Odhiambo & another v Sarova Hotels Limited & another (Cause 787 of 2019) [2023] KEELRC 146 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 146 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 787 OF 2019

JK GAKERI, J

JANUARY 25, 2023

BETWEEN

COLLINS ODHIAMBO ..... 1ST CLAIMANT

KENYA HOTELS AND ALLIED WORKERS UNION ..... 2ND CLAIMANT

AND

SAROVA HOTELS LIMITED ..... 1ST RESPONDENT

PANAFRIC HOTEL LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The claimant initiated this claim by a memorandum of claim filed on November 22, 2019 alleging unfair termination of employment because of union activities.

2. The claimant amended the claim and filed an amended memorandum of claim on January 22, 2020. The amendment introduced the claimant as the 1st claimant and the union as the second claimant in effect taking over the matter from the union.

The 1st claimant's case is pleaded as follows;

3. The 1st claimant was employed by the Sarova Group of Hotels & Lodges on August 1, 1997 and transferred to Sarova Panafric in June 2012 and had a clean record, was appreciated severally and received salary increments.

4. That he privately joined the claimant union and his salary was kshs 25,488/= and a housing allowance of kshs 9,561/= as at the date of termination in 2019.

5. The claimant avers that his tribulations begun when he contested the position of stewardship of the union and was elected against the wishes of the respondent and he was suspended on January 16, 2019

for 7 days on the ground that colleagues had complained against him and was issued with a warning letter on the same day for absconding duty, a decision the 1st claimant appealed against.

6. That a notice to show cause was issued on January 22, 2019 for inter alia involvement in union activities. The 1st claimant responded and demanded for information to facilitate his response but none was provided.

7. The 1st claimant further avers that on January 24, 2019, his suspension was extended and another show cause letter was issued on January 23, 2019 where he was accused of divulging his case to the union and on January 25, 2019, the suspension became indefinite.

8. The claimant further avers that on February 5, 2019, he received a message from the Assistant Hotel Manager, one Anthony to meet the Human Resource Manager at 9.30 am on February 6, 2019.

9. The 1st claimant responded the following day at 8.44 am requesting for the postponement of the meeting as he had travelled to Kisumu to attend a funeral and facilitate his sons admission and had planned to travel on February 7, 2019 and reported to the Human Resource Office on February 8, 2019 when he was issued with a termination letter dated February 4, 2019 which revealed that a disciplinary meeting had been scheduled for February 4, 2019.

10. That the 1st claimant appealed the termination but the appeal was declined on the ground that he had been invited for the disciplinary hearing by email.

11. It is averred that the claimant reported the case to the union on February 15, 2019.

12. The 1st claimant tabulates 13 claims not reflected in the prayers sought. The claims include 4 months pay in lieu of notice, service pay/gratuity, pay for upto February 4, 2019, prorated leave and leave allowance, service charge for January, 2019 and upto February 4, 2019, PH January, uniform compensation, arrears of salary increments, 16% VAT refund 2013 – 2016, 12 months compensation and damages for constitutional violation. The Total sum claimed is kshs 5,027,770.20

13. It is the 1st claimant's case that the actions taken by the respondent against him were unprocedural, without valid reason and unlawful that he was actively recruiting members for the 2nd claimant. Some of the grounds of termination had been addressed earlier. The claimant contends that the accusation of using a gate meant for others was discriminatory, the respondent did not comply with the provisions of section 41 of the *Employment Act*, 2007, the reasons relied upon were insufficient to warrant termination of employment.

14. The claimant prays for;

    i. The honourable court be pleased to find the respondents decision to terminate the 1st claimant's employment unfair labour practice.

    ii. The honourable court be pleased to reinstate the 1st claimant unconditionally without loss of any pecuniary benefits.

    iii. In the alternative, the honourable court be pleased to offer maximum compensation to the 1st claimant.

    iv. The honourable court be pleased to find the respondents action to terminate the 1st claimant on account of union activities in breach of his constitutional right and order the respondent to pay damages as tabulated herein above.

    v. Costs of this suit.

