



Kamande v Nairobi City Water & Sewerage Company Limited (Cause 612 of 2017) [2023] KEELRC 927 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 927 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 612 OF 2017**

**JK GAKERI, J
APRIL 24, 2023**

BETWEEN

BEN KARANJA KAMANDE CLAIMANT

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim filed on 30th March, 2017 alleging that his dismissal from employment was in violation of the provisions of *Employment Act*, 2007.
2. The Claimant avers that he joined the Nairobi City Council in March 1990 and was subsequently absorbed by the Respondent in November 2004 and served diligently.
3. It is the Claimant's case that on 25th January, 2014, he was arrested, detained and humiliated and coerced to record a Police Statement at Muthaiga Police Station under OB No. 59/25/01/2014 on misappropriation of the Respondent's property, Water Meter No. 12-31280 by moving it from the Central Region to Kasarani-Mwiki Region.
4. That by letter dated 31st January, 2014, he was called upon to show cause why disciplinary action could not be taken against him for moving Meter No. 12-31280 from the Central Region to Mwiki-Kasarani region.
5. That he was unaware of the movement of the meter as he was not the custodian and the statement recorded at the Pangani Water Offices was recorded under duress.
6. That he was suspended via letter dated 14th February, 2014.
7. That a letter dated 11th June, 2014 informed the Claimant that he would be advised on when to appear for a hearing on completion of the investigation but only received a dismissal letter dated 18th September, 2014 and appealed on 1st October, 2014, received a response on 13th January,



2015, appeared before the Corporate Appeals Committee on 24th February, 2016 and never received feedback.

8. It is the Claimant's case that Meter No. 12-31280 was procured by Mr. Charles Murigi who was served by one Pamela Nyongesa (NWC 71271), drawer No. 1087 on 19th September, 2013 at 10.07 am.
9. The Claimant prays for;
 - i. Reinstatement.
 - ii. All salary due to him from the date he was suspended to date including emoluments, benefits and interest accrued thereon.
 - iii. Costs of this suit.

Respondent's case

10. In its statement of response filed on 27th June, 2017, the Respondent avers that the Claimant was its employee, employed as a Disconnect/Reconnect Artisan until 18th September, 2014 when he was summarily dismissed after he was notified of the charges against him, afforded an opportunity to respond in writing and a hearing at which he was represented by four (4) union representatives.
11. It is the Respondent's case that the reasons for termination were valid as the Claimant had irregularly processed Meter No. 12-31280, a fact he admitted and having received money from a customer contrary to the Respondent's Human Resource Manual.
12. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

13. In his written statement, the Claimant admitted that he appeared before the Corporate Disciplinary Committee on 5th May, 2014 and proceedings were deferred for further investigations. The Claimant availed no evidence of an invitation to the meeting nor alleged deferment and only received a dismissal letter later on in September.
14. The witness testified that he received a suspension letter on 14th September, 2016 which is not the case.
15. On cross-examination, the Claimant confirmed that he was dismissed in 2014 for illegal water connection and forgery, having attended a disciplinary hearing on 30th May, 2014.
16. It was his testimony that Charles Mwangi, his friend gave him cash but the water connection was done by the Respondent.
17. He disclosed that he was 57 years old and retirement age was 60. He stated that he was no longer interested in reinstatement but subsequently changed his mind stating that he was interested.
18. It was his testimony that he knew one Charles Mwangi who had a water problem and he received Kshs.6,000/= from Mr. Mwangi for survey and deposit.
19. He denied having sent Meter No. 12-31280 to Mr. Charles Mwangi as each region had its meters and no part of the amount was used as fare. He denied having received a bribe from Mr. Mwangi.
20. He confirmed that he was a Meter Reader for the Central Region and Mwiki is in Northern Region.
21. On re-examination, the witness confirmed that he received Kshs.6,000/= from Mr. Charles Mwangi and withdrew Kshs.5,800/= for purposes of the survey and deposit and attended a hearing on 30th



May, 2014 and subsequently received the letter dated 11th June, 2014 on deferment of the hearing for further investigations and would be notified of the next hearing date but received neither an invitation nor the investigation report.

22. That the next communication was the dismissal letter.
23. The Claimant testified that he was neither arrested nor charged for a criminal offence.

