seniors by using intimidating and threatening language and behaving in a manner insulting. Turning almost physical towards the human resource officer by grabbing the cloths that he had on at the chest level in a manner suggesting that you wanted to fight him. Note that the Human Resource Officer had to pull himself free from your grip.

Reference is made to the show cause letters dated 12th June, 2021, 14th June, 2021 and 28th June, 2021 and your subsequent response to the 2nd and 3rd show cause letters dated /received on 15th June, 2021 and 28th June, 2021 respectively. The disciplinary hearings meetings held on 22nd June, 2021 at Shalimar Flowers(FPC) Boardroom and on 1st July, 2021 at Shalimar Flowers Human Resource Offices. During the hearing, the deliberation was on the incidence where you were accused of absence from your place of work without permission , you declined to receive the 1st show cause letter dated 12th June, 2021 and respond to it in writing as required but instead acted in a manner depicting high level of indiscipline by uttering the words(in Kiswahili Language) “Hii show cause sichukui fanyeni kile mnataka , amueni vile mtaamua, hata kama ni kunifuta mnifute niko tayari kwenda hata saa hii” then you left the office. The words were uttered in an intimidating manner to the human resource officer depicting a high level of indiscipline, insubordination, and arrogance.

You also behaved violently towards the human resource officer in the presence of the other shop stewards, which was intimidating, embarrassing, and could have caused harm to the human resource officer. You also held unauthorised meeting with the farm shop stewards within the company premises.



Please note that your action on these incidences went contrary to the company regulations and amounts to gross misconduct that justifies summary dismissal as per the [Employment Act 2007](#) Laws of Kenya section 44(4)(a), (d) and (e), the CBA in place and the company policies.

Upon normal clearance, your final dues shall be paid in accordance with the law as follows.

Days worked up to and including 14th July, 2021 Leave earned and not utilized up to 14th July, 2021 Any other as provided by the law. Certificate of service will be issued

The above will be less any amount owed to the company (if any), and in line with the company procedure and the collective bargain agreement (CBA) you have the right to appeal against this decision within 5 days upon receipt of this communication.

We take this opportunity to thank you for the service offered to the company and wish you all the best in your future endeavours.

Yours faithfully

For Shalimar Flowers Limited

Vitalis Osodo

Group Human Resource Manager

I Maurice Simiyu Id No. xxxxx acknowledge receipt of this communication dated 14/7/2021 signed.....

CC: Personnel file, farm union, KPAWU-Branch Office, County Labour Officer-Nakuru.

14. The grievant stated that vide a letter dated 16th June, 2021, he appealed the dismissal. The said letter of appeal produced as an exhibit by the claimant stated as follows –

Maurice Simiyu

Box 781

Naivasha

16th June, 2021

The Group Human Resources Manager

Shalimar Fresh

Box 781

Nairobi

Dear Sir,

Re Appeal Of My Summary Dismissal

Since I have been complaining about the hearing that was done and also requested the neutral person to chair the hearing and also to give opportunity for me to present evidence that was to prove me innocent about allegations that resulted to summary dismissal. Referring to complains attached in written presented to you is enough for to appeal this summary dismissal. (sic)

Yours sincerely,

On behalf of shop stewards



Organizing Secretary

Jacob Opeto

CC: Hro, Farm Manager, Area Secretary /branch Secretary Kpawu, Nakuru Head Office Kpawu, General Secretary.

15. In cross-examination, he stated that he is now unemployed and living with his parents in their rural home. He testified that he went on leave without filling-in a form as he was allowed to do so by his supervisor. He conceded that there was no indication that he had not received the show cause letter of 12th June, 2021, although he received that of 28th June, 2021 to which he responded. He confirmed that the union officials supported him in the matter and, indeed, attended the hearing of 1st July, 2021. He testified that he appealed against his dismissal.
16. He further stated that his monthly salary was Kshs. 13,839/=, although the same varied from month to month depending on overtime and bonuses paid. He stated that he was entitled to gratuity and that in the absence of proof of any misconduct, his dismissal was unlawful. He insisted that he was dismissed for being a shop-steward although he had no evidence that he ever complained to the union or the respondent of victimization for his lawful union activities.
17. In re-examination, he stated that the union officials who attended the disciplinary hearing were invited by the respondent and he was not accorded an opportunity to call his witnesses to the hearing. He further stated that the union had complained about the conduct of the disciplinary hearings through various letters. He asserted that where leave falls on a public holiday, such holidays are excluded in the computation of leave days.
18. It is on the basis of the foregoing that the claimant purports that the dismissal was wrongful and prays for the reliefs set out in the introductory part of this judgment.

