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Otieno v Unilever Kenya Limited (Cause 1730 of 2017) [2023] KEELRC 303 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 303 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1730 OF 2017

K OCHARO, J

FEBRUARY 2, 2023

BETWEEN

NICHOLAS OTIENO .... CLAIMANT

AND

UNILEVER KENYA LIMITED .... RESPONDENT

JUDGMENT

Introduction

1. Through a statement of claim dated 21st June 2017, the Claimant sued the Respondent seeking the following reliefs: -
    a. A declaration that the termination of his employment was wrongful, unfair and unlawful;
    b. A declaration that the Respondent breached the Claimant's right to fair hearing, fair administrative action and freedom from discrimination.
    c. Damages for violation of Constitutional rights to fair hearing, fair administrative action and freedom from discrimination.
    d. An order directing the Respondent to reinstate the Claimant to his immediate former position.
    e. That in the alternative of [e] an order of 12 months' salary to be paid to the Claimant for wrongful and unfair termination in line with section 49 of the Employment Act.
    f. Costs of the suit.
    g. Any other orders that the Court may grant in the interest of justice.
2. Service of summons to enter appearance on the Respondent, elicited filing of a memorandum of appearance dated 9th May 2018, and a memorandum of defence dated 4th June 2018, by the

Respondent. The Claimant's claim and his entitlement to reliefs sought, were denied in toto, in the memorandum of defence.

3. Pursuant to the Procedure Rules, the Claimant did file a reply to the memorandum of defence on the 4th June 2018. At the close of pleadings, the matter got destined for hearing on merit.

4. The Claimant's case was heard on the 19th October 2021, while the Respondent's was on the 28th March 2022.

The Claimant's case.

5. At the hearing, the Claimant moved this Court to adopt his witness statement herein filed, and the documents under the list dated 21st June 2017, and those that were filed under the list of documents dated 17th June 2022, as his evidence in chief and documentary evidence. The statement was so adopted and the documents admitted respectively.

6. The Claimant stated that he came into the employment of Respondent on or about the 6th April 2006, as an apprentice. Later, on or about 10th November 2009, he was offered a permanent employment subject to a successful completion of his probation period. He was so engaged as a fitter in the Respondent's supply chain – soaps department.

7. The Claimant stated further that on the 1st May 2011, he was confirmed into employment under permanent and pensionable terms as an Engineering store keeper, Grade C.

8. The Claimant asserted that, he for a period of 10 years faithfully and diligently worked for the Respondent, up until on or about the 7th March 2017, when to his dismay, he received a show cause letter from it, requiring him to show cause why disciplinary action would not be taken against him, on an allegation that he had been involved in a racket that led to a loss of Kshs. 120,000,000 on the part of the Respondent.

9. It was specifically alleged against him, that the above stated loss flowed from his act[s] of creating fictitious and fraudulent weighbridge tickets, and in particular the tickets concerning motor vehicle registration number KCG 243 J, of 8th August 2016. He responded to the show cause letter on the 10th March 2017.

10. The Claimant further contended that at the time of the issuance of the letter, he was stationed at the weighing bridge, having been transferred there from the Soaps Department owing to his health condition as a result of injuries that he sustained while working at the Soap Department.

11. At the weighing bridge his role entailed weighing the tracks that would deliver supplies at the Respondent's premises. The truck weight would be picked by the trucks being driven through the bridge. It is after the weight was picked, that he would key in the relevant details into the system.

12. After the 1st weighing, the track would move to the offloading zone accompanied by security guards. The offloading process would take up to between 4 to 5 hours depending on the product being offloaded.

13. The Claimant testified further that after offloading the vehicle would get to the weighbridge, for a second weighing. After the 2nd weighing, he would then print out a computer-generated ticket, which would indicate the identity of the motor vehicle, the three different weights i.e. the combined weight of the motor vehicle and the product, the weight of the motor vehicle when empty and lastly, the net weight of the product. The ticket would also indicate the date and the product.

14. The Claimant stated that once the ticket is produced, the system would also back up the logs for all entries made.

15. In the show cause letter, the Respondent alleged that there had been an investigation which revealed anomalies in handling of heavy fuel oil [HFO], which included; payment for HFO deliveries without sufficient supporting documents; presentation of falsified documentation to support deliveries the Respondent believed were not made, posting of Heavy Fuel Oil issuance in the system without requisition or physical issuance to the cost centers, and creation of fictitious weighbridge tickets and acknowledging receipt of Heavy Fuel Oil stocks based on fictitious and questionable supporting documentation.

16. The Claimant contended that all the allegations against him were erroneous, most of them were in regard to areas that were not under his docket. The allegation on creation of fictitious tickets was not supported by any evidence.

17. By its letter dated 13th March 2017, the Respondent invited him to a disciplinary hearing for the 16th March 2017 at 9.00 a.m. The hearing was conducted in a manner that offended the stipulations of the Respondent's own Human Resource Manual Policy and more specifically Regulation 24.4 and 24.5.1.

