



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kinyua v Bidco African Limited (Employment and Labour Relations
Cause 37 of 2019) [2023] KEELRC 568 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 568 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 37 OF 2019
DN NDERITU, J
MARCH 2, 2023**

BETWEEN

ZACHARY KINYUA CLAIMANT

AND

BIDCO AFRICAN LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The Claimant commenced this cause by way of a Statement of Claim dated 6th June, 2019 filed in court on 6th June, 2019 through Magatta & Njogu Advocates. As expected statement of claim was accompanied with a verifying affidavit, Claimant's witness statement, and a list of documents and copies thereof.
2. On 27th June, 2019 the Claimant filed an amended statement of claim dated 25th June, 2019, seeking the following -
 1. A declaration that the Claimant has been in the Respondent's continuous employment from September, 1998 to 2016
 2. A declaration that the Claimant's dismissal is wrongful and unfair.
 3. A declaration that the Respondent has discriminated against the Claimant on account of his Union activities contrary to Article 27 of the Constitution and Section 5 of the Employment Act, 2007.
 4. A declaration that the Claimant's rights to fair labour practices, remuneration, reasonable working conditions, economic and social rights guaranteed and protected by Article 41 and 43 of the Constitution 2010 have been violated by the Respondent.



5. Terminal dues in the sum of Kshs.1,005,375/= made up as follows:
 - a. Kshs.61,313/= being 2 months' salary in lieu of notice
 - b. Kshs.94,329/= being unpaid pay for 80 days worked between 21st May, 2016 and 8th August, 2016.
 - c. Kshs.107,199/= being salary underpayments.
 - d. Kshs.6,688/= being underpaid house allowance.
 - e. Kshs.17,774/= being unpaid overtime worked.
 - f. Kshs.16,080/= being pro rata leave for 7 months.
 - g. Kshs.202,608.00 being unpaid annual leave
 - h. Kshs.129,000/= being service benefits for 8 years' service.
 - i. Kshs.2,500/= being unpaid leave travelling allowance.
 - j. Kshs.67,884/= being compensation for wrongful dismissal at the rate of 12 months gross salary in terms of Section 49(1) (c) of the *employment Act* Laws of Kenya
6. Compensation in terms of Article 23(3)(e) of the *Constitution*, 2010.
7. A certificate of service
8. Cost of this suit and interest on all the amounts herein.
9. Any other relief the court may deem fit to grant.

Broken As Hereunder

- a. 2 months' gross salary in lieu of notice
Kshs.30,657 x 2 =Kshs. 61,313,00
- b. Unpaid pay for 80 days worked between 21st May, 2016 and 8th August, 2016
= Kshs.30,657/26 x 80 = Kshs. 94,329.00
- c. Salary underpayments
June 2014 – May 2015
= Kshs.18,701 – 14,787 = Kshs. 3,914.00
=Kshs.3,914 x 12 months = Kshs. 46,968.00
June 2015 – January 2016
=Kshs.23,420 –Kshs.14,787 = Kshs. 8,633.00
=Kshs.633 x 4 months = Kshs. 34,532.00
October 2015 – January 2016
=Kshs.23,420 – Kshs.18,701 = Kshs. 4,719.00
=Kshs.4,719 x 4 months = Kshs. 18,876.00
Kshs.107,199.00



d. Underpaid House Allowance

June – September 2015

= 19% x Kshs.23,420 – 19% x Kshs.14,787

=Kshs.4,450 – Kshs.3,675

=Kshs.775 x 4 months = Kshs. 3,100.00

October 2015 – January 2016

=19% x Kshs.23,420 – 19% x Kshs.18,701

=Kshs.4,450 – Kshs.3,553

=Kshs.897 x 4 months = Kshs.3,588.00

Kshs.6,688.00

e. Unpaid Overtime



2014	Due	Paid	Difference
June	1468	927	541
July	2595	1638	957
August	1107	699	408
September	1420	896	524
October	2497	1593	904
November	1754	119	635
December	1463	927	536
2015	-	-	-
January	3944	2516	1428
February	1487	1268	219
March	4986	3181	1805
May	1851	1181	670
June	2139	1365	774
July	391	198	193
October	1392	1103	289
November	199	158	41
December	5651	4478	1173
11,097	-	-	11,097

Double overtime (rest days and public holidays)



2014	Due	Paid	Difference
July	2116	1365	751
2015	-	-	-
January	13250	8452	4798
May	1781	1363	418
July	706	357	349
October	1736	1376	360
-	-	-	6676