Respondents case

15. The respondents aver that termination of the 1st claimant's employment was on account of gross misconduct and thus lawful.

16. That the 1st claimant,

    i. Absented himself from work without leave on January 15, 2019.

    ii. Knowingly failed and refused to obey lawful and proper commands.

    iii. Used undesignated entrance thereby occasioning a security breach.

    iv. Forged signatures of fellow employees to register them as members of the union without their consent.

    v. Wilfully neglected to perform his duties.

17. The respondents further aver that on January 16, 2019, the claimant was accorded an opportunity to explain his absence on January 15, 2019 and sneaking in using an undesignated entrance but failed to offer a satisfactory explanation and he was suspended on the same day.

18. That the claimant elected not to respond to the charges against him in the show cause letter dated January 22, 2019 and was notified of the disciplinary hearing on January 31, 2019 scheduled for February 4, 2019 but did not attend and was dismissed from employment on the same day.

19. The respondents aver that they have maintained a neutral position as regards inter and intra union disputes.

20. That the conciliator was biased against them and ignored the lawful termination, and that the respondents had paid all dues.

21. The respondents pray for dismissal of the 1st claimant case with costs.

1st claimant's evidence

22. The 1st claimant adopted the written statement which replicates the contents of the memorandum of claim.

23. On cross-examination, the witness stated that he was scheduled to resume duty on January 12, 2019 and was at the workplace on January 15, 2019.

24. The witness stated that he was not notified of the changes made in the shift and thus followed the duty rota operational before he proceeded on leave.

25. The witness further confirmed that a second notice to show cause was issued on January 31, 2019 and a disciplinary hearing was slated for February 4, 2019 but did not attend as he received the email on February 8, 2019. That on January 15, 2019, he used the entrance along bishops road and staff were free to use it.

26. He also confirmed that he was supposed to report back on January 12, 2019 but reported on January 15, 2019 but could not work because there was another employee.

27. It was the 1st claimant's evidence that he did not receive the messages regarding change in the shift sent on January 11, 2019.

28. That he wrote a message to the duty manager on January 13, 2019 and the message was received.

29. It was his testimony that he was not provided with the alleged complaints or report of the investigation.

Respondents evidence

30. The respondents called three witnesses, RWI, Betty Mangi Omuganda, the cluster human resource manager testified that she joined the respondents in 2004 and the claimant had no disciplinary issue before 2004 and had been accoladed previously for commitment.

31. That Nicholas had texted the 1st claimant about the changes in the shift and the claimant could not be reached through a follow-up call or call back.

32. The witness confirmed that she had no evidence of complaints by staff about the claimant nor the outcome of the investigations. The witness further confirmed that she had no evidence or record of those recruited to the union.

33. That the respondents had a CBA with Kudheiha which provided for 3 – 4 warnings.

34. That the claimant had requested for information for purposes of preparation of a response to the notice to show cause and none was provided.

35. That he had copied an internal letter to a stranger.

36. That the invitation to the hearing was communicated by email but the same had not been filed and the minutes of the disciplinary hearing were not filed as well.

37. That calls to the 1st claimant's number did not go through.

38. It was her testimony that the gate on Bishops Road was exclusively for those with drivers.

39. The witness confirmed that the claimant was a member of the union and was not recruiting members.

40. On re-examination, the witness testified that the entrance the claimant used was not designated for staff but for suppliers and apartment guests a fact all employers were aware of and the claimant was not victimized and had not requested for more time to respond to the notice to show cause.

41. That the claimant responded to the sms he alleged not to have received.

42. RWII, Mr. Justus Mutua Kioko confirmed on cross-examination that he was the Chief Security Officer at Sarova Panafric.

43. That on January 16, 2019, he was summoned to the entrance on Bishops Road, where the claimant had been intercepted by one Michael Baraza, a security officer trying to sneak into the hotel.

