



**Kenya Union of Commercial, Food and Allied Workers v National Museums of Kenya
(Cause 1156 of 2016) [2023] KEELRC 282 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 282 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1156 OF 2016
JK GAKERI, J
FEBRUARY 6, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

NATIONAL MUSEUMS OF KENYA RESPONDENT

JUDGMENT

1. The Claimant union initiated this suit by a Memorandum of Claim filed on 15th June, 2016 alleging the unlawful suspension and eventual dismissal of seven (7) of its members without due regard to the provisions of the Employment Act, 2007 and their respective employment contracts with the Respondent herein.
2. In its Claim, the Claimant maintains that each of the seven (7) grievants joined the Respondent on diverse dates and served in different positions at the Respondent as follows:-



Name	Date of employment	Position
Saningo Meshuki Senteyiam	1/10/2009	Ticket clerk
Ernest Mburu Waithira	1/7/2009	Ticket Clerk
Philomena Nthenya Makiti	1/2/2011	Ticket clerk
Julius Sankale Isaac	1/9/2007	Ticket clerk
Martha Kivava	1/12/2007	Ticket Clerk
Sarah Wambui Gatonye	1/6/2012	Curatorial/Assistant I/Ticket Clerk
Raphael Sinoya Sarinke	1/11/2010	Database Administrator

3. The claimant avers that the grievants were issued with show cause/suspension letters which were initially issued and amended on 4th November 2014 levelling accusations against them as follows:



Name	1 st Show cause letter	Accusation	Amended accusation
Saningo Meshuki Senteyiam	10.5.2014	Failure to remit Kshs.7,950/= and financial embezzlement	Fraudulent acts causing loss of Kshs.3,716,900/=
Ernest Mburu Waithira	„	Failure to remit Kshs.87,350/=	Fraudulent acts causing loss of Kshs.1,769,950/=
Philomena Nthenya Makiti	„	Failure to remit Kshs.87,350/=	Fraudulent acts causing loss of Kshs.3,716,900/=
Julius Sankale Isaac	„	Failure to remit Kshs.7,200/=	Fraudulent acts causing loss of Kshs.7,166,250/=
Martha Kivava	12/9/2014	Failure to remit Kshs.1,590,300/=	Charge not revised
Sarah Wambui Gatonye	3/3/2014	Failure to remit Kshs.1,541,300/=	„
Raphael Sinoya Sarinke	10/5/2014	Negligently doing his duties thus allowing large amounts of revenue to be stolen.	Accused of acts of omission and commission causing loss of Kshs.9,432,350/=.

4. The claimant further avers that the grievants attended a disciplinary committee meeting on 4th November 2014 at which no evidence regarding the alleged fraud was availed and that the committee members could not agree on the right cause of action.
5. That on the next day, the committee directed the respondent's management to provide evidence regarding the alleged fraud failure to which they would be reinstated to their previous positions unconditionally. It avers that the respondent neither availed the evidence nor reinstate the grievants.
6. The claimant union avers that it took all reasonable steps to resolve the issues with the respondent including addressing the issues with both the respondent and reporting of a trade dispute with the Ministry of Labour. It accuses the respondent of failure to cooperate and a failure to show any justifiable or lawful grounds for suspension and dismissal of the grievants.
7. As a result of the foregoing, it seeks the following orders:
 - i. A declaration that their suspensions and eventual dismissals were unfair and unlawful.



- ii. A declaration that all the accusations levelled against the grievants in the show cause/Suspension and dismissals letters are null and void and shall be treated as such in the future.
- iii. An Order directing the Respondent to reinstate the grievants and treat them in all respects as if their employment had not been terminated or;
- iv. Re-engage them in work comparable to that which they were employed prior to their dismissals, or other reasonably suitable work at the same wages and;
- v. An order directing the Respondent to pay them wages which they did not earn as a result of the suspensions/dismissal.
- vi. An Order directing the Respondent to pay each of the grievants twelve months gross wages based on the gross monthly wage of each of the grievants at the time of suspension.
- vii. Any other Order the Court may find proper and appropriate to grant to meet the ends of justice.

8. In the alternative, and where reinstatement is not considered by the Court, the grievants pray that this Hon. Court, issues the following alternative Orders:-

- i. A declaration that the suspension/dismissals were unfair and unlawful.
- ii. A declaration that the accusations levelled against the grievants in the show cause/suspension and dismissal letters are withdrawn and are null and void and be treated as such in future.
- iii. An Order reducing the dismissal to normal termination of service to enable the grievants to enjoy their terminal benefits.
- iv. An order directing the Respondent to pay each of the grievants for the period of suspension.
- v. An order directing the Respondent to pay each of the grievants all their terminal benefits including pension
- vi. An Order directing the Respondent to pay each of the grievants 12 months gross wages based on the gross monthly wage or salary of each of the grievants at the time of suspension/dismissal.
- vii. Any other Order the Court may find fit and proper to grant to meet the ends of justice.