Total = 17,773.00

- f. Pro rata leave or 7 months 15 days x Kshs.1,072 = Kshs. 16,080.00
 - g. Annual leave earned but not taken between 1998 -2007
= 21 days x 9 years x Kshs.1,072 = Kshs.202,608.00
 - h. Service pay for the period 1998 to 2006 = 15 days' pay x 8 years x Kshs.1072
= Kshs.129,000.00
 - i. Kshs.2,500/= being unpaid leave travelling allowance
 - j. Compensation in terms of Section 49(1) (c) of the Employment Act, 2007
= Kshs.30,657.00 x 12 months = Kshs.367,884.00
3. Together with the amended statement of claim was filed a verifying affidavit and an additional list of documents and copies thereof in support of the cause.
 4. On 30th July, 2019 the Respondent entered appearance through Oraro & Co Advocates and filed a memorandum of reply to the claim dated 2nd June, 2020. In its memorandum of reply, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
 5. Alongside the statement in reply to the claim the Respondent filed a list of documents with copies thereof attached.
 6. The Claimant's case came up in court for hearing on 18th October, 2021 when the Claimant (CW1) testified in-chief and was partly cross-examined and on 1st December, 2021 when the Claimant testified further and closed his case.
 7. The defence was heard on 22nd February, 2022 when Dhreej Belwel (RW1) testified and the Respondent's case was closed.
 8. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Mr Njogu, filed his submissions on 20th April, 2022 while Counsel for the Respondent, Miss Kavagi, filed her submissions on 19th July, 2022.



II.The Claimant's Case

9. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summed up as hereunder.
10. In his testimony in court the Claimant adopted his filed witness statement on record and stated that he was engaged by the Respondent as a fitter from 4th September, 1998 and later confirmed on permanent and pensionable terms from 1st October, 2007 until when he was terminated on 6th June, 2016 by which time he was a senior fitter Grade 1.
11. He stated that in the cause of his employment he became a member of the Kenya Chemical Workers Union (the union) and became the shop-steward at his place of work. He alleged that the employer was not happy with his activities as a member and leader in the union and that the employer was always suspicious and uncomfortable with his union activities.
12. About his termination, and this is very important to this cause, the Claimant stated that on 5th May, 2016 he was assigned a task for which he was to receive dimensions of a shaft-fitting from his senior fitter one Mr. Maguru. That as he was trying to locate Mr. Maguru to obtain the said details, he met two of his colleagues, Wang'ombe and Maina, and inquired from them where Mr. Maguru was located.
13. The Claimant alleged that as he was consulting his colleagues on where to locate Mr. Maguru the manager Mr. Murdh came along and asked why the Claimant and the others were gathered there at that time. The Claimant informed the manager that he was looking for Mr. Maguru to obtain dimensions of the shaft that he was to fix.
14. He stated that on the 30th May, 2016, he was issued with a show-cause letter alleging neglect of duty, refusal to accept and acknowledge receipt of written communication, refusal to obey lawful orders from those in authority, and disrespectful conduct towards his superiors, among other allegations. He was required to respond to the show-cause letter within 24 hours.
15. The Claimant testified that he responded to the show-cause letter and a copy of that response was produced in court. Subsequently, the Claimant was invited for a disciplinary hearing vide a letter from the Respondent dated 31st May, 2016 which was served upon the Claimant on 2nd June, 2016. The hearing was to take place at Thika, the head quarter of the Respondent, on 6th June, 2016 from 11:00AM.
16. For avoidance of doubt the show-cause letter dated 30th May, 2016 provided as follows –

From : Team Leader – Human Resources Department

To : Mr. Zachary Kinyua

ID NO : 2504

Department: Elianto

Date : May 30, 2016

Subject : Show Cause Notice

.....

The management has realized with concern that despite several verbal warnings from your superior (head of department), you have ignored the cautions by not improving on your



performance neither have you realized what is expected of you by the management following the written warning letter from your head of department dated 7th May, 2016 which you declined to acknowledge receipt, you have gone further to defy work instructions issued to you by the said head of department. Your main role is to ensure that repairs and maintenance are effectively done. The department has experienced frequent breakdowns due to your negligence and your attitude toward your assigned duties.

Additionally your attitude towards your superior is by way of verbal communication. You have been neglecting your core responsibilities and when questioned, you respond arrogantly/rudely and threaten your superiors of bringing union officials to deal with Your disrespect and superiority complex has affected the harmony of the department and work relationship which is not acceptable and cannot be tolerated.

In view thereof, this act of unreliability and negligence of duties amounts to gross misconduct. You are required to show cause within twenty four (24) hours from the date of this letter why disciplinary action should not be taken against you for the above mentioned acts which is a violation of Employment Act, 2007 under Section 44(4)(c)(e) and Company rules and regulations part IV(viii, ix).

If you fail to respond within the above specified period, it will be deemed that you have accepted the allegations raised against you.