18. He alleged that he was not afforded reasonable and adequate access to documents that the Respondent relied on at the disciplinary hearing, for instance the audit report despite requesting for it. The representations by the shop stewards were never considered by the Respondent. His representations were neglected.

19. On the 5th of April 2017, he was issued with a letter summarily dismissing him from employment on allegation that he created fictitious documents that were aimed at concealing diversion of Heavy Fuel Oil, and that he failed to maintain the required levels of integrity in handling of Heavy Fuel Oil and or failed to maintain the required levels of integrity in handling of Heavy Fuel Oil and or failed to report any irregularities in handling of the oil.

20. The Claimant asserted that the termination was upon invalid reason, as he presented the ticket that he had generated and was able to demonstrate that. The ticket that the Respondent was placing reliance on could not be attributed to him.

21. On the want of validity regarding the reason for the dismissal, the Claimant argued that it was a product of falsehoods.

22. The Claimant contended that the dismissal lacked procedural fairness. The charge against him was vague to the extent that it did not set out how he created fictitious tickets. This impeded him from mounting an adequate defence. The Line manager did not attend the disciplinary committee, contrary to the requirement in its Human Resource Manual Policy under Regulation 24.4 and 24.5.1.

23. The Claimant contended that he was discriminated against, arguing that though the show cause letter stated that he conspired with other employees to carry out the alleged misconduct, no other employee was taken through a disciplinary hearing and or sanctioned.

24. The Claimant asserted that his dismissal was because of his medical condition.

25. His appeal against the decision to dismiss him from employment was unsuccessful.

26. The Respondent only gave him the audit report after the matter herein had been commenced and following a demand by his lawyer. In the process leading to the audit report, he was not involved, he was not interviewed, at all.

27. The weighbridge ticket that the Respondent released to his counsel, after the notice to produce herein, was the same ticket that he held all through, testament that he was never involved in any forgery.

28. At the time of his dismissal, he was earning a gross monthly salary of Kshs. 185,761.86.

29. Cross examined by counsel for the Respondent, the Claimant testified that at the time of dismissal, he had worked for the Respondent for almost eleven years.

30. Cross examined further, he admitted that he was served with a show cause letter and that the letter showed the accusations that were being levelled against him.

31. On the 13th March 2017 he was summoned to appear before a disciplinary hearing that was slated for the 16th March 2017. At the hearing he had present, a shop steward, and he made representations.

32. His dismissal from employment was on account that he created a fraudulent document.

33. The minutes of the disciplinary hearing, according to him were not a true reflection of what transpired during the hearing.

34. The Respondent issued him with a certificate of service. All the dues that were put forth on the dismissal letter were paid.

35. The witness reiterated that at the disciplinary hearing or before, he was not given the audit report. The same was given to him after the hearing. The report indicated that there was a fraud that happened, same matter mentioned in the show cause letter.

36. On his allegation that he was discriminated against, the Claimant acknowledged that despite the assertion, he would see termination letters for others in the Respondent's bundle of documents.

37. In his evidence under re-examination, the Claimant testified that though the minutes reflect that he generated two tickets, there was no prove of existence of two tickets.

38. During the disciplinary hearing, he demanded for a CCTV footage, but he was never given the same.

39. The Claimant stated that the audit report by Pricewatershouse Coopers was done on the 13th March 2017, apparently same date of the letter inviting him for disciplinary hearing. This makes him believe that the report was an afterthought.

40. The Claimant contended that during the hearing, he was not given any document as in those that the Respondent was placing reliance on.

41. The Claimant testified that during the disciplinary hearing he provided the panel with logs for the material day to demonstrate that the subject motor vehicle was at the Respondent's premises only once that day. From the logs, motor vehicle KCG 243 A with a product, Heavy fuel got in at 10:31.02 am. and left the premises at 2:37.08 p.m. This on the 8th August 2016. This was the only entry concerning the motor vehicle.

42. The contents of the logs, and those that obtained on the receipt were similar. The Respondent did not at all provide any contra document.

43. The Claimant asserted that though the audit report mentions six deliveries as being in issue, he was only accused in relation to that one vehicle.

44. The process like the one in issue was a detailed process. It involved about four people, each issuing a document. His was to weigh vehicles and hand over receipts to the security officer. Before a vehicle would exit the premises, it had to get through the weighbridge for the 2nd weighing. After the 2nd weigh,

the Claimant would issue a receipt in regard thereto then the security officer escorts the vehicle all the way to the exit point.

The Respondent's Case.

45. The Respondent presented Mr. Christoper Chege, its Head of Human Resource to testify on its behalf. The witness moved this Court to adopt the contents of this witness statement dated 3rd May 2018 as his evidence in chief and the bundle of documents filed herein on the 9th May 2018 admitted as the Respondent's documentary evidence.

46. The witness confirmed that the Claimant was employed by the Respondent on the 10th November 2009 as an Assistant fitter. Later he was transferred to the weighbridge section at the Respondent's commercial street factory. His duty was to weigh the commercial trucks.