44. It was his testimony that all employees were aware of the designated entrances for staff and users of this entrance were apartment guests and suppliers and staff parking was elsewhere and it was his duty to investigate the security breach.

45. The witness confirmed authorship of the report and the grounds of termination of the claimant's employment were based on his report.

46. RWIII, Mr. Leonard Kilonzo testified that he had been a porter in the concierge department for at least 10 years and knew the claimant well.

47. That in 2019, he was the acting concierge and the claimant was still a porter and thus his supervisee.

48. That on January 11, 2015, he called the claimant several times but had no evidence of the call logs.

49. That the claimant responded to the sms.

50. The witness confirmed that he is the one who made changes to the shift before which the claimant was supposed to report on January 11, 2019.

51. That he used the hotel telephone and the claimant enquired about the timing of his shift.

52. That the claimant reported on January 16, 2019 and was intercepted by guards and learnt of the security breach from RWII.

53. The witness stated that no staff was supposed to use the entrance on Bishops road.

54. The witness further confirmed that it was him that reported the claimant's absence to the assistant security manager.

Submissions

55. Hearing of the suit concluded on January 26, 2022 and parties were accorded 21 days each to file and serve their submissions. During the mention slated for October 4, 2022, none of the parties had complied and the claimant's counsel prayed for 7 days and the respondents counsel 14 days after service and the court obliged and a judgement date was set.

56. By November 9, 2022 when the court retired to prepare this judgement, none of the parties had filed submissions.

57. Regrettably, the court did not benefit from the insights and perspectives of counsel.

58. Similarly, the claimant's counsel was to avail its supplementary bundle of documents but did not.

Determination

59. The issues for determination are;

    i. Whether termination of the claimant's employment was unfair and unlawful.

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

60. As to whether termination of the claimant's employment was unfair and unlawful. Parties adopted contrasting positions. While the claimant avers that it was indeed unlawful and unfair, the respondent maintains that it had valid reasons to terminate his services and followed the law.

61. In typical employment disputes such as the instant suit, for a termination of employment to pass the fairness test, it must be proved that the employer had a substantive justification for the termination and conducted it in accordance with fair procedure as encapsulated by the provisions of sections 41, 43, 44, 45 and 47 (5) of the *Employment Act*.

62. The bedrock of fair termination of employment contracts is section 45 of the *Employment Act*which provides as follows;

    1. No employer shall terminate the employment of an employee unfairly.

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

        a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason –

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

63. The requirement of substantive justification and procedural fairness in termination of employment has been underscored in numerous decisions such as *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR, *Kenafric Industries Ltd v John Gitonga Njeru* (2016) eKLR as well as *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.

64. In the latter case, Ndolo J. stated as follows;

> " However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness."

65. The learned judge explained that while substantive justification involved the reason(s) relied upon by the employer to terminate employment, procedural fairness was concerned with the process involved to effect the termination.

66. Needless to belabour, the reason(s) relied upon must be valid and fair as ordained by the provisions of section 45(2) of the *Employment Act* and must relate to at least one of the matters specified in section 45(2) (b)(i)(ii).

67. Relatedly, the provisions of the *Employment Act* place a heavy obligation on the employer to establish the dual requirement for a termination of employment to pass muster. Failure to establish both requirements renders the termination of employment unfair.

68. I will now proceed to apply the foregoing provisions and principles of law to the facts of the instant case.

Substantive justification.

69. It is common ground that on January 16, 2019, the respondent issued a warning letter to the claimant for allegedly not reporting to work on January 15, 2019 as scheduled without notifying the supervisor or reception or Lobby Manager and for ignoring his Manager's messages sent on January 11, 2019 on reporting dates yet he had himself written messages to other persons enquiring about the reporting date.

70. This was the first warning letter and the claimant responded by letter dated January 21, 2019 stating that he was unaware of the changes as he had not received the supervisor's message.