Authorized Signatory,

Teamleader –hrd

I acknowledge receipt of this letter.

Employee's signature..... DATE.....

17. The notice or invitation to the disciplinary hearing dated 31st May, 2016 provided as follows –

Our Ref : BAL/HRD/NDH/25/2504/2016

Date : May, 31, 2016

Name : Zachary Kinyua

ID. NO : 11064237

Address: P.O. BOX 7029

Town : Nakuru

Re: Notice To A Disciplinary Hearing:

Dear Zachary,

We are in receipt of your response to our Notice to show cause letter via your letter dated 30th May 2016.

Kindly take notice that the hearing of your case in regard to the following conduct mentioned below from your part shall take place on 6th June, 2016 at Thika office Old boardroom from 11.00a.m. in the morning or soon thereafter.

That, you willfully neglected to perform your assigned duties and ignored the cautions by not improving on your performance. That, you continuously refused to accept/acknowledge receipt of written communication from the management of the company. That, you knowingly failed/refused to obey a lawful and a proper command/



instructions which is within the scope of your duty and which was issued by person authorized to give such command/instruction and which was well made known to you through your job description. That, your attitude/disrespect towards your superiors has immensely affected the harmony and overall objectives of the department as well as work relationship. You are at liberty to have an employee of Bidco Africa Limited to accompany you at the hearing. Kindly note that if you do not appear on the said date and venue for the hearing, the hearing will proceed in your absence and the judgment be delivered notwithstanding your absence. Yours faithfully, For: Bidco Africa Limited Authorized Signatory Team Leader – Thika C.C: Shopstewards I acknowledge receipt of this letter. Employee's signature. Signed Date 2/6/2016

18. On 5th June, 2016 the Claimant wrote to his union protesting the unfair treatment meted upon him and other union members by the Respondent stating that the Respondent was harassing and intimidating union members to ensure that he was not represented by such officers of the union of his choice from Nakuru during the disciplinary hearing at Thika. The protest letter was produced as an exhibit in this cause.
19. The disciplinary hearing proceeded as intimated by the Respondent and thereafter the Claimant was summarily dismissed as per the letter of dismissal dated 7th June, 2016 which stated as follows –

Our Ref : BAL/HRD/SD/2504/2016

Date : June 7, 2016

Name : Zachary Kinyua

File No : 2504

Address : 7029 - 20100

Town : Nakuru

Dear Zachary,

RE: Summary Dismissal

This letter is with reference to your response to our notice of showcause letter dated 30th May, 2016 and the disciplinary hearing meeting held on 6th June, 2016.

Following the disciplinary hearing meeting held on 6th June, 2016 at 11.00a.m. and soon thereafter, the panel found you guilty of the following:-

That, on 5th May 2016, you willfully neglected to perform your assigned duties, duties that was made known to you in a departmental meeting held at 8.30 a.m. same day, where the Supervisor distributed duties to each person in engineering department. You were to work on a shaft at the workshop and specifications were to be communicated to you by Phillip Maguru (Fitter) soon after the meeting. At around 9.30a.m. you were found by the team Leader idling around, mobilizing and disrupting two(2) other employees at the preparation plant far from where you were assigned the duties. That, you have on several occasions continuously refused to accept/acknowledge receipt of written communication from the management of the company. That, you knowingly failed/refused to obey a lawful and a proper command/instructions which is within your scope of duty, and which was issued by a person authorized to give such command/instructions and which was well made known to you through your job description. That, your attitude/disrespect towards your



superior has immensely affected the harmony and overall objectives of the department as well as work relationship with your Superiors.

In view of the above thereof, the committee found you guilty of negligence and ignorant of the standard operating procedures. The *Employment Act*, 2007 Section 44(4) (c and e) and Company Rules & Regulations Part IV(viii & ix) which amounts to grave misconduct and subject to summary dismissal without notice or compensation. You have therefore been summarily dismissed with immediate effect, your last working day will be deemed to be 6th June, 2016.

Please note that, you will be paid your terminal dues as soon as the finance team finalizes with the computation at the soonest time possible. You are therefore required to hand over any company property in your possession as soon as possible, in case of any query kindly contact Human Resource Department.

In the event that you feel that the Committee ruling was not just and or fair, you have a right to appeal within fourteen (14) days from the date of receipt of this letter.

Your faithfully

Bidco Africa Limited

Authorized Signatory,

Team Leader – HRD

C.C. Shopstewards

I acknowledge receipt of this letter

Employee's Signature ...signed.. Date 5/6/2016

C.C:Personal File No 2504.