III. The Respondent's Case

19. The respondent's case is contained in the amended memorandum of defence, the oral and documentary evidence adduced through RW1, the head of human resources, and the written submissions by its counsel.
20. In his testimony in court, RW1 stated that the grievant was dismissed for absenteeism and disobeying lawful instructions from a person placed in authority. He stated that the disciplinary hearing culminating in the dismissal of the grievant was held on 1st July, 2021 and the minutes thereof were signed by all those in attendance. He testified that the minutes of the hearing of 22nd June, 2021 were not signed as the union officials refused to sign. He stated that those minutes did not form the basis for the dismissal of the grievant.
21. RW1 further stated that the grievant had convened an irregular meeting over lunchtime which had not been sanctioned by the respondent's management to discuss allegations that union officials were being harassed. He testified that the reasons for the dismissal were contained in the letter of summary dismissal. He testified that the grievant was to proceed on leave from 3rd April, 2021 to 29th April, 2021, although he did not sign a leave form. He conceded that the reporting date in the leave form had been altered from 30th April, 2021 to 29th April, 2021. He stated that although the grievant was entitled to 30 days leave, he had only applied for 26 days leave and was expected to report back to work on 29th April, 2021. RW1 further testified that the grievant had alleged that he had asked for a two-day compassionate leave although he failed to adduce evidence in support of that assertion.



22. RW1 further testified that before the grievant was issued with a show-cause letter the matter had been investigated internally before it escalated to the human resources officer. He further testified that grievant's supervisor had reported that the grievant had absented himself from work on 29th and 30th April, 2021 although there was no record by the supervisor to that effect. RW1 further testified that the supervisor did not participate in the disciplinary process. He stated that the grievant appealed his dismissal but the same was upheld.
23. In re-examination, RW1 clarified that the disciplinary hearing was conducted on two occasions, on 22nd June, 2021 and on 1st July, 2021. He testified that the decision to dismiss was not made in any of the two meetings. He stated that the grievant did not indicate that he was on leave on 29th and 30th April, 2021. He stated that the show-cause letter of 12th June, 2021 was clear on the issue of absenteeism. He stated that no new issues were raised by the grievant in his appeal for consideration and the dismissal was hence upheld.

IV. Submissions By Counsel

24. On the one hand, the claimant's counsel submitted on three issues – Whether the termination of the employment of the grievant by the respondent was wrongful, unfair, and unlawful; Whether the grievant is entitled to the reliefs sought; and, Who should bear the costs of the suit.
25. It is submitted that lawful termination must satisfy substantive fairness under Section 45 of the *Employment Act* (the Act) and procedural fairness under Section 41 of the Act. It is submitted that for procedural fairness, an employer ought to inform an employee of the charges upon which the employer is contemplating taking disciplinary action. It is submitted that before an employee is dismissed, an employer must accord such an employee an opportunity to prepare and be heard in defence, either in person or through a representative of choice. Citing *Freddy Kipkorir Langat v the Cooperative University of Kenya* (2021) eKLR, where the court cited with approval *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, the court is urged to find that the tenets of procedural fairness must include both advance and reasonable notice and also the provision of documentation to an employee to prepare a defence where such documents were in the employer's custody. It is submitted that a hearing must meet the elements of a fair hearing under Article 50 of *the Constitution*. It is further submitted that a fair hearing calls for one to be informed of the charges against them with sufficient details to enable one to answer; and be given adequate time and facilities to prepare a defence. To buttress this assertion counsel urged the court to be guided by the reasoning in *Godfrey M Mae v Equity Bank Limited* (2014) eKLR.
26. It is submitted that the grievant's woes arose after the meeting with the human resources manager on 12th June, 2021 when he was summoned and questioned about his alleged absence from duty on 29th and 30th April, 2021. It is submitted that the grievant was served with a show-cause letter dated 14th June, 2021 with allegations of insubordination insulting behaviour, and indiscipline, which allegation the grievant denied in his response.
27. It is submitted that the grievant was never served with the show-cause letter dated 12th June, 2021, and in any case, no evidence was adduced to prove that the grievant refused to receive the said show-cause letter. It is further submitted that the main reason for the grievant's dismissal was absenteeism without permission and all the other issues set out in the dismissal letter arose from his meeting with the human resources manager.
28. It is submitted that the grievant was not absent from work but rather he had been on a 30 days leave which commenced on 3rd April, 2021 to end on 2nd May, 2021, taking into account two public holidays