9. The specific claims are as follows;

- i. Saningo Meshuki Kshs.620,500/=
- ii. Ernest Mburu Kshs.810,500/=
- iii. Philomena Nthenya Kshs.765,000/=
- iv. Julius Sankale Kshs.804,780/=
- v. Sarah Wambui Gatonye Kshs.1,181,100/=



- vi. Martha Kivava Kshs.755,888/=
- vii. Raphael Sinoyia Kshs.6,535,318/=

Respondent's case

- 10. The Respondent filed its Reply to the Statement of Claim on 11th August 2016 admitting that the grievants were its employees. It however avers that the 7th grievant is not a registered member of the claimant union and as a result, he cannot be represented by the Claimant.
- 11. The respondent further avers that under every grievant's letter of employment, it reserved the right to summarily dismiss the employee for gross misconduct or under performance.
- 12. It states that on or about mid-2014, the Respondent noted that it was losing a lot of money through the e-ticketing system installed for collection of gate fees. Investigations revealed the following:
 - a. Mr. Saningo, in conspiracy with other colleagues had embezzled Kshs.3,580,500/= through non-disclosure of full revenue generated from daily sale of admission tickets.
 - b. Mr. Mburu, alone and in conspiracy with other colleagues had embezzled Kshs.154,400/= through non-disclosure of full revenue generated from daily sale of admission tickets.
 - c. Ms. Nthenya, in conspiracy with other colleagues had embezzled Kshs.136,400/- through non-disclosure of full revenue generated from daily sale of admission tickets.
 - d. Mr. Sankale, alone and in conspiracy with other colleagues embezzled Kshs.113,550/- through non-disclosure of full revenue generated from daily sale of admission tickets.
 - e. Ms. Kivava, alone and in conspiracy with other colleagues had embezzled Kshs.1,590,300/- through non-disclosure of full revenue generated from daily sale of admission tickets.
 - f. Ms. Gatonye, alone and in conspiracy with other colleagues had embezzled Kshs.1,541,300/- through non-disclosure of full revenue generated from daily sale of admission tickets.
 - g. Mr. Sarinke as the ICT Systems Administrator was charged with the responsibility of monitoring the Respondent's automated parking system. He was issued with a show cause letter on why he should not be dismissed on account of negligence leading to the loss of Kshs.9,432,350/=.
- 13. The respondent avers that it followed due process in dismissing the grievants and that the decision to do so was informed by the investigations carried out by its independent service providers.
- 14. It maintains that it afforded all grievants an opportunity to be heard and that each one was accorded a fair hearing. That during the hearing, various reports were presented before the disciplinary committee on the investigations carried out and that the reports linked the grievants to the missing funds.
- 15. The respondent further avers that none of the grievants gave a satisfactory defence to the allegations against them. They merely denied having embezzled the funds.



16. The Respondent concludes that the grievants were dismissed on grounds of gross misconduct contrary to its Terms and Conditions and the [Employment Act](#), 2007.

Evidence

17. The Claimant called two witnesses Mr. Saningo Meshuki Senteyian and Raphael Sinoyia, who adopted their written witness statements.
18. CWI told the court that he was employed by the Respondent effective 1st December, 2009. He testified that according to the letter inviting him for the disciplinary hearing, the amount allegedly lost had been amended by the Respondent.
19. That he was dismissed from employment on 11th November, 2015 and the letter did not set out the reasons for dismissal.
20. It was his testimony that they attended the disciplinary hearing but no evidence of the purported loss was adduced. The witness denied that he worked with one Nthenya in May 2014.
21. It was his testimony that all the grievants received and responded to the notice to show cause.
22. The witness explained that when a visitor arrived at the Respondent's place of business, he or she would pay in cash, bank slip voucher or visa card and obtain a ticket from the Ticket Clerk and charges depended on nationality, residence and adult or minor. The visitor would then proceed to the Customer Care desk where the serial number of the ticket, amount and whether the visitor was a resident or not would be recorded manually. He testified that customer care were another category of employees of the Respondent.
23. The witness explained that if a ticket was rejected at the flaps (scan), it would be returned to the ticket office, where it would be invalidated by the machine and retained and recorded in the occurrence book. The ticket would then be re-issued with a different serial number and the system would show its status. A used ticket could not be re-issued even if the visitor had not accessed the Gallery. He explained that for the Snake Park, visitors would obtain a ticket and proceed to the scan to the park as they were not recorded by the Customer Care.
24. The witness testified that the Accountant would collect cash and bank slips from the Ticket Office with a collection form in triplicate and both would sign and the Ticket Clerk would retain a copy of the form.
25. That the cash would be taken to the cash office and deposited in a safe. The Accountant would collect payments randomly as many times as possible depending on the number of visitors and on a close of business, an automatic report would be generated for the day showing the number of tickets for different categories, number of visitors per section, total per section and the grand total and the report would be reconciled with the collection form. The grand total would reflect on the screen. Any amount uncollected by 5.30 pm would be deposited in the safe and a reconciliation would be done the following morning.
26. The witness testified that complimentary tickets were issued to staff for their visitors and had to be authorised by the Curator or the Accountant in writing and the tickets were issued under a complimentary utility. It was his testimony that Internal Auditors audited the system without notice and knew how much a ticket clerk had received.
27. It was his testimony that none of the grievants was issued with a copy of the minutes of the disciplinary hearing and only saw them as part of court record after the suit was filed.