20. Vide a letter dated 8th June, 2016 the Claimant appealed the dismissal as follows –

To The Director

Bidco African Limited

PO BOX 239

Thika

8/6/2016

REF: Appeal To My Summary Dismissal

Dated 7/6/2016

May i take this opportunity to write to you in regard to the above.

This matter was concluded by the panel without exhausting all avenues in regard to my accusations leveled against me. nobody was called by the panel to be interviewed, as you mentioned some individual -workmate.

The panel relied on information given by superior from nakuru. the panel had ten individuals, seven from management and three from my side. and as such i feel the committee was not just and fair, hence no justice prevailed.



They could have sought other mechanism to prove the allegation beyond reasonable doubt without biasness.

I therefore request the company management to withdraw this dismissal letter dated 7.6.2016.

Kindly i would be glad if you can accept my appeal.

Thanks for giving this chance.

Yours faithfully

Zachary Kinyua

signed

8/6.2016

CC - National General Secretary

Kenya Chemical And Allied Workers Union

PO BOX 73820

Nairobi

Branch Secretary, Nakuru

Shopstewards – Bidco Africa

21. Vide a letter dated 7th June, 2016 the Claimant was informed that his appeal was to be heard at Nakuru on 24th June, 2016. After the hearing of the appeal the summary dismissal was confirmed and the Claimant was accordingly informed vide a letter dated 3rd August, 2016.
22. Thereafter, the Claimant took up the matter with his union and the union submitted the matter to the ministry for conciliation. It is clear that the lengthy discussions and negotiations between the union and the Respondent did not settle the matter and the Claimant decided to file this cause praying for orders stated above.
23. In cross-examination the Claimant stated that his last day at work was 6th June, 2016. He stated that he was not allowed to appear with union officials of his choice during the disciplinary hearing at Thika and that he has no idea who sent those who showed up thereat. He stated that the conciliation failed as he was not agreeable to what the union and the Respondent were proposing as his dues. In any event, the Respondent failed and or refused to pay even what was agreed between it and the union.
24. It is on the basis of the foregoing that the Claimant prayed that his cause be allowed as prayed in the statement of claim. The submissions by his Counsel shall be considered in the determination of the issues in a latter part of this judgment.

III.The Respondent's Case

25. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, the head of human resources, and the written submissions by Counsel, as summarized hereunder.
26. RW1 alleged that the Claimant's dues were negotiated and agreed between the union and the Respondent at Kshs.92,563.45 as per a letter dated 7th May, 2019 from the Respondent to the union.



27. He alleged that the Claimant was a disruptive worker and a union official. He stated that the workers that the Claimant was talking to on 5th May, 2016 were not dismissed with the Claimant but were issued with warning letters alongside the Claimant.
28. In cross-examination, and without offering any reason or explanation, he admitted that although the Claimant was based at Nakuru the disciplinary hearing took place at Thika.
29. In re-examination the witness stated that a shop-steward from Nakuru, David Onyancha, was present during the disciplinary hearing. He did not inform the court as to who had invited this union official.
30. The submissions by Counsel for the Respondent shall be considered alongside those of the Claimant's Counsel in the succeeding part of this judgment.

IV. Issues For Determination

31. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties and the court identifies the following issues for determination –
 - a. What was the nature of the employment relationship between the Claimant and the Respondent?
 - b. Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
 - c. If (b) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - d. Who meets the costs in this cause?

V. Employment

32. The Claimant's case is that while he started off on fixed term contracts on or about 4th September, 1998 he was later absorbed as a regular employee (permanent and pensionable) with effect from 1st October, 2007. He was originally based at Thika but upon becoming permanent and pensionable he was moved to Nakuru.
33. The Claimant pleaded and testified that as at the time of his dismissal he was on a gross monthly salary of Kshs.27,870/=.
34. On the other hand, the Respondent pleads that the Claimant was always on fixed term contracts and that the last such contract was to run from 1st January to 20th December, 2016 and the same is dated 7th April, 2016.
35. From the foregoing, the parties have taken diametrically opposed positions in regard to the nature of the employment relationship between the Claimant and the Respondent and this therefore becomes an issue for determination.
36. The Claimant produced a letter of confirmation dated 17th October, 2007 which in part states that "We have the pleasure in confirming your appointment with our company in the position of Fitter In Production Department – Elianto Division with effect from 1st October 2007 after successful completion of probation period." The Claimant signed on the face of the above letter in acknowledgment of receipt thereof.
37. On the other hand, the alleged fixed term contract produced by the Respondent and dated 7th April, 2016 is neither acknowledged by the Claimant nor signed by him. In any event, if indeed the



Claimant was on fixed term contracts for his entire period of service with the Respondent, why did the Respondent not avail all such contracts in court to prove that indeed the Claimant was always on short-term contracts during his entire employment relationship with the Respondent?