47. The witness stated that on or about January to September 2016, the Respondent experienced losses approximately, Kshs. 120,000,000 through payments for Heavy Fuel Oil [HFO] that was neither received nor consumed by the Respondent.

48. This prompted the Respondent to instruct the firm, Pricewaterhouse Coopers to investigate the loss which was as a result of variances been stocks recorded in its SAP Management System and actual physical stocks of Heavy Fuel Oil [HFO].

49. The witness testified that the investigations revealed the following anomalies in handling Heavy Fuel Oil.

    i. Heavy Fuel Oil was received physically but not posted in SAP;

    ii. Payment for Heavy Fuel Oil deliveries was made without sufficient supporting documents;

    iii. Presentation of falsified documentation to support deliveries that were not made;

    iv. Posting of Heavy Fuel Oil issuances in the SAP system without requisition or physical issuances at the cost centres;

    v. Creation of fictitious weighbridge tickets.

    vi. Acknowledging receipt of Heavy Fuel Oil stocks based on fictitious and/or questionable documentation.

50. The witness stated that following the findings, the Respondent issued the Claimant with a Notice to show cause, under its letter dated 7th March 2017. The letter informed the Claimant that the Respondent believed that he was involved in an irregular and fraudulent scheme to defraud the it, which involvement amounted to gross misconduct.

51. The witness asserted that the letter did with clarity, set out the allegation of misconduct against the Claimant. He was given adequate time to respond to allegations. The charges against him were specified, thus;

    a. In August 2016, he created a fictitious weighbridge receipt for truck number KCG 243 J whereby the truck was booked as having made two trips to the Respondent's facility.

    b. He failed to maintain the required level of integrity in handling of Heavy Fuel Oil and or failed to report any irregularities in the handling of Heavy Fuel Oil.

52. The witness alleged that the Claimant failed to satisfactorily address the allegations made against him. Following this, the Respondent by a letter dated 13th March 2017, invited the Claimant to a disciplinary hearing that was slated for 16th March 2017.

53. The witness asserted that the subject ticket was provided to the Claimant ahead of the disciplinary hearing. At the hearing the Claimant was accompanied by three shop stewards. Both the Claimant and the stewards were allowed to make representations.

54. The witness asserted that the disciplinary action was not premised on his medical condition but misconduct.

55. On the alleged discrimination against the Claimant, the witness asserted that disciplinary action was taken against other employees who were implicated in the Heavy Fuel Oil. The witness referred the Court to summary dismissal letters that were issued to those other employees.

56. In the circumstances of the matter, the dismissal was justified and due procedure followed.

57. In his evidence under cross examination, the witness stated that the Claimant was issued with a show cause letter flowing from the audit report and the investigation that was carried out. Upon receipt of the audit report, the Respondent undertook investigation, and it is after the investigations that the show cause letter was issued.

58. The witness asserted that since Claimant was a unionsable employee, the Collective Bargaining Agreement that was in place, guided the relationship between the Respondent and the Claimant.

59. Clause 24.5 of the Respondent's Human Resource Manual provided for "disciplinary process." Clause 24.1 provided for duties of the line manager at the disciplinary hearing. The disciplinary hearing minutes do not reveal why the Claimant's Line manager was not in attendance of the hearing.

60. Contrary to what on one Mary asserted in the disciplinary proceedings, the audit was done by Pricewaterhouse Coopers. At page 5, the indicated those people who were interviewed. The Claimant's name is not one of them.

61. The witness alleged that at the time the show cause letter was issued, the Claimant was given all the documents that were to be relied on in the disciplinary hearing. He was provided with a copy of the subject ticket before the hearing.

62. In pursuance to the notice to produce documents, the Respondent did not produce the same.

63. Referred to the logs in respect of the material date and motor vehicle KCG 243 J, the logs that were auto generated by the weighbridge, compared with the contents of the ticket, there was no variance.

64. The witness elaborated on the procedure of admitting the trucks into the Respondent's premises for purpose of delivering products. He mentioned of the first weighing and the second weighing. He testified that before motor vehicles would be admitted into the premises, the security personnel at the gate had to record. The ticket could be generated after the second weigh.

65. According to the witness, on the material date [8/8/2016], motor vehicle KCG 243 J was first weighed at 10:29 am, the weight being 46,720 Kgs. The second weighing was done at 11:27 am, the weight recorded being 10,820 Kgs.

66. Referring to the logs tendered by the Claimant before Court, the witness testified that it is interesting to note that they reflect that on the same date, the same motor vehicle was again weighed at 14:35 pm, the weight being 18,960 Kgs and 2nd weight recorded two minutes later, 18,960 Kgs.

67. The witness alleged that the ticket that the Claimant generated combined the two trips. Each trip must have its own ticket and time.

68. He alleged that once the truck goes through the weigh bridge, the system picks and records the time.

69. The witness admitted that the Claimant's job description did not include making payments for the Heavy Fuel deliveries. He was not an IT staff.