71. The warning letter was followed by a notice to show cause dated January 22, 2019 which accused the claimant of

1. Registering staff to a union secretly during working hours.
2. Peddling falsehoods to staff about the company.
3. Forcing new staff to sign forms without proper knowledge about them.
4. Registering staff without consent and forging their signatures.

5. Failing to use officially designated staff entrance on January 15, 2019.

72. The letter gave the claimant 48 hours to respond.

73. By letter dated the same day, the claimant wrote to the human resource manager requesting for evidence on six (6) items including staff complaint's against him, nature of the falsehoods he had made against the respondents, details on secretive registration of staff, list of staff coerced to sign forms, list of the forged signatures and other relevant documents, to facilitate his response. The request was not responded to and the claimant did not respond to the notice to show cause dated January 22, 2019.

74. Subsequently, the claimant was suspended for 3 days by letter dated January 22, 2019 and extended until further advised by letter dated January 25, 2019.

75. Meanwhile, on January 23, 2019, the respondents responded to the claimant's letter on the notice to show cause accusing him of having copied his response to a 3rd party.

76. The letter reminded the claimant of the 48 hours deadline of the response.

77. The claimant responded to the letter contesting the confidentiality of communication from the human resource manager. A response dated January 24, 2019 reminded the claimant the need to respond to the notice to show cause.

78. The claimant did not respond to the notice to show cause dated January 22, 2019 or apply for extension or remind the employer of the demands he had made on particulars of the allegations made against him.

79. The respondent, by letter dated January 31, 2019 introduced new charges by an addendum. These were absenteeism on January 15, 2019 and possession of confidential documents in his locker.

80. The letter allegedly sent by email gave the claimant 48 hours to respond and purportedly attached some evidence to and in his response. Finally, the letter intimated that hearing of the claimant's case was slated for February 4, 2019 at 9.00 am.

81. Puzzlingly, the respondent adduced no evidence to show that the letter and its alleged attachments were infact forwarded to the claimant's email addressor that he received the email on time to attend the hearing.

82. RWI confirmed on cross-examination that she had no evidence that the email sent to the claimant. The claimant on the other hand testified that he received the email on February 8, 2019.

83. In sum, the claimant did not respond to the notice to show cause at all despite the rather accidental extension of time by the respondent.

84. It is unclear whether the claimant wished to respond bearing in mind that he did not follow up the information he had requested for or expressly deny all the allegations for lack of the information on which the charges were allegedly based.

85. The claimant did not attend the alleged disciplinary hearing on February 4, 2019 at 9.00 am and a termination of even date was forwarded to him by email.

86. The letter identified four reasons or grounds of termination of the claimant's employment.

1. Absence from the work place on January 15, 2019.
2. Using an undesignated entrance on January 16, 2019.
3. Forgery of staff signatures and registering them to a union.

4. Failure to attend the disciplinary hearing on February 4, 2019.

87. The letter was emphatic that the conduct complained of amounted to gross misconduct and justified summary dismissal under section 44(4)(a)(e) and (g) of the *Employment Act*, 2007.

88. The letter tabulated the claimant's final dues and he was at liberty to dispute the same.

89. I will now assess the reasons given by the employer against the evidence on record.

Absence on 15th January, 2019

90. Although the claimant testified that he reported to work on January 15, 2019 but found another person and thus went back home, the claimant adduced no evidence on reporting time, who was on duty on that day or who instructed him to go back home. The respondent on the other hand maintained that he was not at the place of work.

91. It is common ground that the claimant had been on leave due to report back on January 12, 2019 but did not. On Friday January 11, 2019, Nicholus sent a message to the claimant notifying him of the changes in the shift. The claimant denied having received the message.

92. The claimant confirmed on cross-examination that he followed the duty rota operational before he proceeded on leave.

93. Puzzlingly, the claimant sent a message to Nicholus on January 13, 2019 about his inability to report to work that night at 2300 hours and the message was received and responded to. Relatedly, the claimant sent a message to one Leonard Kilonzo enquiring about the shift.