38. Based on the foregoing and the evidence adduced, this court is inclined to rule in favour of the Claimant that as at the time of his dismissal he was a month to month employee of the Respondent at a monthly gross salary of Kshs.27,870/= as pleaded in paragraph 7 of the statement of claim and it is so declared.

VI. Dismissal

39. The facts on the circumstances leading to the dismissal of the Claimant and the dismissal itself are not really in dispute as such. While in employment of the Respondent the Claimant joined and became an active member of the union and he was a shop-steward at the material time. It is the Claimant's case that his union activities did not sit well with his employer and that he was treated with scrutiny and suspicion that was not applied to other employees. In not so few words the Claimant is clearly and evidently saying that his troubles with his employer and even his dismissal had all to do with his union activities.
40. The Respondent's chronology of events is that on 5th May, 2016 the Claimant was allocated a task by his head of department, Shadrack Otieno, but instead of working on the assignment he was found by the manager talking to other employees and that the Claimant was not able to complete the task as expected. This misconduct earned the Claimant and the other two employees a warning letter which the other two employees received and signed for, but the Claimant failed and or refused to acknowledge receipt of the same insisting that he could only receive and acknowledge receipt thereof in presence of a union official.
41. It is the evidence on record that the Respondent was not impressed with the conduct of the Claimant this far and on 30th May, 2016 the Claimant was issued with the show-cause letter that was alluded to in an earlier part of this judgment. From that point on the events towards summary dismissal of the Claimant moved pretty quickly as narrated in an earlier part of this judgment.
42. The Claimant challenges the dismissal on two fronts. He argues that there was no reason to warrant his dismissal and that the procedure adopted by the Respondent was absolutely unlawful.
43. On the other hand, the Respondent takes the view that it accorded the Claimant both substantive and procedural fairness before, during, and after dismissal.
44. A plethora of jurisprudence from this court (ELRC) has by now and to a large extent, settled the law on what constitutes substantive and procedural fairness – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro vs Teachers Service Commission* (2012) eKLR.
45. The bottom-line in fairness is that an employer must have a legal reason and adopt the proper legal procedure before terminating or dismissing an employee.
46. The law in its wisdom recognizes that employment contracts, like all other contracts, are organic and shall come to an end at some point in time. There are a variety of reasons that could terminate a contract of employment and the *Employment Act* (the Act) provides for many such reasons. Employment is personal in nature and hence death of an employee brings the relationship to a natural end. Sections 40 (redundancy), 43, 44, 45, and 46 of the Act provide for reasons and circumstances that may form good reasons or grounds for termination or dismissal. Similarly, Sections 35, 36, 40, and 41 of the Act provide for germane pointers towards what constitutes procedural fairness.



47. It is in the context of the foregoing that the facts and evidence in this cause shall be weighed in determining if the dismissal of the Claimant by the Respondent was substantially and procedurally fair and lawful.
48. In the show-cause letter dated 30th May, 2016 the Respondent accused the Claimant of several failures in performance of his duties. The Claimant was accused of ignoring or refusing to obey lawful directions from his superiors, poor performance, unreliability, bad attitude, and neglect of duty among other charges as reproduced elsewhere in this judgment. The said charges were reproduced in the invitation to disciplinary hearing dated 31st May, 2016 which is also reproduced elsewhere in this judgment.
49. It is important to note at this point that no particulars of the charges were given in the notice of disciplinary hearing to enable the Claimant to prepare and mount a defence especially when it is alleged that there were many incidents of such neglect of duty, failure to obey lawful orders, poor performance, and bad attitude. Further, the Claimant was not informed of his right to appear with a fellow employee and or union member or officer of his choice.
50. While the alleged charges against the Claimant were serious to warrant summary dismissal under Section 44 of the Act, the Claimant was equally entitled to details and particulars of the charges and to be informed of his rights before, during, and after the disciplinary hearing. It is also curious that the Claimant was issued with a show-cause letter on 30th May, 2016 and he was required to respond thereto on the same day, which he did, and then he was served with a notice for hearing dated 31st May, 2016 on 2nd June, 2016 to appear for hearing on 6th June, 2016.
51. In his response to the show-cause dated 30th May, 2016 the Claimant denied each of the allegations and in essence sought for further and better particulars of the charges and allegations against him. He decried the issuance of a warning letter against him without being given an opportunity to be heard. However, instead of the Respondent supplying the Claimant with the particulars sought a notice of hearing was issued as alluded to above.
52. The court has carefully gone through and examined the minutes of the disciplinary hearing held on 6th June, 2016. There is no explanation whatsoever why the hearing was conducted at Thika and not Nakuru where the Respondent had a factory and offices and where the Claimant was stationed. There is also no indication as to which union members had been invited by the Claimant. There is also no indication that the Claimant was allowed to come along with an employee of his choice.
53. The Claimant was accused of idling and gossiping with other employees and refusing to acknowledge receipt of a warning letter. The record shows that there were serious personal differences between the Claimant and his supervisor Mr. Otieno. The record does not show that the Claimant was allowed and given an opportunity to defend himself against each and every allegation made against him. His defence is captured as a footnote and no witness was called by the Respondent to enable the Claimant to cross-examine them on the allegations.
54. It is also curious that by 7th June, 2016, one day after the hearing, the Respondent had already deliberated and decided to summarily dismiss the Claimant as evidenced in the letter of summary dismissal dated 7th June, 2016 which was served upon the Claimant on 8th June, 2016. Even more curious is the conclusion by the Respondent that the Claimant had been found guilty of all the allegations, accusations, and charges.
55. The letter of summary dismissal is reproduced elsewhere in this judgment but for emphasis the decisive part of the said letter is reproduced for emphasis – “In view of the above thereof, the committee found