- of Easter Monday and Labour Day. It is submitted that the respondent failed to prove that the grievant was not on leave, as the leave form adduced by RW1 was not signed by the grievant and the same had alterations. The court is urged to question why the issue of absenteeism was raised two months after the grievant had reported back to work, yet he had been working under his supervisor's direction until he was summoned.
29. It is further submitted that no evidence was adduced or witnesses called to prove that the grievant was violent towards the human resources manager. Citing *Phelista Mukamu Makau v Elizabeth Kanini Mulumbi* (2015) eKLR where the court cited *Janet Kaphiphe Ouma and another v Marie Stopes International (Kenya)* HCC No. 68 of 2007, the court is urged to find that pleadings or assertions without evidential support remain mere allegations. Likewise, it is submitted that the respondent failed to prove the grievant's dismissal was justified under Section 45(2) of the Act.
 30. Citing *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, it is submitted that the procedure followed in terminating the grievant was unfair. It is submitted that in the disciplinary minutes adduced by the parties the issue of absenteeism was not discussed and or the grievant accorded an opportunity to respond thereto. It is further submitted that the only issue that arose was his alleged indiscipline and arrogance towards his seniors and the issue of holding an unauthorized meeting. It is submitted that the grievant requested that a neutral person chair the disciplinary meeting, other than the human resources manager who was the complainant, but his complaint was not addressed. The grievant was subsequently dismissed and his appeal dismissed on 20th July, 2021.
 31. Citing *OH Abantu (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration and ORS* (2019)40ILJ 2477, it is submitted that the key elements of fairness being include the employee being informed of the charges against him/her and an opportunity to prepare, defence specificity of charges, and the avoidance of bringing new charges after commencement of a hearing which is prejudicial under Section 45(5) of the Act. It is submitted that the minutes of 22nd June, 2021 do not contain a conclusion of the hearing and were not signed thus invalid.
 32. It is submitted that during the second disciplinary meeting of 1st July, 2021 which led to the grievant's dismissal, the issue of absenteeism was not discussed. It is submitted that the grievant was not accorded an opportunity to respond to the complaint against him and his appeal was not considered on merit.
 33. It is submitted that the grievant had worked for the respondent for nine years without any disciplinary issues and the court is urged to find that his dismissal was unfair.
 34. For all the foregoing reasons the court is urged to find in favour of the claimant and award all the reliefs as prayed.
 35. On the other hand, counsel for the respondent identified the following issues for determination – Whether the claimant's termination was procedural, fair and lawful; Whether the claimant is entitled to reliefs sought; and, Who should pay costs of the suit.
 36. On the first issue, it is submitted that the respondent is mandated by clause 19 of the Collective Bargaining Agreement(CBA) (2019-2021) to summarily dismiss an employee for gross misconduct. It is submitted that the grievant was heard on two occasions during which four union representatives appeared for him as evidenced in the disciplinary hearing minutes. It is further submitted that the grievant was given an opportunity to appeal against the dismissal decision but the dismissal was upheld by the respondent.
 37. It is submitted that pursuant to Section 41 of the Act the grievant was informed of the grounds contemplated for the disciplinary action vide various show-cause letters. It is submitted that the



grievant was accorded a disciplinary hearing and a right to appeal and a decision made and communicated within the set timelines. It is urged that the grievant was a chief shop-steward and thus aware of the provisions of the CBA, although the same were further explained to him by the respondent.