28. The witness recounted the financial and emotional suffering he and his family and other grievants underwent during suspension.
29. On cross-examination, the witness confirmed that he was a Revenue Clerk whose duty was to collect payment from visitors and issue tickets. It was his testimony that rejected or unknown tickets were recorded in the Occurrence Book.
30. The Ticket Clerks had rights to invalidate tickets and re-issue.
31. That the Collection Form would be signed by the Accountant and the Ticket Clerk.
32. It was his testimony that complimentary tickets were recorded manually but the Ticket Clerk would retain the letter from the visitor but record the serial number of the ticket on the letter.
33. The witness testified that he could not tell how customer care recorded the tickets.
34. The Claimant denied having signed receipt of the Notice to Show Cause though he received the letter.
35. The witness further confirmed that while the Notice to Show Cause had a figure of Kshs.7,950/=, the invitation to the Disciplinary Hearing had Kshs.3,716,900/=.
36. Finally, CWI confirmed having attended the proceedings and responded to the questions asked.
37. CWI, Mr. Raphael Sinoyia S. Ole Masindet testified that he was employed by the Respondent on 1st November, 2010 as a Database Administrator and was confirmed on 15th December, 2011 and his duties included supporting the system and maintenance. That he received the show cause/suspension and the dismissal letter. That he was dismissed on the ground that he and Ticket Clerks jointly facilitated the loss of Kshs.9,432,350/= by the Respondent but had previously been accused of loss of Kshs.343,000/=.
38. It was his evidence that he was not given evidence of his culpability.
39. That he responded to the show cause letter, attended the disciplinary hearing and was not given a copy of the minutes.
40. The witness testified that he had rights to create and disable accounts as instructed by Management but could not edit, upgrade or delete any record in the system and could not initiate a transaction.
41. He testified that the IT Manager had super system rights. That he was not shown evidence of what he had deleted. It was his testimony that he could only see the sales per day but could do nothing about it but could tell whether a transaction was irregular or not.
42. He further testified that there was no forensic audit on what he allegedly deleted in the system.
43. The witness recounted the financial and emotional distress he underwent, including inability to pay a bank loan.
44. On cross-examination, the witness confirmed that he was the administrator of the Respondent's Database which inter alia included ensuring that data was not lost.
45. CWI testified that he had the mandate to monitor the e-ticketing system at his level to ensure it ran smoothly but was not a Supervisor of the Ticket Clerks.
46. It was his testimony that he was unaware that the Respondent lost data relating to e-ticketing and maintained that it was his duty to ensure safety of data.



47. It was his testimony that he could view the transactions on the e-ticketing system but could not print reports. He also confirmed that he attended the disciplinary hearing as was a union representative.
48. On re-examination, CWI testified that he could create accounts for Ticket Clerks and specific heads of departments for management to view the e-ticketing system and he did not notice any suspicious transaction by anyone.
49. The witness testified that he was not given any report or evidence of tampering with the system or show the alleged deletions of records.

Respondent's evidence

50. RWI, Esther Mukami, testified that she was the Accountant at the site and ensured that the systems were working including duty roaster and the manual book at the Customer Care desk. That her main role was to collect revenue from Ticket Clerks daily.
51. The witness contradicted CWI on tickets for the snake part by stating that the same procedure was applicable and details would be captured manually.
52. The witness testified that the Ticket Clerks were custodians of cash before it was collected by the Accountant and both would sign for the amount after counting the cash.
53. That the Revenue summary report had to balance.
54. It was her testimony that a spot check showed that the manual records and the ticketing reports could not tally and reported the same to the supervisor who called the System Provider and the Internal Auditor.
55. On cross-examination, the witness confirmed that she had not produced the customer care book or the manual reports or the cash collection form. She confirmed that the Internal Auditors Report dated 8th September, 2014 was signed at the top.
56. That she had no evidence of the concerns she had raised in 2013 and did not appear before the disciplinary committee to explain the loss. That she was a whistle blower.
57. RWII, Mr. James Thuita testified that he was a systems developer. The witness explained how the system worked including authentication of the receipt at the flaps (scan) and exit.
58. It was his testimony that a Systems Administrator had right on the e-ticketing.
59. The witness testified that he conducted an audit of the system to ascertain if tickets were missing and found that malicious code was deleting used tickets. That the Data Base Administrator or Manager could have noticed the anomaly.
60. On cross-examination, the witness confirmed that KAPS created the Respondent's system and rights were given to the appointed officer when it was handed over. He could not recall who it was.
61. The witness testified that the codes that were deleting data were within the Respondent's system but foreign to the system delivered by the developer.
62. That KAPS report identified the person who was in the system when deletion took place and the amounts involved as well as the date.
63. The witness stated that he could not apportion loss to any of the grievants.



64. On re-examination, RWII stated that the amounts lost were traceable to those on duty. That the amount being handed in was less by what was being deleted.
65. RWIII, Maureen Achieng testified that she compared the manual records and the reports from the system. That the cash collection report and KAPS Report provided evidence of who was on duty on any particular day and the two had to tally failing which there ought to have been an explanation.
66. The witness testified that there was a discrepancy and the Respondent made a loss of Kshs.9,432,350/=.
67. That she and her colleagues attached value to the deleted tickets.
68. It was her testimony that the manual records showed a higher value than what was submitted by Ticket Clerks.
69. That the Data Base Administrator should have detected the deletions.
70. On cross-examination, the witness confirmed that she conducted an internal audit and signed it next to her title as Internal Auditor.
71. It was her testimony that there were differences between manual register and the amount remitted per month and the manual and e-system report were not filed in court.
72. The witness confirmed that the KAPS Report did not apportion loss to any of the grievants but identified who was on duty and had logged into the system.
73. That RWII, Raphael Masinde was not the supervisor.
74. It was her testimony that the figure of Kshs.9,432,350/= was extracted from the manual register.
75. RWIV, Mr. Joel Oluchina Asiva testified that he was the Senior Human Resource Officer. It was his testimony that the Respondent complied with all prescribed procedures and dismissal of the grievants was fair and legal.
76. On cross-examination, the witness confirmed that the amount in the notice to show cause and the invitation for the disciplinary hearing for Mr. Sankale Isaac was different and neither the report of the investigation referred to in the dismissal letter nor the Auditor's report was given to the grievants.
77. RWIV stated that based on the reports, the disciplinary committee could not attribute the figures to the specific employees. That he relied on the Internal Auditors Report to apportion the amount between the grievants.
78. The witness confirmed that the Economic Crimes Unit did not conduct investigations and no representative of KAPS attended the disciplinary hearing.
79. The witness confirmed that although Clause 12.19(vii) of the Respondent's Terms and Conditions for Museum Management Staff, July 1997 provided that disciplinary cases were to be finalised within 6 months, the grievants were on suspension for over one (1) year.
80. On re-examination, the witness confirmed that the suspension letter dated 10th May, 2014 specified the commencement of the suspension.
81. That KAPS presented its report to the disciplinary committee in the absence of the grievants.