you guilty of negligence and ignorant of the standard operating procedures, The Employment Act 2007 Section 44(4)(c & e) and Company Rules & Regulations Part IV (viii & ix) which amounts to grave misconduct and subject to summary dismissal without notice or compensation. You have therefore been summarily dismissed with immediate effect, your last day will be deemed to be 6th June, 2016.”

56. Surely, was the Claimant summarily dismissed for his ignorance towards the company rules and regulations and the *Employment Act* or for the alleged misconduct? No evidence was called at the hearing to prove that indeed the Claimant was guilty of the alleged misconduct. No oral or documentary evidence was adduced during the hearing to found a basis for a guilty verdict. The Claimant was not accorded an opportunity to test the evidence by way of cross-examination.
57. This court has held in the past, and even now, that a disciplinary hearing is not expected to meet the standards of a trial in a law court as the courts are subject to strict rules of law and procedure. However, rules of natural justice apply in disciplinary hearings in that no one may be condemned unheard, the employee has a right to all information and particulars of charges before the hearing, and he has a right to test the evidence by way of cross-examination. The employer has to establish a prima facie case against the employee for the hearing to meet the minimum threshold of fair hearing as envisaged under Article 47 of the *Constitution* and the various provisions of the *Fair Administrative Action Act*.
58. It is in the considered opinion of this court that while the Respondent may have had some grounds to taking disciplinary action against the Claimant such grounds were neither particularized, substantiated, nor proved during the hearing. No evidence was adduced in support of the allegations, accusations, or charges and the Claimant was hence denied an opportunity to test the evidence by way of cross-examination of the witnesses who were to give or had given the information relied upon. It is the opinion of this court that the Respondent approached the disciplinary process with a predetermined outcome of dismissing the Claimant.
59. Be that as it may, the Claimant appealed the dismissal and in his letter of appeal dated 8th June, 2016 he complained that he had been found guilty without any evidence being tendered against him. This is the very issue that the court has discussed at length in the foregoing paragraphs.
60. The minutes of the hearing of the appeal availed by the Respondent show that the same was held on 25th May, 2016. This cannot be correct as the disciplinary hearing took place on 6th June, 2016 and it is the decision arising therefrom that was appealed and logically the appeal must have been heard after the disciplinary hearing. The minutes of the hearing of the appeal availed by the Respondent are not signed by the chair of the committee/panel and the head or leader of legal department. They are only signed by a shop-steward, one Habert Gichana, and it is indicated in the last page that he signed on 5th December, 2017. That is over one year after the hearing of the appeal, if at all there was such a hearing held. For all intents and purposes those are not proper minutes and the same are of no evidential value. They are false and only intended to deceive and or mislead the court and the same cannot be authenticated.
61. From the evidence by the Claimant and RW1 the appeal was heard at Nakuru on 24th June, 2016 unlike the disciplinary hearing that was held at Thika. The Claimant alleged that his co-workers were intimidated by the Respondent not to appear with him in both the disciplinary hearing and during the appeal. He complained that the notices inviting him to both hearings were too short. He testified that the disciplinary hearing was held at Thika to deny him the opportunity of availing his witnesses as they were not facilitated and the Respondent allegedly intimidated them not to attend.
62. The letter dated 3rd August, 2016 by the Respondent indicates that the appeal by the Claimant was dismissed and the summary dismissal upheld. The Respondent in this letter alleges that this was a newly constituted panel following complaints by the Claimant that the panel that heard the case initially was