38. Citing Anthony Mkala Chivati V Mlandi Water & Sewerage Company Limited (2013) eKLR, it is submitted that the respondent complied with the procedure and process provided for under Section 41 of the Act. It is submitted that under Section 44(4) of the Act, the reasons for the grievant's dismissal were set out in the letter of summary dismissal as absenteeism on 29th and 30th April, 2021, failing to obey lawful instructions, indiscipline and arrogance towards his seniors, and grabbing the collar of the human resource manager suggesting an intention to engage in a physical fight. It is submitted that each of the foregoing grounds amount to gross misconduct.
39. It is submitted that although the respondent accorded the grievant every opportunity to present his case, the grievant turned violent to circumvent the due procedure and frustrate the disciplinary process. Citing CMC Aviation Limited v Mohammed Noor (2015) eKLR where the decision in Consolata Kemunto Aming'a V Milimani High School (2019) eKLR was cited it is submitted that the respondent provided all the particulars of the grievant's misconduct. It is submitted that the grievant was accorded a hearing on the first charge of absenteeism, but he proceeded to commit further misconduct by acting unruly, holding an unauthorized meeting, and attempting to fight the human resources officer.
40. It is submitted that based on the foregoing the respondent was right in terminating the grievant and that the proper procedure was adopted. It is further submitted that the grievant, a chief shop-steward, was well-versed with the applicable standards of conduct under the CBA and the law but he failed to abide with the same and set a bad example to the other employees.
41. It is submitted that on the request by the grievant for a neutral person to chair disciplinary proceedings, the claimant was advised that internal disciplinary procedures were undertaken under the human resources officer and the grievant was not entitled to special treatment. It is submitted that the grievant's dismissal was lawful and his claim should be dismissed with costs.

V. Issues For Determination

42. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
 - a. Was the dismissal of the grievant by the respondent wrongful, unfair, and unlawful?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
 - c. Who meets the costs in this cause?

VI. Dismissal

43. The facts and the circumstances leading to the dismissal of the grievant are contained in the letter of summary dismissal reproduced elsewhere in the judgment.
44. A plethora of decisions from this court (ELRC) has by now, and to a large extent, settled the law on what constitutes substantive and procedural fairness – See for example 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.



45. It is in the context of the foregoing decisions and the law applicable that the facts and evidence in this cause shall be weighed in determining whether the dismissal of the grievant, if at all, by the respondent was substantially and procedurally fair and lawful.
46. The respondent alleges that the grievant absented himself from duty without permission on 29th and 30th April, 2021, failed to obey lawful instructions by not acknowledging receipt of the show cause letter dated 12th June, 2021, showed a high level of indiscipline and arrogance towards his seniors by using intimidating and threatening language, and behaved in a manner insulting and turned aggressively physical towards the human resources officer in a manner suggesting that he wanted to engage him into a physical duel.
47. It is the grievant's case that he was lawfully on his 30 days leave on 29th and 30th April, 2021 and resumed duty on 2nd May, 2021. His position is that he was summoned by the human resources officer on 12th June, 2021 and questioned about his alleged absence on the aforesaid dates and was directed to resume his duties. He states that he was issued with a show-cause letter on 14th June, 2021, to which he responded on the same day. He was then suspended from duty for seven days and invited to a disciplinary hearing on 22nd June, 2021. The contents of the minutes of the said meeting were not agreed upon thus were not signed. He stated that he was invited to a further disciplinary hearing meeting on 1st July, 2021 after he was issued with a further show-cause letter dated 28th June, 2021 for allegedly holding unauthorized meeting and attempting to assault the human resources officer. He was dismissed vide the letter dated 10th July, 2021. He further stated that he had requested that the hearing be chaired by a neutral person other than the human resources officer but that request was not addressed.
48. The respondent's chronology of events is that the grievant was issued with a show-cause letter on 12th June, 2021 for absenteeism, but refused to acknowledge receipt thereof and used insulting language towards the human resources officer. This culminated in him being issued with another show-cause letter dated 14th June, 2021. He was suspended from duty until the disciplinary hearing of 22nd June, 2021. The hearing culminated in the extension of the suspension and before the suspension letter was issued to the grievant, he was allegedly found conducting unauthorized meeting in a boardroom. It was in the said boardroom that he was given the letter of extension of suspension but he allegedly grabbed the human resources officer by the collar intending to assault him. It was after this incident that disciplinary hearing was held on 1st July, 2021.
49. RW1 testified that on the issue of absenteeism the grievant had not signed the leave requisition form. Further, RW1 conceded that the leave form contained an altered return date changed from 30th to 29th April, 2021. RW1 testified that he could not explain why the grievant had not signed the leave form and why the same contained altered dates. He stated that the grievant had requested for 26 days leave and that in response to the show-cause letter, the grievant had indicated that he had requested for two days compassionate leave, although no evidence was adduced in support thereof. In the response to the second show-cause letter of 14th June, 2021 the grievant stated that he had requested for the production of the compassionate leave form that he had signed but none was availed in court.
50. There is no indication that the alleged compassionate leave form was in regard to the period when the grievant was said to have been absent. As to whether the grievant was to proceed on 30 days or 26 days leave, it cannot be ascertained as the grievant did not sign the leave form submitted by the respondent. The leave form submitted in evidence by the respondent, additionally, had been altered on the reporting date. It could not be ascertained when and where the alteration was done and by who.