70. Referred to paragraph 28, 29 and 30 of the minutes of the disciplinary hearing, the witness further admitted that during the hearing, the Claimant did inform the panel that the ticket generated was as a result of a systemic error.

71. The Respondent Company had an elaborate security check mechanism. Records of the vehicles getting into and out of its premises were captured by the security personnel, however the Respondent did not place before this Court any such record concerning the subject motor vehicle or present any witness to testify on the record.

72. The panel indicated that they were to check whether the CCTV footage for the material time would be available. They did not find the same. The committee's decision was absent of consideration of the CCTV footage.

73. The witness testified that Clause 24.5.1 of the Human Resource Policy, provided for duties of the Line manager in relation to the disciplinary process. He was to call witnesses and conduct disciplinary hearing. His Line manager was not present during the hearing.

74. The witness testified in admission that the Claimant was not furnished with the audit report during the disciplinary hearing.

75. The witness asserted that the suspect motor vehicle is indicated to have done two deliveries on the material day, a thing impossible since no motor truck can make a trip to and fro Nairobi – Mombasa within three hours.

76. The Claimant's Line manager did not attend the disciplinary hearing because he too, was a suspect.

77. The audit report is dated 13th March 2017, by this time the Claimant had been issued with a show cause letter. The auditors had earlier on given its interim report and thereafter, internal investigation commenced.

78. The CCTV footage was not available owing to the passage of time between the alleged time of the incident and the disciplinary hearing date.

The Claimant's Submissions.

79. The Claimant identified three issues for determination, thus:

    i. Whether the termination of the Claimant's employment was substantively justified.

    ii. Whether due process was followed in the process of disciplining the Claimant.

    iii. Whether the Claimant is entitled to the prayers sought.

80. On the 1st proposed issue, the Claimant submitted that the accusations against the Claimant were not supported by any evidence, for instance, the allegations that the ticket was fictitious.

81. The Respondent's witness admitted that the ticket that the Claimant tendered before the disciplinary hearing in content marries with the system weighbridge records. Cross examined why the ticket

contents did not agree with those on the manual record, the witness gave a reason that was illogical and preposterous, the system-generated record combined time of the 1st and 2nd trip. The Claimant submitted that there is no way time can be combined. Clearly, the reason for the termination was invalid.

82. The Claimant submitted that the committee made various findings as brought out in the summary dismissal letter dated 5th April 2017. All the findings were erroneously made.

83. The Respondent's findings on appeal and more specifically that the ticket the Claimant produced had an entry of 25th January 2017 cannot find support in the document referred to.

84. It was further submitted that though the Respondent relied heavily on the audit report by Pricewaterhouse Coopers. Looking at the report, it is clear that though the Claimant was one of those persons of interest, he was not interviewed by the auditors. The names of those who were interviewed, obtains in the report. The Respondent was wrong to place reliance on the report to dismiss the Claimant, yet he was not interviewed during the process leading to the report. In support of this submission, the judicial decision in *Wilberforce Ojiambo Oundo v Regent Management Limited* [2013] eKLR, was cited thus:

> "In taking its decision on the Claimant's employment, the Respondent relied heavily on the forensic audit report yet as confirmed by Nimrod Kiyego Kurgat, a partner at Kimani Kerrets & Compnay who conducted the audit, the Claimant was not interviewed. The logical conclusion is that the Claimant had no opportunity to respond to any adverse findings of the forensic audit. Overall, I find the termination of the Claimant's employment by way of summary dismissal to have been unfair within the meaning of section 45 of the Employment Act and award him 12 months' salary compensation."
>
> It was further submitted that section 43 of the Employment Act places upon the employer in a dispute as the instant one, to prove the reason[s] for the termination. To support this the Judicial decision in *National Bank of Kenya v Anthony Njue John* [2019] eKLR was cited.

85. On procedural fairness, the Claimant submitted that the same was absent in the process leading to his dismissal. The appeal process too lacked procedural fairness.

86. It was argued that the disciplinary hearing was in contravention of the Respondent's Human Resource Policy Manual. The authority to call witnesses and conduct disciplinary hearing is delegated to the Line manager by dint of Clause 24.4 of the manual. It goes without say therefore that the disciplinary hearing was by people who did not have the mandate to. The Claimant's Line Manager was not invited. The Court was asked to consider the decision in Court of Appeal case of *Kisumu County Public Service & another v Samuel Okuro & others* [2018] eKLR, and find that the committee that handled the hearing acted without authority.

87. Contrary to what was expected of the Respondent in terms of adherence to procedural fairness it failed to supply the Claimant with the documents they relied on before the disciplinary hearing and more especially the audit report. The Respondent's witness made an admission to the effect.

88. The witness's evidence in re-examination to the effect that the audit report was received after the show cause letter had been issued to the Claimant was untrue. The audit report is dated 13th March 2017, whilst the show cause letter was issued on the 15th March 2017.