- improperly constituted. This is indeed an admission on the part of the Respondent that the disciplinary hearing was not properly conducted and that indeed that process was unfair to the Claimant. Yet the Respondent maintains that the second hearing was an appeal hearing. This is completely out of order and tune with the law and procedures applicable.
63. In any event, and this court has noted as much above, the minutes availed are neither properly dated nor signed by those who participated in the alleged hearing.
 64. During the hearing in court no evidence was called by the Respondent to demonstrate that indeed the Claimant was guilty of the alleged gross misconduct. The court has not detected any such misconduct on the part of the Claimant based on the evidence presented in court.
 65. The union concluded that the dismissal of the Claimant was wrongful and unfair and engaged the Respondent in lengthy negotiations which bore no fruit.
 66. This court has this far said enough to demonstrate that the Claimant was denied both substantive and procedural fairness as required in law. In regard to substantive fairness the Respondent has not demonstrated or proved that indeed the Claimant was prima facie guilty of the allegations, accusations, and charges levelled against him. No evidence was called during the disciplinary hearing or even in court to demonstrate that indeed the Claimant was guilty of the gross misconduct as alleged which misconduct the Claimant vehemently denied.
 67. On procedural fairness the notice given to the Claimant to respond to the show-cause within the same day that the same was served upon him, failure by the Respondent to inform the Claimant of his right of representation during the hearing, conducting the disciplinary hearing at Thika as opposed to Nakuru where the Claimant was based, failure to allow the Claimant to call union officers of his choice, among many other factors, clearly demonstrate a process that was completely out of touch with the law and procedure applicable. It is evidently a process geared towards a predetermined outcome of dismissal of the Claimant.
 68. The stage-managed hearing of the appeal, which was clearly aimed at sanitizing the mess that was the disciplinary hearing, added no value as there is no evidence that the same ever took place and the minutes availed in court by the Respondent add no probative value as they are misleading in the date when the appeal was heard, they are not signed, and hence they are not authentic.
 69. In the circumstances, this court finds and holds that the Claimant was denied both substantive and procedural fairness and hence the dismissal was wrongful, unfair, and unlawful.
 70. The court is inclined to believing the Claimant that the Respondent commenced the disciplinary process with a mind and eyes fixed on his dismissal for his activities as a union member and a shop-steward for that matter. Further, this court concludes that the Respondent engaged in unfair labour practices envisaged under Article 41 of the *Constitution*. The Respondent had no genuine, reasonable, or probable grounds upon which to dismiss the Claimant as envisaged in Section 43 of the Act.
 71. The court disagrees with Counsel for the Respondent on his submissions in regard to the foregoing issue. Counsel has cited *Emmanuel Mambo Oduory v One Acre Fund* (2020) among other decisions in support of her argument on fairness of the dismissal both in substance and procedure. On the other hand, Counsel for the Claimant has cited *Mary Chemweno* (*Supra*) and *Walter Ogal Anuro* (*Supra*) in his submission that the dismissal was grossly wrongful, unfair, and unlawful for failing the twin tests of substantive and procedural fairness. This court agrees with Counsel for the Claimant on this issue.



VI. Reliefs

72. Having held that the Respondent wrongfully, unfairly, and unlawfully summarily dismissed the Claimant and failed to accord him both substantive and procedural fairness this court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
73. Prayer (1) is for a declaration that the Claimant was in continuous employment of the Respondent for the period from September, 1998 to 2016. The Claimant testified in support of this allegation and the Respondent did not avail any evidence in terms of employment records to demonstrate otherwise. Sections 9, 10, and 74 of the Act bestow upon the Respondent a duty to keep employment records and to produce the same when required to do so. It is only such records that would have dislodged the allegations made by the Claimant and in absence of such records the evidence by the Claimant stands unchallenged. This prayer is hence allowed and a declaration granted in the above terms.
74. Prayer (2) is for a declaration that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful. This court has found as much in the foregoing part of this judgment and this declaration is hereby issued without any difficulties.
75. Prayer (3) is for a declaration that the Claimant was discriminated against on account of his union activities. While it is highly probable and likely that the Respondent made a solemn decision to dismiss the Claimant for his union activities, there is no clear evidence in support of that allegation or proposition. In his statement of claim the Claimant invoked Articles 27 and 43 of the Constitution but no evidence was adduced in support and prove of the alleged discrimination. Anarita Karimi Njeru v Republic (No. 1) (1979) KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance (2014) eKLR are leading authorities on how to plead and prove constitutional violations. It is in the considered view of this court that the Claimant has not met the threshold in pleading and proving violation or breach of his alleged constitutional rights. This prayer is hence denied.
76. The reasoning in the foregoing paragraph applies to prayer (4) and the declaration sought that the constitutional rights of the Claimant under Articles 41 and 43 were violated is denied for lack of prove and failing to meet the threshold. The allegation that the Claimant was dismissed for his union activities, though highly likely and or probable, remains mere suspicion.
77. Prayer (5) is for various items of terminal dues amounting to Kshs.1,005,375/= as follows. Item (a) is for Kshs.61,313/= being two month's salary in lieu of notice. In paragraph 7 of the amended statement of claim the Claimant pleaded that as at the time of dismissal his gross monthly salary was Kshs.27,870/= . There is no record from the Respondent to disprove this proposition. This evidence by the Claimant is thus admitted and the monthly salary is accepted as Kshs.27,870/=. The Claimant was a month to month employee and hence the notice applicable is for one month or payment of monthly gross salary in lieu thereof. The Claimant is hence awarded Kshs.27,870/= under this head.
78. Item (b) is for a sum of Kshs.94,329/= being unpaid pay for 80 days worked between 21st May, 2016 and 8th August, 2016. However, this claim is not justified as the letter of dismissal clearly indicates that the Claimant's last day at work was 6th June, 2016. There is no evidence whatsoever that the Claimant worked for the Respondent beyond this date. There is a pay-slip on record produced by the Respondent indicating that the Claimant was paid for the period up to 20th June, 2016. For this reason, this item is denied as there is no evidence that the Claimant worked beyond the date of dismissal.
79. Item (c) is for underpayment. This cause was filed in court in June, 2019. In consideration of provisions of Section 90 of the Act, only claims that are less than three years old shall be considered as those beyond that period are time barred. Counting backwards this period goes back to June, 2016. All the items