51. It was conceded by RW1 that the grievant refused to receive the said show-cause letter dated 12th June, 2021 relating to absenteeism. Thus, if the grievant failed to receive the said letter, did the respondent reserve the show-cause or was the charge of absenteeism abandoned? The subsequent show-cause letter dated 14th June, 2021 addressed to the grievant related to the alleged refusal to receive the show-cause letter of 12th June, 2021 and the use of abusive language, while the show-cause letter dated 28th June, 2021 related to holding unauthorized meeting and attempting to assault the human resources officer.
52. The minutes of the hearing held on 22nd June, 2021, adduced by the respondent, were neither signed by the respondent's officials nor by union officials and the grievant. Needless to say, there was no discussion of the grievant's absenteeism in the said meeting. There was no cross-examination on the issues raised in the show-cause letter of 14th June, 2021 either, rather the grievant's response was read out. The union however requested that the grievant be forgiven and be allowed to return to work. The minutes indicated that the human resources manager said that there were valid reasons for absenteeism but issues of insubordination, insulting behavior, and indiscipline needed further discussions before a final verdict. He recommended that the grievant's suspension be extended by a week and that the grievant to report to the human resources office on 28th June, 2021.
53. The minutes of the disciplinary hearing of 1st July, 2021 indicated that there was a disciplinary hearing on 21st June, 2021 when the grievant was to be given an extension to his suspension. It indicates that when the grievant held unauthorized meeting with all floor-shop managers and allegedly grabbed the human resources manager by the collar intending to assault him. The minutes of 22nd June, 2021 indicate that disciplinary hearing was held on 22nd June, 2021 and not on 21st June, 2021 as alleged in the minutes of 1st July, 2021. Both the grievant and RW1 testified that the hearing was on 22nd June, 2021. The issue discussed in the said hearing related only to the alleged unauthorised meeting that the grievant had organized. The issue of absenteeism was not addressed at all. Neither was the issue of refusal to receive the show-cause letter of 12th June, 2021 or use of insulting language discussed. The issues arising from the first and second show-cause letters were not discussed or any witnesses called in support thereof or for cross-examination.
54. There was no discussion on the grievant's absenteeism during disciplinary hearing and the respondent adduced no evidence to show that the said show-cause letter of 12th June, 2021 was subsequently served upon the grievant. If the issue of absenteeism was not brought up during the disciplinary hearing on 22nd June, 2021 or 1st July, 2021, it cannot be fair and lawful that the same ground was applied in dismissing the grievant.
55. The hearing of 1st July, 2021 discussed the issue of holding unauthorized meeting and the alleged assault on the human resources manager by the grievant. During the said hearing the human resources manager indicated that some employees had seen him when he left FPC Boardroom during the attempted assault but he asserted that indeed some of the employees who witnessed the assault were harassed through phone calls and threats not to testify. The issue for the disciplinary hearing was the alleged assault on the human resources manager and the alleged unauthorized meeting. There was no witness called to corroborate and support those allegations/charges against the grievant.
56. No evidence was adduced on what the meeting allegedly organised by the grievant related to. There was no evidence adduced on what was discussed in the alleged unauthorized meeting. No evidence was called to confirm that indeed unauthorized meeting was held and neither was evidence adduced that the grievant had tried to assault the human resources officer.