Claimant's submissions

82. The Claimant indicated the dates of employment of the grievants as follows;

Saringo 1.10.2009

Meshuki
Mburu 1.07.2009

Waithira
Nthenya 1.02.2011

Makiti
Sankale 1.09.2007

Isaac
Martha 1.12.2007

Kivava
Wambui 1.06.2012

Gatonye
Raphaell 1.11.2010

Sarinke

83. The Claimant submitted that the letters inviting the grievants for the hearing accused the grievants for amounts different from the amounts in the notice to show cause/suspension letters as follows;

Name	Show cause/ suspension letter	Dismissal letter/ Invitation letter
Saringo Meshuki	7,950	3,716,900
Mburu Waithira	87,350	1,769,950
Nthenya Makiti	87,350	3,716,900
Sankale Isaac	7,200	7,166,250
Martha Kivava	1,590,300	1,590,300
Wambui Gatonye	1,541,300	-
Raphael Sarinke	Negligence	Acts of omission

84. That the invitation letters had no accompanying evidence in support of the allegations as neither the copies of the internal audit nor the KAPS report were not provided for preparation for the hearing and all the grievants were dismissed.

85. The Claimant submitted that minutes of the disciplinary hearing were not availed to the grievants. That KAPS representative did not attend the meeting to explain its report. That the report of the Economic Crimes Unit was not provided.

86. It was the Claimant's submission that the Respondent did not explain how part of its data was lost from its back up system.

87. That the Disciplinary Committee doubted the accuracy of the documents relied upon in the audit report and the Internal Auditor's inability to apportion the money allegedly embezzled to individual grievants.



88. It was submitted that M/s Sara Dahir doubted the loss of funds and accuracy of manual records.
89. It was further submitted that the KAPS Report did not identify the grievants as having manipulated the Respondent's system or attribute the 3rd party system or deleted data to any of the grievants.
90. The Claimant further submitted that the root password to the system was given to the senior most officer of the Respondents and the grievants role was to issue tickets and Mr. Raphael had limited access to the system and Mr. Thuita confirmed as much and did not apportion blame and RWIII Maureen Achieng tendered no basis of her report.
91. It was submitted that the grievants were on suspension for too long contrary to the terms and conditions of service.
92. That none of the Respondent's witness could explain why the figures changed in the invitation for disciplinary hearing letters.
93. That RWI, Esther Mukami could not explain how much she received from the ticket clerks and how much was remitted.
94. The Claimant submitted that the absence of the Customer Care Book, KAPS report and daily collection reports, the Respondent had failed to prove that the grievants were culpable.
95. The Claimant further submitted that the grievants were sacrificial lambs where other persons were to blame such as the Super Users and a Weak System.
96. The court was urged to award the grievants the reliefs claimed in the Memorandum of Claim.

Respondent's submissions

97. By the time the court retired to prepare this judgement, the Respondent's submissions were untraceable in the system.

Determination

98. The issues for determination are;
 - i. Whether termination of the grievants employment by the Respondent was fair and lawful.
 - ii. Whether the grievants are entitled to the reliefs sought.
99. As to whether termination of the grievants employment was fair, parties have adopted different positions with the Claimant maintaining that the summary dismissal on 11th November, 2015 was unfair and unlawful.
100. In determining this issue, an opportune starting point is the evidence on record as adduced by the parties.

Reason for termination

101. It is common ground that the grievants Saningo Meshuki, Ernest Mburu, Philomena Nthenya, Julius Sankale, Martha Kivava, Sarah Wambi and Raphael Sinoya were employed by the Respondents on diverse days between 1st October, 2009 and 1st June, 2012 as Ticket Clerks and Database Administrator respectively under written contracts of service. The contracts were terminable by one (1) month's notice or pay in lieu by either party.



102. It is not in dispute that none of the grievants had a previous warning letter.
103. It is also not in contest that all the grievants received and responded to a notice to show cause/suspension letter dated as follows;
- Saningo 10th May, 2014
 Meshuki Ernest 10th May, 2014
 Mburu Philomena 10th May, 2014
 Nthenya Julius 10th May, 2014
 Sankale Martha 12th September, 2014
 Kivaya Sarah 12th September, 2014
 Gatonye Raphael 10th May, 2014
 Sinoyia and were suspended indefinitely.
104. The Notice to Show Cause/suspension letter accused the grievants for failure to remit specific sums of money while on duty and in the case of Raphael Sinoyia, for acts or omissions of negligence which led to the loss cited by the Respondent of Kshs.9,432,350/=.
105. The accusation was based on an Internal Audit Report dated 8th September, 2014 covering the period May 2013 to May 2014.
106. Needless to gainsay, the Internal Audit Report in question prepared by RWIII attributed no specific loss to any of the grievants and the witness confirmed as much. RWII was also emphatic that he could not apportion loss to any of the grievants. The report identified the amounts allegedly lost per month and the aggregate loss as Kshs.9,432,350/=.
107. The methodology employed was a comparison between the daily totals of registered visitors in the manual register and the daily summaries from the system.
108. The KAPS Report was relied upon to ascertain the name of the clerk on duty at the time.
109. It is unclear as to how long the investigation took. However, it is evident from the report that the grievants were not involved in any way or interviewed which implicates the conclusiveness of the report as it was the basis upon which the grievants were called upon to show cause and suspended.
110. The report was the foundation for the accusations.
111. Instructively, the witness did not avail the manual register she relied upon for the figures as submitted by the Claimant.
112. It is also not in contest that the grievants were invited for a disciplinary hearing on diverse days for the meeting slated for 4th November, 2014 and all attended the hearing on 4th and 5th November, 2014.
113. RWI confirmed that the Internal Audit investigation was conducted after she noticed anomalies between the manual records and the ticketing report but could not avail any of the Revenue Collection Forms for scrutiny.
114. It was her testimony that payment by visitors took different forms such as bank slips, cash and by card.
115. From her evidence, it was unclear what could not tally.