94. The back and forth between the claimant and Nicholus and Leonard Kilonzo reveals that the claimant was aware that changes had been made to the shift and his evidence that he was relying on the pre-leave rota was untruthful.

95. This is a witness who communicated by sms to inform his supervisor that he was unable to report to work and provided no reason, but alleged that a message sent to him did not reach him.

96. From the evidence on record, it is the finding of the court that the claimant has failed to demonstrate that he was at the work place on January 15, 2019.

Use of undesignated gate

97. Paragraph A3 of the respondents House Rules October 2015 provided that;

> " Employees are not allowed to enter/leave the hotel premises except through the designated staff entrances . . ."

98. It is common ground that on January 16, 2019, the claimant entered the hotel through the gate on Bishops road, a fact he did not deny. According to him, the entrance as available for use by junior and senior staff.

99. RWI, RWII and RWIII confirmed that the gate on Bishops Road was reserved for apartment guests and suppliers not staff. RWII further confirmed that staff parking was elsewhere. The witness further confirmed that he was called to the entrance on the material day.

100. Puzzlingly, the claimant adduced no evidence that he had been using the entrance previously.

101. It is unclear to the court why a long serving employee of a respectable institution would disregard his employers internal rules and not be remorseful about it.

102. The memorandum of claim is emphatic that the fact that the entrance was meant for those with cars was discriminatory towards the claimant. This would appear to justify the claimant's behaviour.

103. Needless to emphasize, internal rules, policies or regulations are meant to promote harmony in organizations and have justifications and employees are at liberty to propose changes and/or modifications as necessary. The claimant adduced no evidence that he had expressed concerns about the alleged discriminatory entrance/exit policy of the respondents.

104. It requires no gainsaying that the claimant used an undesignated staff entrance on January 16, 2019.

Forging of staff signatures

105. The respondent provided no scintilla of evidence to demonstrate that the claimant had forged any staff signatures so as to register them as members of his union.

106. Coincidentally, evidence of active union activities by the claimant would have reinforced the argument by both sides for different reasons. For the claimant, it would have shown that the termination was based on matters excepted by law and for the respondent that the claimant was doing so during office hours without consent of the employer and did not furnish the claimant with the list of signatures allegedly forged or list of staff members who had complained or the complaints made.

107. In the absence of evidence to substantiate the allegation, the same is unavailable and falls by the way side.

Failure to show up for the disciplinary hearing on February 4, 2019

108. As mentioned elsewhere in this judgement, RWI confirmed on cross-examination that the addendum to the notice to show cause dated 31st January, 2019 was forwarded to the claimant through email, a copy of which was not provided as evidence.

109. The respondents tendered no evidence to show that the letter was actually dispatched to the claimant on January 31, 2019 and was thus aware of the hearing on February 4, 2019.

110. The claimant's evidence that he received the email on February 8, 2019 was uncontroverted.

111. The allegation that the claimant could not be reached on his cellphone did not justify the writing of a termination letter on the same day, if anything, the respondent should have accorded the claimant a second chance pursuant to a properly served notice and acknowledgement by the claimant. The respondents appear to have been in a hurry to terminate the claimant's employment.

112. Intriguingly, the respondents provided no evidence of whether the hearing actually took place. There is no record of the minutes to show who participated and what transpired thereat.

113. In the absence of minutes, it is unclear how and when the decision to terminate the claimant's employment was made.

114. From the foregoing, it is clear that this ground of termination of the claimant's employment was not substantiated and was not valid.

115. That leaves the respondents with two grounds. Were this grounds sufficient to justify termination of employment?

116. Section 43(2) of the *Employment Act* provides that;

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

117. With regard to the absence from work on January 15, 2019, the respondent issued the 1st warning to the claimant and the claimant explained what had transpired and the matter rested. It would appear that the respondent was not persuaded that a one day absence without notice, though inconveniencing would justify a termination or notice to show cause.

118. As regards the use of an undesignated entrance, it is not in contest that the claimant did it while aware of the restriction but did so to access the work place to render services as an employee.