57. On a balance of probabilities, the respondent ought to have adduced evidence in justifying the reasons for dismissal of the grievant. In failing to call the witnesses that allegedly had witnessed the assault and the illegal meeting, the respondent failed into justifying the reasons for the dismissal
58. On the reasons for the dismissal set out in the letter of dismissal, the allegation of absenteeism was not discussed in any meeting and in any event there was no proof that the show-cause letter was served upon the grievant after he allegedly refused to receive the same in the first time. Further, no evidence was called on whether the grievant had used insulting language towards the human resources officer, which was allegedly done in the presence of the human resources manager, and the packhouse manager yet neither of them testified on the issue.
59. The CBA under Clause 19 provided that the grounds of summary dismissal are those under Section 44(4) of the Act provides for summary dismissal, including, absenteeism from work, being intoxicated in the workplace, neglect to perform any work, an employee using abusive or insulting language at the workplace, failing to abide by a lawful command in the course of duty from an employer at the workplace, an employee having been arrested for a cognizable offence, or being suspected of committing a criminal offence against or to the substantial detriment of his employer's property.
60. There is no evidence that the grievant was guilty of any of the above as to justify his dismissal.
61. In the circumstances, the court finds that the respondent failed to justify the reason(s) for the dismissal and no evidence was adduced to prove that the grievant had used insulting language, refused to receive the show-cause letter, held unauthorized meeting, or attempted to assault the human resources officer.
62. On procedural fairness, it is submitted for the grievant that he was not accorded a chance to defend himself on charges of absenteeism and no evidence was called to prove insubordination, insulting behaviour or indiscipline. Although a disciplinary hearing was held on 22nd June, 2021, the minutes thereof were not signed by either party and as such they are neither authentic nor binding.
63. This court has held in the past, and even now, that a disciplinary hearing need not 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, the employee has a right to all information and particulars of charges before the hearing, and (s)he has a right to test the evidence by way of cross-examination. The employer is obligated to establish a prima facie case against the employee for the hearing to meet the minimum threshold of fair hearing as envisaged under Article 47 of *the Constitution* and the various provisions of the *Fair Administrative Action Act*.
64. It is in the considered opinion of this court that while the respondent may have had grounds to take disciplinary action against the grievant, there was no evidence adduced during the disciplinary hearing on 22nd June, 2021 or on 1st July, 2021 in support of the charge and for cross-examination by the grievant. The grievant was however notified of his right to call a witness of his choice who was an employee. There is no evidence that the grievant came with along with any witness. However, the grievant confirmed that the union officials were present during the hearing to represent him. The grievant vide the letter of 21st June 2021 and 29th June, 2021 sought that a neutral person chair the disciplinary proceedings other than the human resources officer who was essentially a complainant. Likewise, the issue of a neutral arbiter was raised in the disciplinary hearing on 1st July, 2021 and the recommendation was that it could be considered. The grievant was however dismissed on 10th July, 2021. That issue was not addressed. The human recourses officer had alleged that the grievant had attempted to or assaulted him hence there was bad blood between him and the grievant. Allowing



the human resources officer, who was also a complainant, to chair the disciplinary hearing was against natural justice in that one cannot sit as a judge in his/her own case.