116. Similarly, from the evidence adduced by the Respondent and documents on record, it is unclear as to how the Respondent came up with the amounts cited against the grievants. RWIII confirmed that the figures came from the manual register which was not filed.
117. Strangely, the figures were solely attributed to the grievants because the individual happened to be on duty on the material day yet KAPS, the supplier of the e-ticketing system could not determine who was giving the deletion commands.
118. The Respondent tendered no particular document to demonstrate a particular date on which any of the grievants gave less than they were supposed to. This is also borne by the lack of specificity of the allegations made in the Notice to Show Cause.
119. The letters dated 10th May, 2014 stated as follows;
- “It has been brought to the Management’s attention that the Nairobi National Museums has been losing huge amount of revenue through fraudulent acts committed by you in line of duty. It has been noted through the ongoing investigations that in the month of May 2014 while on duty alone, revenue worth KES 106,350 was not remitted by you. Also during the same month, while on duty with Ms Sarah Muthoni you jointly failed to remit Kshs.7,200/= . . .”
120. Two of the letters dated 12th September, 2014 had a slightly different formulation as follows;
- “It has been noted from the audit report that while on duty alone and in some instances with other colleagues during the audit period, you failed to remit Kshs.1,590,300/= cumulatively . . .”
121. The letter to Raphael Sinoyia dated 10th May, 2014 stated as follows;
- “You as the ICT Systems Administrator charged with the responsibility of monitoring NNM automated ticketing system committed acts of omission/commission jointly with ticket clerks negligently doing your work and allowed the large amount of revenue to be stolen . . .”
122. Evidently, the letters dated 10th May, 2014 were written before the Internal Auditor had completed her investigation and also before the KAPS Report was compiled in June 2014.
123. It is unclear why the Respondent appear to have been in a hurry to discipline the grievants.
124. Significantly, the grievants responded to the Notice to show cause/suspension letter. The 6 letters on record are dated 18th – 20th June, 2014 and were all written after the 14 days given by the letter. As expected, all the grievants whose response letters are on record denied the allegations.
125. For instance, Mr. Saningo stated that during the month of May 2014, he was stationed at the Nairobi Gallery (OLD PC) Ticket Office for the entire month and was off duty from 28th April, 2014 to 3rd May, 2014. Mr. Saningo attached copies of handover reports from the Nairobi Gallery.
126. Ernest Mburu attached his Revenue Collection Forms for May 2014 for reference. He asserted that he was only trained on how to use the e-ticketing system i.e sale and issue of tickets.
127. Philomena Nthenya stated that according to the duty roster for May 2014, she did not work with Saningo Meshuki.
128. Julius Sankale stated that he was only shown how to login and sell tickets and log out of the system.



129. Martha Kivava denied having failed in her duties and stated that she had been on maternity leave and reported on 12th June, 2013 and could not have been on duty in May 2013. The grievant attached her leave form and sales summary while she was on duty.
130. Raphael Masindet stated that he did not handle sales of tickets or reports and had discharged his duties.
131. A panoramic view of the responses by the grievants reveal that they raised factual and systems issues which the Respondent was obligated to investigate to ascertain their veracity.
132. From the evidence on record, it is unclear whether these responses were subjected to examination.
133. Strangely, although the letters inviting the grievants for the disciplinary hearing made reference to their responses, it made no allusion to the veracity or cogency of the responses and the allegations were founded exclusively on the audit report, copies of which were never availed to the Claimants.
134. As regards the alleged loss of funds, the Respondent adduced no other evidence other than the 3 page internal audit report dated 8th September, 2014. It tendered no evidence that the report was escalated to the board of directors and the directions given by the board. Similarly, the Respondent adduced no evidence to demonstrate how the loss was reflected in its financial statements and whether the Auditor General raised queries.
135. Significantly, four out of six members of the disciplinary committee raised various concerns;
 - i. They doubted the accuracy of the data used during the audit exercise which date was neither availed to the committee nor the court.
 - ii. They also questioned the Internal Auditor's inability to apportion the amounts embezzled by individual officers.
 - iii. The members failed to understand how banking slips, unknown vouchers and complimentary tickets were accounted for during the exercise.
136. In essence, these members of the committee were questioning the accuracy and reliability of the report by the Internal Auditor.
137. In the court's view, the audit report lacked essential details and necessary annexures.
138. The report was supposed to demonstrate the amounts allegedly lost by each of the 6 grievants, the specific dates they were on duty, the amounts they handed over to the Accountant and the alleged shortage.
139. Puzzlingly, the Internal Auditor testified that she compared the manual records with the e-ticketing system report and did not seek to engage the grievants in any way. The manual records were neither availed to the disciplinary committee nor the court for perusal.
140. It is apparent that the Internal Auditor could have conducted a more thorough audit.
141. The Internal Auditor had the opportunity to unearth the alleged conspiracy, if there was any, and clearly demonstrate that monies were lost in the hands of the grievants.
142. Clear illustrations of how a particular grievant sold tickets, received payment in whatever form but failed to account for part of it actually happened. This was necessary since the grievants denied having deleted anything in the system and the deletions were not traceable to any of them.