89. The Respondent's witness stated that the interim report that was released in February 2017 was the genesis of the charges against the Claimant. The report was never supplied to the Claimant.

90. The holding in *Joseph Nyakundi v K-Rep Bank Limited* [2015], thus:

> "………………. In my view, an audit or investigation within the employment relationship is to gather the facts to establish whether there are grounds for disciplinary action and after the facts have been established the employer should inform the employee the allegations or facts and find the employee time to make a response."

And in *Benjamin Mwendwa Nduati & 4 others v East Africa Portland Cement Company* [2010] eKLR, thus:

> "I do agree with the Claimants. Reasonable time should have been accorded to them to prepare for their defence and be ready to defend themselves and in this case reasonable time would in my view be at least seven days. This would in any case also include details of the charge against the Claimant which details were not provided. I therefore find that in terms of section 45 of the Employment Act, the termination of the Claimant in all cases was unfair for lack of following due procedure before termination and in the case of Benjamin Nduati, Evans Abuya and Desmond Oningu for lack of adequate reasons for dismissal."

to buttress the submission on procedural unfairness in the matter for lack of adequate time being given to the Claimant and the Respondent's failure to supply him with documents before the hearing or at all.

91. On the reliefs sought, the Claimant submitted that as he was not granted ample time to prepare for his defence and as the Respondent failed to furnish him with the documents referred to hereinabove, his Constitutional rights under Article 50 for Fair Hearing and 47 for a Fair Administrative Action were violated. A declaration should be made to that effect and damages awarded for the violation. To support this the Court of Appeal decision in *John Gakuo & another v County Government of Nairobi & others* [2018] eKLR, was relied on.

92. It was further submitted that reinstatement is a statutory remedy provided for under section 49 [3] of the Employment Act. Reinstatement, re-engagement and monetary compensation should be preferred in that order. The Claimant placed reliance in the case of *O'Laoire v Jackel International Limited* [1990] ICR. 996, 1003 [Sir David Cairns]. Too the author's view, *Labour Law* 2nd Edition, Deakin S.F; Morris, Gillan S, Page 491. The circumstances in this matter justify an order for reinstatement.

93. In the alternative the Claimant submits for a compensatory relief pursuant to provisions of section 49 [1] [c] of the *Employment Act* to the full extent contemplated thereunder, twelve months' gross salary.

The Respondent's Submissions.

94. According to the Respondent the following issues are for determination in this matter:

    a. Whether the summary dismissal was grounded on fair and valid reasons.

    b. Whether the procedure for summary dismissal was fair.

    c. Whether the Claimant is entitled to any to the prayers sought in the statement of claim.

95. On the 1st proposed issue, the Respondent submitted that the Claimant's dismissal was justified, the Respondent has proved that it had sufficient reason to believe that the accusations levelled against the Claimant were true. The action by the Respondent against the Claimant was a reasonable response in the particular circumstances of the case. The decision falls within the band of what a reasonable

employer may have done in the circumstances. As regards the test, reliance was placed on the Court of Appeal holding in *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwoma* [2015] eKLR.

> " .... In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach [the range of reasonable responses test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

96. The Respondent relying on the decision in *David Githinji Kibuge v New Co-operative Creameries Limited [KCC]* [2019] eKLR, submitted that in a matter like this, the burden of proving that the Respondent's reason for summary dismissal was unfair and or invalid lay on the Claimant, and only upon the Claimant satisfying the legal burden does the onus of proof shift to the Respondent. The Claimant did not show that the Respondent's reasons for his dismissal were unfair in order for the burden to shift to the Respondent.

97. On the issue of procedural fairness, the Respondent submitted that there was due compliance with the provision of section 41 of the *Employment Act*. The ingredients of procedural fairness as were established in the decision in *Anthony Mkala Chitavi v Maladi Water & Sewerage Company Limited* [2013] eKLR, as can be discerned from the process leading to the summary dismissal of the Claimant. The Claimant was informed of the accusations against him, he was accorded the right of accompaniment. In fact, at the disciplinary hearing, he had three representatives from the union and the Claimant's representation and that of the stewards were considered, before the dismissal.

98. There was a sound reason as explained by the Respondent's witness as to why the Claimant's Line manager was not involved in the disciplinary proceedings. He was a suspect. He was conflicted.

99. The Respondent submitted that the Claimant did not seek for the report. The documents that he requested for were availed to him. It was further submitted that to provide an employee with an investigation report is at the managerial prerogative of an employer.

100. In sum, the dismissal was procedurally fair, the Respondent submitted.

101. On the reliefs sought by the Claimant, the Respondent submitted that having demonstrated that the summary dismissal was upon a fair and valid reason, the compensatory relief under section 49 [1] [c], twelve months salary, cannot be available to the Claimant.

102. On the reliefs sought upon basis of the alleged violation of Constitutional rights, the Respondent submitted that the same are not properly pleaded. The threshold established in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR was not met. Further, the Claimant did not prove the violation.