listed under this item as particularized in the section of particulars date before June, 2016. There is no evidence that the Claimant had at anytime during his employment raised the issue of underpayments of his salary. There is also no evidence that the pay was below that recommended by the government as from time to time, or below that negotiated or agreed in a collective bargaining agreement. For this reason, this item is denied.

80. The reasoning in the foregoing paragraph applies to items (d), (e), (f), and (g). Consequently, all those items are denied.
81. Item (h) is for service benefits for eight years in the sum of Kshs.129,000/=. There is no evidence that the Claimant was entitled to any gratuity or service pay. The Claimant was not terminated on redundancy so as to be entitled to severance pay under Section 40 of the Act. Gratuity can only be paid if and where the same is agreed and or provided for in the contract of service. For this reason, this item is denied.
82. Item (i) is denied for the foregoing reasons as well.
83. Item (j) is for compensation under Section 49 of the Act. The Claimant has pleaded for the maximum compensation of 12 month's gross salary. The Claimant worked for the Respondent for a considerably lengthy period of about eight years. He was treated very unfairly leading to wrongful, unfair, and unlawful dismissal. He testified that he did not get another job after the wrongful dismissal and that he now relies on casual engagements. Although there were lengthy negotiations between the union and the Respondent the latter did not settle this claim and the Claimant did not agree to the negotiated sum of Kshs.92,563.45. It is important to note at this point that the Claimant was not bound by the said negotiations and he was not obligated to accept the outcome thereof. He was not estopped by those negotiations from coming to court to seek compensation as he did.
84. It is the considered view of this court that this is an appropriate case for award of the maximum 12 months gross salary in compensation. The same is calculated at Kshs.27,870/= *12= Kshs.334,440/=. This sum is so awarded.
85. Prayer 4 is for compensation for violation of Claimant's constitutional rights. As stated elsewhere in this judgment the Claimant has not pleaded and proved specific threats, breach, or violations of his constitutional rights as to meet the threshold set in the Anarita Karimi Njeru and the Mumo Matemo decisions cited above. Counsel for the Claimant has not submitted on this issue so as to guide the court on the nature of the damages the Claimant is seeking.
86. Prayer 5 is for a certificate of service. The Respondent is ordered to issue and deliver a certificate of service to the Claimant within 30 days of this judgment in accordance with Section 51 of the Act.

IV. Costs

87. The Claimant is awarded costs of this cause.

V. Disposal

88. In final disposal of this cause, this court issues the following orders: -
 - a) That a declaration be and is hereby issued that the Claimant was an employee of the respondent on a contract of service running from month to month.
 - (b) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.



- (c) The Claimant is awarded a total of Kshs.362,310/= together with interest thereon from the date of this judgment less statutory deductions. The said sum is made of-
- i. One month's gross salary in lieu of notice..Kshs. 27,870/=
 - ii. Compensation for wrongful and unlawful dismissal.....
Kshs.334,440/=
- Total.....Kshs.362,310/=
- d) All the other claims are denied.
- e) The Claimant is awarded costs of this cause.
- f) The Respondent is ordered to issue and deliver a certificate of service within 30 days of this judgment.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 2ND DAY OF MARCH, 2023

DAVID NDERITU

JUDGE