119. In the court's view, the blatant manner in which the claimant breached the House Rules of the respondent on this occasion merited a strongly worded warning letter and ought not to have been relied upon as a reason for termination of the claimant's employment.

120. Flowing directly from the foregoing, it is the finding of the court that the respondents has on a balance of probabilities failed to demonstrate that they had a valid and fair reason to terminate the claimant's employment.

Procedure

121. Section 41 of the *Employment Act*, 2007 prescribes the procedural precepts to be complied with by the employer before terminating the services of an employee and as explained by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (Supra), these provisions are mandatory.

122. The specific procedural requirements have been articulated and elaborated upon in several decisions including by this court in *Loice Otieno v Kenya Commercial Bank Ltd* (2013) eKLR by Radido J.

123. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal stated as follows;

> " Four elements must thus be discernible for the procedure to pass muster:-
>
> i. an explanation of the grounds of termination in a language understood by the employee;
>
> ii. the reason for which the employer is considering termination;
>
> iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
>
> iv. hearing and considering any representations made by the employee and the person chosen by the employee."

124. I will now proceed to assess whether the respondents met the threshold prescribed by section 41 of the *Employment Act*.

125. It is not in dispute that the claimant received the notice to show cause dated January 22, 2022 and responded asking for certain information as he prepared to respond. The information as not supplied.

126. It is also common ground that the claimant was first suspended on January 22, 2019 to resume duty on January 25, 2019 but the suspension was extended "until further advise."

127. It is also not in contest that the respondents added an addendum to the notice to show cause by letter dated January 31, 2019 and intimated to the claimant that he had 48 hours to respond and a hearing was scheduled for February 4, 2019 and the claimant was entitled to attend with a witness of his choice either a colleague or a shop floor union representative.

128. However, the respondents adduced no shred of evidence to prove that the letter was sent to the claimant and was actually received in good time for the claimant to respond to the new allegations and appear for the hearing.

129. The claimant acknowledged that he received the email on February 8, 2019 after he had been dismissed from employment.

130. As adverted to elsewhere in this judgement, the clamant did not attend the hearing.

131. Clearly, the process adopted by the respondents in this case did not pass muster and may be faulted in various respects. First, the respondents did not respond to the claimant's request for information and evidence they were relying upon in framing the charges against him. It is unclear whether the respondents had the information and refused to forward the same or did not have it. Their silence was unjustifiable. The right to information relied upon by the accuser is a right of the accused person as it facilitates preparation for rebuttal of the allegations.

132. This reasoning finds support in *Wilberforce Ojiambo Oundo V Regent Management Ltd* (2013) eKLR, where Court of Appeal stated;

> " An employee on suspension remains innocent until proved otherwise. In addition, such an employee has a legitimate expectation that they will at the very least be given an opportunity to respond to any adverse findings arising out of the investigation."

133. It is unclear to the court why the respondents could not avail the information requested for even at the claimant's costs. If the respondents had the information, and refused to hand it over, they denied the claimant a basis attribute of a fair hearing and proceeded to condemn him unheard.

134. Since the claimant refused to respond to the notice to show cause, reminders notwithstanding, the respondents should in court's view, have been more cautious about taking further action until it ascertained his circumstances, whether it was belligerent or genuinely needed facilitation by evidence to respond.

135. It behoved the respondents to consolidate all the allegations made against the claimant into one letter to the claimant, furnish the materials it was relying upon and accord him sufficient time to respond before taking the next course of action.

136. Similarly, it was the duty of the respondents to invite the claimant for a disciplinary hearing through a properly served notice and ensure that it was actually received and await his attendance.

137. If the claimant failed to attend as was the case here, it is only fair that he be accorded another chance through another notice.

138. In the instance case, it is clear that the mandatory provisions of section 41 of the *Employment Act* were not complied with.

139. The charges the claimant was facing were not explained to him in the presence of a witness, and he was not given an opportunity to make representations before the decision was made.