103. On the prayer for reinstatement, the Respondent submitted that the Claimant's employment was terminated on 5th April 2017, more than 3 years from the date of termination have since lapsed. By dint of the provision of section 12 [3] [vii] of the *Employment and Labour Relations Court Act* the reinstatement cannot be granted.

104. Further, section 49 [4] of the *Act* stipulates the matters that the Court should take into account in granting an order for reinstatement, the practicability of recommending reinstatement or re-engagement and the common law principle that there should be no order for specific performance in a contract for service unless in very exceptional circumstances.

Analysis and determination.

105. I have carefully considered the material placed before this Court by the parties, I distil the following broad issues for determination:

i. Whether the summary dismissal of the Claimant from employment was fair;

ii. Whether the Claimant is entitled to the reliefs sought or any of them.

Whether the summary dismissal of the Claimant was fair.

106. Whenever a Court is called upon to interrogate fairness in relation to termination of an employee's employment or summary dismissal of an employee, it must consider two components, the procedural fairness component, and the substantive fairness component. The two components make the total fairness unit, in a termination or summary dismissal. Absence of any of them or both of them renders the termination or summary dismissal unfair.

107. Having said this, I now turn to consider whether the dismissal of the Claimant was procedurally fair. Jurisprudence is now settled, section 41 of the *Employment Act* provides for the structure of fair procedure in the Kenyan situation. However, I must state that the provisions of section 41 of the *Employment Act* must not be read in isolation from the stipulations of the *Constitution* of Kenya, 2010, and more especially Article 47 and 50, and the principals of natural justice.

108. In *Lilian Muchungi v Green Belt Movement*, Nairobi ELRC Cause No. 1418 of 2017, this Court held:

> " 95. The section provides, and I find it in sync with the Constitutional provisions on the right to fair hearing that the employer contemplating as hereinabove stated, must explain to the employee, reason[s] for which he intends to cause the termination, and give the employee an opportunity to make representations on the reasons. In other words, to defend himself against the accusations levelled against him."

109. Through a show cause letter dated Tuesday 7, March 2017, which was clearly received by the Claimant on the 8th March 2017, the Respondent informed the Claimant that it had conducted investigations on a variance that was discovered on Heavy Fuel oil [HFO] and various anomalies in the handling of Heavy Fuel Oil revealed. The Claimant was expected to show cause by 12 noon on Friday, 10th March 2017. The letter had a warning:

> " In case your reply is not received within the stipulated period, it shall be assumed that you have accepted the charges levelled against you and that you have nothing to say in your defence ...."

110. The Claimant testified that faced with this, he had to reply to the letter somehow, which he did, denying the accusations against him, stating that to the best of his recollection he only weighed the subject motor vehicle once, not twice as alleged in the show cause letter.

111. The Court notes that though the Respondent in the show cause letter referred to a Collective Bargaining Agreement [CBA] and the Unilever Code of Business Principles [COBP], none of these documents were placed before the Court for consideration more specifically on how they related with the Respondent's disciplinary procedure, and the charges that were levelled against the Claimant, respectively. The only document from which the Respondent's disciplinary procedure can be gleamed, and the Unilever Best Africa Human Resource Policies Manual.

112. At Clause 24.4.2 , provides that:

> " .... The Human Resource Business partner shall examine the report shall examine the report and if satisfied that there is a prima facie basis for action, shall write to the employee being complained about within 3 working days from the receipt of the report:
>
> 2. Specifying the nature of the complaint;
>
> 3. Requiring a written explanation within a specified period.
>
> Upon receipt of the employee's explanation or enquiry of a specific period, the Human Resource Business Partner shall consider the complaint against the explanation, and:
>
> Either ...."

The wording of the clause o underscores the importance of the process contemplated thereunder. It would act as a sieving mechanism, to an extent then, that it would require serious attention from both the employer [Respondent] and the employee [the Claimant]. I find the process being a core piece in the Respondent's disciplinary process.

113. The Court notes that the manual does not stipulate a specific time within which an employee of the Respondent who has received a show cause letter, would be expected to respond. In the ordinary run of things, where there is a silence like is here, the employee would be expected to act within a reasonable time. Reasonable time would depend on the circumstances peculiar to each case. In the circumstances of the instant matter where the show cause letter is said to have flowed from an audit report and investigation report documents that would require one to go the in order to make an intelligible response, I find the two days that the Claimant was given to respond to the show cause letter unreasonable.

114. It is not in dispute that through a letter dated 13th March 2017, the Respondent invited the Claimant to attend a disciplinary hearing that had been slated for the 16th March 2017. Clear from the invitation letter is the fact that the same was received by the Claimant on the 15th March 2017, a day to the appointed date for the hearing.