65. The grievant appealed the dismissal and raised the issue relating to the chairing of the meeting by the human resources officer. The response to the appeal dated 20th July, 2021 stated that – “Despite this you have not been able to demonstrate/show that the human resource officer was in any way biased during the hearing.”
66. This was unfair in the circumstances as the human resources officer having been a complainant could not be deemed neutral. In the circumstances, the court finds and holds that the grievant was denied both substantive and procedural fairness and hence the dismissal was wrongful, unfair, and unlawful.

VII. Reliefs

67. Having held that the respondent wrongfully, unfairly, and unlawfully dismissed the grievant by failing to accord him both substantive and procedural fairness the court shall consider each of the reliefs sought as set out in the introductory part of this judgment.
68. Prayer (a) is for compensation equivalent to 12 months’ gross salary under Section 49 of the Act amounting to Kshs166,068/=. The grievant worked for the respondent for about 9 years. He testified that he has remained unemployed since the dismissal and currently lives with his parents. 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 which is in the loss of the income or earnings that should have been due and payable to him/her were it not for the termination or dismissal. It is not intended for unjust enrichment.
69. The grievant was unfairly terminated and no evidence was adduced by the respondent to justify the reason(s) for the dismissal were valid. The grievant testified that he has not obtained an alternative occupation. The court finds that this cause is suitable for the award of the maximum compensation and awards the 12 months’ salary compensation as pleaded as follows – $Kshs13,839/= * 12 = Kshs166,068/=$.
70. Prayer (b) is for two months’ salary in lieu of notice. Clause 24 of Appendix III – (Shalimar CBA) provides for two months’ pay in lieu of notice for employees who have worked for a period of over two years. The grievant falls into this category and was entitled to the two months’ notice or equivalent pay in lieu thereof having worked for the respondent for about 9 years. The grievant testified that he earned Kshs13,839/= monthly. The claimant is hence awarded Kshs27,678/= under this head.
71. Prayer (c) is for salary arrears for all days worked based on gross pay. In the letter of summary dismissal, the respondent submitted that the grievant’s final dues could only be paid upon his clearing with the respondent. The days worked in the summary dismissal are indicated as up to 14th July 2021. In the circumstances the grievant is awarded half salary for the month of July, 2021 equivalent to Kshs6,919/=.
72. Prayer(d) is for gratuity for 9 years in the sum of Kshs95,040/=. Clause 24(a) of the Shalimar CBA provided that –

“An employee whose services are terminated, is retired or resigns after five (5) years continuous service with the employer shall be entitled to gratuity at the rate of twenty-four (24) days basic pay for each completed year of service.”

The grievant is entitled to gratuity of Kshs95,040/= for the 9 years worked.



73. Prayer (e) is for leave traveling allowance. Clause 9 of the binding CBA provided that – “a) An employee shall be entitled to Kenya shillings three thousand one hundred only (3,100) as leave traveling allowance once a year”. Clause 9(c) of the CBA further provided that “All leave related dues (leave traveling allowance and 50% salary for the month of leave) shall be paid before the date of leave commencement, together with the last month’s salary prior to the leave commencement. The balance of fifty percent (50%) of the salary shall be paid at the end of the month of leave.” No records were produced by the respondent demonstrating that the leave traveling allowance was paid when the grievant proceeded on leave. The CBA is part of the contract between the parties and hence the grievant is entitled to the Kshs3,100/= as leave traveling allowance. The claim succeeds.

VIII. Costs

74. Costs ordinarily follow the event and hence claimant is awarded costs of this cause.

IX. Disposal

75. The court issues the following orders –

- a. A declaration be and is hereby issued that the dismissal of the grievant by the respondent was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness.
 - b. The claimant is awarded a total of Kshs298,805/= made of –
 - i. Compensation for wrongful and unlawful dismissal.....Kshs166,068/=
 - ii. Two month’s gross salary in lieu of notice.....Kshs27,678/=
 - iii. Salary arrears for July, 2021...Kshs6,919/=
 - iv. Gratuity pay for 9 years.....Kshs95,040/=
 - v. Leave traveling allowance.....Kshs3,100/=Total.....Kshs298,805/=
- This amount is subject to statutory deductions.
- c. The claimant is awarded costs of this cause together with interest.

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

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DAVID NDERITU
JUDGE