Respondent's evidence

24. RWI, Mr. George Okech testified that the Claimant was suspended on 14th February, 2014 for irregularly processing meter connection for one Charles Murigi of Mwiki. That he installed Meter No. 12-31280, belonging to the Central Region in the Northern Region in September and it was recommended that the Claimant should step aside for purposes of investigation.
25. The witness testified that preliminary investigations revealed a conspiracy between the Claimant and others to use forged receipts to make an illegal water connection in January 2014.
26. That the Claimant had made payments for 2 receipts that were a forgery which denied the Respondent Kshs.6,000/=, a gross misconduct.
27. The witness testified that the Claimant was guilty of making forged documents, making or aiding in the making of an illegal connection, obtaining a meter irregularly from the Central Region, stealing from the employer and sabotage to commercial and finance directorates in revenue collection.
28. That the Claimant was given Kshs.6,000/= to pay for survey and meter deposit which he did on 29th September, 2013 and took the Meter No. 12-31280 two weeks later.
29. The witness tendered no evidence on how the sum of money was given or how the Claimant took the meter or whether he paid for it or not.
30. It is the witnesses' testimony that the Corporate Disciplinary Committee (CDC) meeting held on 30th May, 2014 recommended summary dismissal of the Claimant which was effected by letter dated 14th September, 2014.
31. The witness admitted that on appeal, the claim for forgery was dropped as the receipts were genuine but the dismissal was upheld since the Claimant handled customer's money.
32. That the Claimant was paid all his dues.
33. On cross-examination, the witness stated that the letter of suspension made no reference to the duration of suspension and the Claimant was not charged for a criminal offence.
34. He confirmed that the hearing on 30th May, 2014 was deferred and had no evidence of the Claimant's invitation for the next hearing and minutes of the hearing on 15th July, 2014 had no indication that the Claimant attended the meeting. The witness confirmed that the deferment was to facilitate further investigations but had no evidence that the Claimant was notified of the outcome.
35. That investigations revealed that the payments made by the Claimant and the receipts were genuine.
36. The witness confirmed that the Appeals panel referred the matter back to the Corporate Disciplinary Committee which sat on 29th September, 2017.
37. It was his testimony that although the Claimant was on suspension for more than the prescribed duration, he was not reinstated contrary to the provisions of the Respondent's Human Resource Manual.



38. Finally, on re-examination, the witness stated that the union representatives relayed information and the investigation report to the Claimant but had no evidence to establish the allegations.

Claimant's submissions

39. As regards termination of the Claimant's employment, counsel for the Claimant submitted that the same was not conducted in accordance with the law, specifically Section 41 of the *Employment Act, 2007*.
40. The decisions in *Evans Mogute Nyaundi V China Road & Bridge Corporation (K) Ltd* and *Angela Wokabi Muoki V Tribe Hotel Ltd (2016) eKLR* were relied upon to underscore the essence of procedural fairness.
41. Counsel urged that the indefinite suspension of the Claimant was irregular and unfair as it violated the Respondent's Human Resource Policy.
42. Similarly, the Claimant was not invited for the disciplinary hearing held on 15th July, 2014 at which an investigation report was to be produced and the Claimant had no opportunity to mount a defense and was thus condemned unheard.
43. Reliance was made on the sentiments of the court in *R V Board of Governors Our Lady of Victory Girls Secondary School Kapnyeberai & another ex parte Korir Kipyego & another (2015) eKLR* and *O' Reilly V Mackman (1983) 2 AC* among others to underline the essence of observance of the rules of natural justice.
44. Counsel further submitted that there was no merit in the Respondent's allegations that the Claimant committed the various transgressions since the Respondent's investigation revealed that the store was accessible to all employees in the department and it was impossible to hold anyone accountable and it was impossible to ascertain whether there was indeed an illegal connection and no evidence was adduced on how the Meter No. 12-31280 was removed from the store.
45. Counsel urged that the allegations made against the Claimant were not proved.
46. Reliance was made on the provisions of Section 45 of the *Employment Act* and the decision in *Alphonse Mghangha Mwachanya V Operation 680 Ltd (2013) eKLR* to urge that termination of the Claimant's employment was substantively unfair.
47. As regards reliefs, counsel prayed for the Claimant's reinstatement as well as Kshs.129,000/= being the Claimant's salary for 3 months after the prescribed duration of suspension.
48. Counsel further urged the court to award salary upto and including 14th February, 2023 a total of Kshs.4,515,000.00 and house allowance of Kshs.1,732,000.00 from 2014 to the present.
49. Finally, counsel urged the court to award Kshs.25,082/= since the uniform allowance should not have been taxed as indicated in a payment voucher dated 22nd July, 2018.