115. The Claimant complains and I hold rightly so, that the notice was too short to enable him prepare adequately for his defence. Under section 41 of the *Employment Act*, is embodied an employee's right to be heard on grounds which his or her employer has intimated as being basis for his contemplated action against him or her. This right is fully exercised if the employee is accorded an adequate opportunity to prepare for his or her representations contemplated in the stated provision of the law. No doubt therefore that the employer has a corresponding obligation to accord him or her adequate time to prepare for his or her defence. It cannot suffice for the employer to say that he discharged the obligation, without caring about sufficiency of the notice. Sufficiency is normally dictated by the Human Research Policy of the employer and in absence of a clear specific stipulation in the policy, the circumstances of the matter.

116. In my view, if there is no insistence on sufficient notice, the protection that was intended under section 41 of the [*Employment Act*] shall be shaken immensely and be rendered useless. The right to be heard shall be fully eroded. The gains made under the post 2007 Employment and Labour Legal regime shall be diminished.

117. I agree with the Claimant's contention that the notice that was given was not adequate for his defence, this contrary to what is contemplated in section 41 of the *Employment Act*, Article 50 of the *Constitution* of Kenya, 2010, and the now imported into employment contracts, principles of natural justice.

118. I find considerable difficulties to understand why the Respondent as an employer would insist on giving very short notices of 1 to 2 days, to the Claimant for action, while the its manual read keenly reveals that the notices were to be reasonable. There was no reason given by the Respondent either in its pleadings or in the evidence by its witness for this. The impression left, the Respondent was an employer in a rush to dismiss the employee [Claimant].

119. In finding as I have hereinabove, I am inspired by the holding in the decision – in *David Wanjau Muuhoro v Ol Pajeta Ranching Limited* [2014] eKLR, thus:

> "................... First the right to sufficient time between the date of service to show cause and the date of hearing to prepare for the hearing, second the right to fully understand the charges, general charges such as dishonesty, fraudulent activities are vague and offer an employee no opportunity to respond opportunity to respond intelligibly. Lastly the employee has the right to documentation. The employee must be given the documents the employer intends to rely on at the hearing."

120. The Claimant contended that the disciplinary committee was not properly constituted, as his Line Manager was not part of the committee. The Respondent asserted that the Claimant's Line Manager was one of the suspects in the alleged fraudulent activities. The Claimant did not in his tendered evidence inform Court who his Line Manager was. I hold he deliberately did so. He did not in any manner challenge the Respondent's witness's evidence as regards who his Line manager was and that he was suspected as hereinabove stated and therefore he would have been conflicted if he were to be allowed to conduct the disciplinary proceedings. I am persuaded that the Respondent had a valid reason to constitute the disciplinary committee in the manner it did, considering the circumstances at the material time.

121. The Respondent's witness testified that the decision to charge the Claimant flowed from an audit report that had been conducted KPWC, and the internal investigations that it conducted. The witness admitted that in the process leading to the audit report and in the course of the investigations, the Claimant was not interviewed. In the face of this, in my view, the Respondent was reasonably expected to furnish the Claimant with the two reports. He had a right to be. See *David Wanjau Muhoro v Ol Pajeta Ranching Limited* [2014] eKLR.

122. The Respondent submitted that furnishing an employee with documents to be relied in a disciplinary hearing is at the discretion of the employer. I find this line of reasoning baffling, and one that is completely in ignorance of the fact that post 2007, the landscape in the employment and labour relations legal system radically changed, the employers' discretion at large got curtailed.

123. By reason of the premises, I find that the summary dismissal was procedurally unfair.

124. I now turn to the substantive justification aspect of the Claimant's summary dismissal. Before I delve further into the aspect, I find it imperative to state that the Respondent in its submissions urged this

Court to, in interrogating the appropriateness of the summary dismissal apply the reasonable responses test. In support of this submission fortification was sought in the Court of Appeal decision in the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] eKLR, where the Court cited with approval the position stated in *Halsbury's Laws of England*, 4th Ediction, Vol.16 [B] Para. 42, thus:

> "In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wiser inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach [the range of reasonable responses test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer reasonably take another; the function of a tribunal as an industrial [any is to determine whether in the particular circumstances of each case the decision to dismiss the employee fall within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

125. The Respondent contends that the reasons for the dismissal were those that it genuinely believed existed. The Court appreciates the provisions of section 43 [2] of the *Employment Act*, however, it is the Court's view that the belief must be demonstrated to be flowing from a sound and reasonable basis. It won't suffice for an employer to just assert, "I genuinely believed."

126. Section 43 of the *Employment Act* places a legal burden upon the employer to prove the reasons for the termination of an employee's employment. The Respondent in its summary dismissal letter dated 5th April 2017, did put forth elaborately, the reasons for summary dismissal of the Claimant. With this it can be safely concluded that the Respondent did discharge the burden under the stated provision of the law.

127. However, it is not enough for an employer to prove the reason[s] for the termination or dismissal. Section 45 of the Act imposes a further burden on the employer, to prove that the reason[s] were valid and fair. It is here that I now turn to consider the validity and fairness of the subject reason[s].