143. RWIII confirmed on cross-examination that she relied on the KAPS Report dated June 2014 to apportion culpability because the amounts in question were allegedly unaccounted for when a particular grievant was on duty.
144. In the court's view, the lack of essential information, details, clear illustrations and annexures would appear to compromise the veracity and reliability of the Internal Auditor report dated 8th September, 2014.
145. The lack of elemental detail and information was reflected in the notices to show cause/suspension and dismissal letters since the audit covered a duration of one year. It behoved the Internal Auditor to set out dates when the alleged shortages occurred and how the global sum attributed to each of them was arrived at to justify personal culpability and enable the grievants respond appropriately. This was not done. Finally, the Internal Auditors Report was silent on how the alleged shortages were a consequence of a conspiracy.
146. Needless to emphasize, interviewing the grievants would possibly have given the Internal Auditor the breakthrough she required to appreciate how the alleged shortages could have occurred.
147. There is nothing on record to show that the grievants or any of them acted in concert. KAPS was unable to establish the IP address that was sending the deletion commands.
148. RWII testified that he could only attribute the deletion to person who was in the system on that day but could not tell where the commands came from.
149. In sum, neither the Internal Auditors Report nor the KAPS Report identified the person or persons who was issuing the deletion commands in the e-ticketing system yet the codes were within the Respondent's system.
150. Section 45 of the [Employment Act](#), 2007 provides that;
 1. ...
 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.
151. Similarly, Section 43 of the [Employment Act](#) provides that;
 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
152. As elaborated in legions of decisions of this court and the Court of Appeal, for termination of employment to pass muster, it must have a substantive justification and procedural fairness.
153. This proposition was aptly captured by Linnet Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and elaborated further by the Court of Appeal in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.



154. Applying the foregoing provisions and propositions of law to the facts of the instant case, the court is satisfied and finds that the Respondent has on a balance of probabilities failed to establish that it had a valid and fair reason to terminate the grievants employment on 11th November, 2015.

Procedure

155. Section 41 of the *Employment Act* sets out the detailed procedural tenets to be complied by the employer before termination of employment.

156. The specific precepts to be followed have been elaborated in legions of decisions of this court and the Court of Appeal.

157. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR for instance, the Court of Appeal held;

“Four elements must 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 are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

158. Relatedly in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal held that the elaborate procedural requirements prescribed by Section 41 of the *Employment Act* were mandatory.

159. In the instant case, it is common ground that the grievants were issued with show cause/suspension letters dated 10th May, 2014 or 12th September, 2014.

160. As regards the Tickets Clerks, the letters stated the amount allegedly lost by the grievant either alone or with others.

161. None of the letters contained essential particulars on how the alleged non-remittance of money took place, bearing in mind that 5 of the letters were issued to the grievants before the Internal Auditor Report had been finalised and the KAPS report did not exist then.

162. Equally, the grievants responded to the letter and were invited for a disciplinary hearing slated for 4th November, 2014 and all appeared on 4th and 5th November, 2014. Intriguingly, the invitation to the disciplinary hearing did not inform the grievants that they had the right to be accompanied by another employee of their choice or a shop floor union representative. Similarly, no representative of KAPS was invited to the meeting and while the Internal Auditor made submissions on the Audit Report, the Systems Administrator presented the KAPS Report explaining that the system had been hacked by compromising the root password to the data base.

163. The presentations were made in the absence of the grievants. They had no opportunity to contest the contents of the Internal Audit Report or the KAPS Report or question the presenters yet the documents formed the substratum of the Respondent’s case.



164. Mr. Saningo for instance queried the amount allegedly embezzled since it had risen from Kshs.7,950/= in the notice to show cause to Kshs.3,850,500/=. The change affected all the grievants except one.
165. All the charges against the grievants were grounded on the Internal Auditor Report.
166. Some members of the committee felt that the Respondent had lost a substantial amount of money through a well-orchestrated plan between the “hacker”, Ticket Clerks and the Systems Administrator.
167. That the parties to the scheme could not have acted otherwise than in concert.
168. Since four of the six members of the committee doubted the accuracy of data relied upon during the audit exercise and the inability to clearly apportion amounts allegedly embezzled by individual officers, decision making appear to have been deferred. No particular minutes state so. The minutes state as follows;
- “The Committee was informed that available evidence from audit and KAPS had enough facts to held it make recommendations to the Ag. Director General, however, some members fell otherwise thereby making the members to agree that in the event the evidence was not sufficient in the assessment of the Legal Officer, then a forensic audit should be carried out by an independent body to unearth clear information on the scandal. A re-evaluation coupled by bench-marking of the E-ticketing System and rotation of Tickets Clerks was also recommended as measures that need to be taken to avoid such cases in future.”
169. The upshot of the foregoing passage is that majority of the members of the disciplinary committee felt that the evidence before them was insufficient for purposes of decision making in the cases before them and the Legal Officer was to avail the evidence after the hearing.
170. Surprisingly, the minutes were signed on 19th February, 2015, more than three months later.
171. From the evidence on record, no further or other investigation took place. This is consistent with RWIV’s testimony on cross-examination that the Economic Crimes Unit did not conduct any investigation.
172. From the minutes on record, deliberations of the disciplinary committee continued on 16th April, 2015 when a differently constituted committee, but for one Mr. Juilus Kirigha sat.
173. The Respondent tendered no evidence as to when the committee was reconstituted and what necessitated the reconstitution. Creditably, the Legal Officer clarified to the committee that she had no authority to make a decision on the cases before the committee as implied by the previous minutes.
174. Ms Dahir clarified that she had not acknowledged loss of funds as indicated in the earlier minutes since she doubted the accuracy of the manual records relied upon by the Internal Auditor.
175. Noteworthy, the Internal Auditor made submissions on the Audit Report and purported to explain contents of the KAPS report.
176. The minutes of the committee meeting held on 16th April, 2015 are incomplete. It is unclear what the committee recommended. However, another meeting was held on 3rd and 4th November, 2015 more than 6 months later and 5 committee members attended.
177. Minute 3/10/2015 on matters arising from previous minutes states;