140. For the going reasons, it is the finding of the court that termination of the claimant's employment was unfair for want of substantive justification and procedural propriety.

Entitlement to reliefs

141. Having found that termination of the claimant employment was unfair, the court proceeds as follows;

a. Reinstatement

142. Although the remedy of reinstatement is one of the reliefs available to an employee whose employment has been terminated unfairly, under section 49(3)(a) of the *Employment Act*, read together with section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011, the remedy is discretion any and only available within 3 years of dismissal or termination of employment, subject to such conditions as the court may think fit to impose.

143. In the instant case, the claimant's employment was terminated on February 4, 2019 more than 3 years ago.

The remedy is unavailable.

b. Maximum compensation

144. Having found that termination of the claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, the claimant is entitled to the relief provided by section 49(1)(c) of the *Employment Act* subject to compliance with the provisions of section 49(4) of the Act.

145. In determining the quantum of compensation, the court has considered the following;

i. The claimant was an employee of the respondent for about 21 years and 5 months a comparatively long period of time and wished to continue as evidenced by the prayer for the remedy of reinstatement.

ii. The claimant had no disciplinary issues before 2019 and had demonstrably received accolades and letters of appreciation from the employer from 2004 till 2012 including a Summit Heroes Award in July 2004.

He was undeniably a committed and diligent employee. Although the claimant alleged that his tribulations begun when he joined the 2nd claimant union, he did not disclose when he did so nor the forms the tribulations took.

Relatedly, neither the claimant nor the respondent adduced any iota of evidence to demonstrate the union activities the claimant was involved in.

When the respondents accused him of recruiting members, the claimant asked for details instead of explaining the legal activities he may have been engaging in.

iii. The claimant refused to respond to the notice to show cause without providing reasons. Other than the response to the warning letter, the claimant made no other attempt to explain his position on the issues raised.

Surprisingly, the claimant appealed the respondents decision to terminate his employment though the appeal was unsuccessful.

iv. The claimant substantially contributed to the termination of employment by inter alia his apparent confrontational approach. This is most vividly demonstrated by the use of an undesignated entrance on January 16, 2019 which in the court's view was unnecessarily provocative.

146. In the circumstances, the court is satisfied that the equivalent of 8 (eight) month's salary is fair.

c. Having found that neither the claimant nor the respondent pleaded and proved the particular union activities the claimant was involved in, where and when, the court was not persuaded that the claimant's employment was terminated on account of union activities and as adverted to else, whether the claimant did not even disclose when he joined the union or when the alleged activities commenced and when the alleged tribulations commenced as well.

147. Intriguingly, the claimant led no evidence to establish the claims set out in paragraph 3 of the memorandum of claim and being species of special damages they had not only to be pleaded but proved by evidence as provided by the provisions of sections 107, 108 and 109 of the *Evidence Act*.

148. The court is further guided by the sentiments of Abuodha J. in *Nicholas Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR,

> " The burden of proof does not become any less on the employee because the employer has not defended the claim or absent at the trial. The claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his favour."

149. The claims referred to above and reproduced in the witness statement were not explained by way of particulars and supportive evidence. It is unclear how the court was expected to evaluate them without particulars and evidence let alone their exclusion from the prayers sought.

150. When for instance did the prorated leave and leave allowance accrue? Service pay/Gratuity are not synonymous and 4 months salary *in lieu* of notice let alone.

151. What for instance is PH or uniform compensation?

152. When did the arrears of salary increment arise and why the sum of kshs 21,000/=? What is the justification of VAT refund 2013 – 2016? and how was the right to participate in union activities quantified at kshs 3,600,773.40?

153. These are pertinent questions for which the claimant tendered no particulars or evidence in substantiation.

154. In the upshot, judgement is entered for the claimant against the respondent in the following terms;

i. Equivalent of eight (8) months salary compensation.

ii. Costs of this suit.

iii. Interest at court rates from the date hereof till payment in full.

155. For the avoidance of doubt, all other claims are dismissed.

156. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JANUARY 2023

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