128. As regards the duty under section 45 of the *Employment Act* the Court of Appeal in the decision cited by counsel for the Respondent, *National Bank of Kenya v. Anthony Njue John* [2019] eKLR, cited with approval the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, where the Court stated:

> "Section 45 of the Act makes a provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employment is deemed unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason, and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity."

129. When one talks of a valid reason, he or she is talking of one based on sensible reasoning, one that is logical, right and defensible. Before the disciplinary committee as can be seen from the minutes, the Claimant faced two charges, namely:

i. That he created fictitious weighbridge tickets aimed at concealing losses on HFO that was not delivered to the company.

ii. That he failed to maintain the required levels of integrity in handling of Heavy Fuel Oil and/ or failed to report any irregularities in the handling of Heavy Fuel Oil.

130. The summary dismissal letter, indeed captured these as the charges.

131. I have carefully considered the letter and note it reads in part;

> " .... The company, therefore, finds you culpable for:
>
> i. Generating fictitious and fraudulent documents to support payment for supplies that were never delivered to the Company.
>
> ii. Gross reckless, carelessness and or negligence in the performance of your work, thereby."

132. This section of the letter contains reason[s] for the summary dismissal of the subject matter herein. In my view, these stated findings, the basis for the Claimant's dismissal, are not in any manner connected to the specific charges that the Claimant was confronted with at the disciplinary hearing, I see not any content from which a conclusion can be derived that the finding on gross reckless, carelessness and or negligence, in the manner the Claimant performed his work, was a subject matter of deliberation at the hearing and, the processes that preceded the summary dismissal.

133. It is my view that a finding, therefore a reason for dismissal, that does not flow from material before a disciplinary committee or panel and or that has no connection with the charges levelled against an employee, cannot by any stretch of imagination fit in the description accorded hereinabove for a valid reason.

134. It was the Respondent's position that, and its witness admitted that much, that the disciplinary process that was initiated against the Claimant flowed from an audit report by an external auditor, and an investigation report following an internal investigating process. There is no doubt that the Claimant was not at any time interviewed during the two processes that led to the reports. The documents were not supplied to the Claimant at any time, before or at the disciplinary hearing. The minutes of the disciplinary hearing bears it out, the Claimant was not referred to any of the reports in the course of the hearing. The fact that the two reports had not been supplied to the Claimant, and considering their centrality in the accusations that were levelled against him, would have made it more imperative on any reasonable employer, to refer the documents to the employee to elicit a reaction on the contents thereof.

135. In my view, what the Respondent did was tantamount to suppression of material evidence from the Claimant.

136. Section 45 [4] [b] of the *Employment Act* stipulates that a termination of employment shall be unfair where it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. To make conclusions that are not connected with the charges facing an employee, and make them a basis for sanctioning the employee, and to suppress material evidence from him or her during the disciplinary hearing, amounts not to acting in accord with equity and justice.

137. By reason of the foregoing premises, I find that the summary dismissal of the Claimant was not in accord with equity and justice, and upon a valid and fair reason[s]. It was substantively unfair.

Of the Reliefs

138. The Claimant sought inter alia, a declaration that his rights to fair hearing, fair administrative action and freedom from discrimination were breached, and consequently an award of general damages for the violation. I have considered the material before this Court, I am of the view that the same does not in any manner establish the alleged violation of the Claimant's rights under Article 27 and 47 of the *Constitution*. I decline to find that the Claimant's rights as stipulated in the stated provisions of the Constitution were violated. However, I have not lost sight of the finding hereinbefore that the summary dismissal was procedurally unfair inter alia for the reason that Article 50 of the *Constitution* was affronted. However, I am reluctant to award general damages for the violation, as the aspect of procedural unfairness shall form among other factors the basis for the compensatory award that I will shortly hereinafter make pursuant to the provisions of section 49 [1] [c] of the *Employment Act*.

139. This Court agrees with the submissions by counsel for the Respondent that by operation of the law, section 12 [3] [vii] of the *Employment and Labour Relations Court Act*, it has no authority to make an order for reinstatement.

140. Section 49 [1] [c] of the *employment Act* empowers this Court to award a compensatory relief in matters where an employee has successfully assailed his or her employer's decision to terminate his or her employment. However, it is imperative to state that the award is discretionary, depending on the circumstances peculiar to each case. I have considered the fact that; the Respondent substantially deviated from what was required of them on matters substantive and procedural fairness, the length of the period that the Claimant had been in the employment of the Respondent before the summary dismissal; the finding hereinabove that the Respondent did act with equity and justice, and conclude that the Claimant is entitled to the award and to an extent of 5 [five] months' gross salary, Kshs. 928,890.30.

141. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

    a. A declaration that the dismissal of the Claimant from employment was unfair.

    b. Compensation pursuant to the provisions of section 49 [1] [c] of the *Employment Act*, Kshs. 928,809.30.

    c. Interest on the awarded sum at Court rates from the date of this Judgment till full payment.

    d. Costs.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2023.

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OCHARO KEBIRA

JUDGE

In the presence of

Ms. Onsango for the Claimant.

Mr. Kahura for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

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