“The committee was informed that disciplinary cases for Saningo Meshuki, Martha Kivava, Sarah Gatonye, Ernest Mburu, Philomena Nthenya, Julius Sankale and Raphael Sarinke



were still pending. In order to resolve the cases, the committee agreed to read through full KAPS report, the then Ag. Chief Internal Auditor's Report, the current Chief Internal Auditor's Report and the ICT Manager's Report so that they could make an informed decision on the cases.

After reading through all the reports, the committee deliberated and unanimously agreed that the specific amounts embezzled by each officer could not be identified since at least two ticket clerks were on duty at one point during the audit making it difficult to separate the figures. However, the whole committee based on the audit report of May 2013 to May 2014 and KAPS Report of 6th August, 2014 alongside Chief Internal Auditor's E-ticketing Cashiers Analysis, was satisfied that the seven officers were guilty of collectively embezzling Kshs.9,432,350/=. The Chief Internal Auditor's E-Ticketing Cashier's Analysis Report indicated that Kshs.1,051,750/= was for unknown ticket value while 8,787/= tickets were unaccounted for."

178. The Committee recommended that the grievants be summarily dismissed from the Respondent's service.
179. The Respondent's disciplinary process against the grievants may be faulted in various respects.
180. First, and as already adverted to elsewhere in this judgement, the notice of invitation to the disciplinary hearing did not inform the grievants that they were by law entitled to be accompanied by another employee of their choice. This is a requirement of the law for which the Respondent had no explanation. In addition, the Respondent violated paragraph 12.22(iv) of its Terms and Conditions of Service, 1997.
181. In *Postal Corporation of Kenya V Andrew K. Tanui (Supra)*, the Court of Appeal stated as follows;

"In this case, the letter inviting the Respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular . . ."
182. The foregoing sentiments apply on all fours to the facts in this case as regards the presence of another employee. Relatedly, the termination letter did not notify the grievants that they had the right to appeal to the Board of the Respondent.
183. Second, the grievants case was heard by the committee meeting held on 4th and 5th November, 2014 but the decision to dismiss them was made by different committee at a meeting held a year later.
184. The members of the committee who attended the meeting held in 2014 saw and heard all the grievants and at least four (4) were satisfied that the Respondent's case was unsustainable owing to the doubts they had about the accuracy of the data relied upon and the inadequacy of the audit report itself.
185. The committee could not find the grievants culpable based on the evidence before them.
186. In the view of the committee (the majority) further investigation and/or evidence was necessary. The committee abdicated its responsibility and gave the Legal Officer the mandate to assess the evidence on its behalf and determine its sufficiency or otherwise.



187. It is unclear what the meeting held on 16th April, 2015 found and/or recommended. The copy of minutes on record is incomplete.
188. Third, members of the disciplinary committee meeting held on 16th April, 2015 were different, other than one (1) Mr. Julius Kirigha. It is unclear as to when they were appointed by the Director-General as provided by the Respondent's Terms and Conditions of Service, 1997.
189. The meeting appear to have relied on the record of the previous meeting but heard submissions of Ag. Chief Internal Auditor. They did not hear anyone from KAPS or ICT or the grievants.
190. The new committee purported to exercise appellate powers but heard only one party, the Respondent, the accuser but relied exclusively on the record for the grievants case, a case of double standards in decision making.
191. Since six out of the seven members of the committee were not members of the committee when the grievants were heard, it was incumbent upon the committee to summon and hear the grievants afresh and make its decision.
192. The trajectory the meeting took would not have guaranteed fairness to the grievants.
193. Fourth, on 3rd and 4th November, 2015, five members of the committee met from 3.10 pm and as stated above, they went through four reports, namely;
- i. KAPS Report.
 - ii. Ag. Internal Auditor's Report, 2014
 - iii. Current Chief Internal Auditor's Report
 - iv. ICT Manager's Report.
194. The committee also relied on the minutes of previous meetings.
195. It is unclear as to when the last two reports were prepared and what their contents were.
196. Noteworthy, members of the committee relied on the reports without having heard the grievants yet they had heard the Respondent's evidence afresh from the Internal Auditor.
197. More fundamentally, however, none of the above-named reports and minutes were availed to the grievants yet they were the substratum of the allegations.
198. Unlike allegations of general misconduct by an employee, where the allegation involves money, it is necessary for the accuser to provide the basis of the accusation for the employee to respond appropriately.
199. This position finds support in the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (Supra) as follows;
- “ . . . The board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictments which could torpedo his entire career and destroy his future.”
200. These sentiments are equally applicable to the instant case.



201. The Respondent, not only failed to give the grievants the evidence it was relying upon, but also went ahead and procured additional reports to revamp its case without putting the findings of the new reports to the grievants for rebuttal, bearing in mind that the Internal Auditor's Report 2014 and the KAPS, 2014 report were found to be an insufficient basis of culpability by the committee meeting held on 4th and 5th November, 2014.
202. Unsurprisingly, the committee meeting held on 3rd and 4th November, 2015 found the evidence overwhelming and found all the grievants culpable.
203. The minutes of the meeting were signed on 9th March, 2016.
204. Finally, documents on record reveal that the disciplinary process against the grievants commenced on 10th May, 2014 and ended on 11th November, 2015 more than one (1) and six (6) months during which time the grievants were on suspension. Similarly, the suspension was effective 10th May, 2014 for 5 of the grievants and 12th September, 2014 for the other two and neither a time frame nor terms of the suspension or purpose were outlined. The duration was not only inordinate but unjustifiable in any respect and was a violation of the grievants right to fair labour practice. In addition, the respondent violated its Terms and Conditions of Service, dated July, 1997.
205. Even assuming that the grievants were culpable, the process took too long to pass as fair. It cannot be gainsaid that keeping an employee on tenterhooks indefinitely amounts to an unfair labour practice. Prudence demands that a suspension be for a particular purpose and duration. The grievants narrated the financial and emotional distress they had to endure for the entire duration.
206. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probabilities failed to demonstrate that it conducted the termination of the grievants employment in accordance with fair procedure as demanded by Section 45(2)(c) of the *Employment Act* read with Section 41 of the Act.
207. In sum, the court is persuaded that termination of the grievants employment was unfair within the meaning of Section 45 of the *Employment Act*, for want of a substantive justification and procedural propriety.
208. As to whether the grievants are entitled to the reliefs sought, the court proceeds as follows"
 - a. Having found that termination of the grievants employment was unfair within the meaning of Section 45 of the *Employment Act*, a declaration is hereby issued.
 - b. In light of the foregoing finding, the grievants are entitled to all terminal benefits due to them including pension, as applicable.
 - c. The grievants are entitled to the salary due to them for the entire duration they were on suspension. As explained elsewhere in this judgement, the duration of the suspension was inordinate and undoubtedly inequitable.

d. Notice pay

209. Paragraph 6 of the Collective Agreement between the National Museums of Kenya and Kenya Union of Commercial Food and Allied Workers for the period 1st July, 2011 to 30th June, 2013 states that termination of employment shall be three months' notice or pay in lieu of notice.
210. Paragraph 32 of the Agreement provided that the agreement would remain in force for a period of 2 years after which "it shall continue to be in force until reviewed by the parties."



211. As no evidence was adduced to contest the membership of the union by the grievants, the grievants are awarded salary for 3 months as pay in lieu of notice.

e. Pending leave

212. None of the grievants furnished cogent evidence of the leave days claimed and when the leave accrued. Neither Saningo's written statement nor Raphael Sinoyia's evidence in court made reference to outstanding leave days.

The prayer is declined.

f. 12 months compensation for wrongful termination

213. Having found that termination of the grievants employment by the Respondent was unfair, the grievants are entitled to the relief provided by the provisions of Section 49(1)(c) of the [Employment Act](#) of up to a maximum of 12 months' salary.

214. The court is enjoined to assess the quantum of compensation on the basis of the parameters outlined in Section 49(4) of the [Employment Act](#), as applicable.

215. In the instant case, the court has taken into consideration that;

- i. The grievants were employees of the Respondent for a duration of between 3 and 8 years and wished to continue as exemplified by the prayer for reinstatement.
- ii. There is no evidence on record to show that any of the grievants had a previous warning letter or misconduct.
- iii. None of the grievants appealed the decision of the Disciplinary Committee to the Board of the Respondent. Having been members of the union, they may be presumed to have been aware of the right of appeal. More significantly, they were deemed aware of the Respondent's Terms and Conditions of Service which provided for the right of appeal.
- iv. The allegations made against the grievants were unproven.

216. In the circumstances, the court is satisfied the equivalent of 2 and 3 months salary is sufficient as follows;

- i. Saningo Meshuki 2 months
- ii. Ernest Mburu 2 months
- iii. Philomena Nthenya 2 months
- iv. Julius Sankale 3 months
- v. Sarah Wambui 2 months
- vi. Martha Kivava 3 months
- vii. Raphael Sinoyia 2 months
- g. Reinstatement

217. The remedy of reinstatement is provided for by the provisions of Section 49(3)(a) of the [Employment Act](#) as read together with Section 12(3)(vii) of the [Employment and Labour Relations Court Act, 2011](#).



218. The provisions of Section 12(3)(vii) are categorical that the remedy of reinstatement is only available within 3 years of termination of employment or dismissal and as emphasized by the Court of Appeal in *Kenya Airways Ltd V Aviation and Allied Workers Union* (2014) eKLR, the remedy is discretionary.
219. The grievants employment was terminated in November 2015, more than 7 years ago.
220. In the circumstances of this case, the prayer for reinstatement is unavailable.
221. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the grievants employment was unfair.
 - b. Declaration that the grievants are entitled to terminal dues including pension as applicable.
 - c. Unpaid salary during suspension.
 - d. 3 months' notice pay.
 - e. Equivalent of 2 and 3 months salary as above.
 - f. Interest at court rates from date of judgement till payment in full.
 - g. The Claimant is awarded Kshs.60,000/= as the direct expenses incurred.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF FEBRUARY 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