Respondent's submissions

50. According to counsel, the issues for determination are;
- i. Whether the Claimant was dismissed on lawful grounds and in line with the Respondent's Human Resource Policy and Procedures Manual (herein HR Manual).
 - ii. Whether the Claimant was taken through a lawful and procedural process.



- iii. Whether the Claimant's case and reliefs sought has merit.
51. On the 1st issue, counsel submitted that the Claimant was found to have committed gross misconduct contrary to Clause 23.2(viii) of the Human Resource Manual in that the issue of misappropriation of funds and the illegal connection in the Northern Region was against company policy.
 52. That the Claimant had not acted in good faith by failure to report the illegal connection and was arrested and held at Muthaiga Police Station under OB No. 59/25/1/2014 and they settled the matter out of court by signing to pay Kshs.30,000/= to the Respondent under the provisions of the [Water Act](#).
 53. That the Claimant changed his statement in court as to how he obtained possession of Meter No. 12-31280.
 54. That handling client's money was at odds with the Respondent's Human Resource Policy.
 55. According to counsel, the Respondent had valid reasons to dismiss the Claimant from employment.
 56. Reliance was made on the decisions in Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others and Kenya Power and Lighting Co. Ltd V Aggrey Lukorito Wasike (2017) eKLR to urge that the test for reasons for termination was a subjective one.
 57. On procedure, counsel urged that the Respondent had a clearly defined termination procedure. Reliance was made on the decisions in Kenfreight (EA) Ltd V Benson K. Nguti (2019) eKLR as well as Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (2014) eKLR to underscore the essence of procedural fairness.
 58. Counsel urged that the Respondent issued a notice to show cause which the Claimant responded to, was suspended for investigations, invited to a hearing and there was a union representative. That the Corporate Disciplinary Committee resolved that the Claimant's employment be terminated. That he appealed and the Corporate Appeals Committee upheld the dismissal.
 59. That the Respondent took all the requisite steps to ensure that the proceedings were conducted lawfully.
 60. Reliance was made on the decisions in Kenya Plantation & Agriculture Workers Union V Unilever Tea (2021) eKLR on procedure and Judicial Service Commission V Gladys Boss Shollei (2014) eKLR on the standard of proof in civil cases.
 61. Counsel urged that the Claimant's summary dismissal was conducted in accordance with the law.
 62. That the Respondent took into consideration the requirements of Section 41 of the [Employment Act](#) and had representatives.
 63. Counsel further urged that termination of the Claimant's employment was fair as it was justifiable under Section 44(4)(e) of the [Employment Act](#) as regards failure to obey lawful commands.
 64. The decision in Timothy Gakere Gachaga & 2 others V Kenya Marine Contractors & another (2017) eKLR was relied upon to reinforce the submission.
 65. As regards the reliefs sought, the Respondent's counsel submitted that reinstatement was unavailable to the Claimant on account of his age and the 3 year rule prescribed by Section 12(3)(vii) of the [Employment Act](#) and Labour Relations Court Act, 2011.
 66. The decisions in Meshack Onguti V Kenyatta National Hospital & 2 others (2018) eKLR and Sotik Highlands Tea Estates Ltd V Kenya Plantations & Agriculture Workers Union (2017) eKLR were



relied upon to urge that the remedy of reinstatement was unavailable to the Claimant owing to passage of time.

67. Secondly, counsel submitted that during suspension, the Claimant was only entitled to housing and other allowances but no salary in consonance with the Respondent's Human Resource Manual and the same was irrecoverable as termination was fair.
68. The Respondent prayed for dismissal of the suit with costs.

Findings and determination

69. After careful consideration of the pleadings, evidence on record and rival submissions by counsel, the issues for determination are;
 - i. Whether the Claimant's summary dismissal by the Respondent was fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
70. As regards summary dismissal and termination of employment generally, while the Claimant's counsel submitted that the summary dismissal was neither substantively justifiable nor procedurally fair, the Respondent's counsel maintained that the Respondent had valid grounds and effected the dismissal in accordance with the prescribed procedure. The provisions of the *Employment Act* establish an elaborate framework to be complied with by the parties and in particular the employer where the dismissal or termination is at the instance of the employer. The Act is unambiguous that a termination of employment must be fair.
71. For a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification had to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
72. Similarly, in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*, the Court of Appeal stated as follows;

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair . . .”
73. The provisions of Section 43(2) and 45(2) (a) and (b) provide further details on the reason(s) for termination of employment. For instance, the reason must relate to the employee's conduct, capacity or compatibility or operational requirements of the employer. The reason(s) must be valid and fair.



74. On the other hand, the provisions on Section 41 of the *Employment Act* prescribe an elaborate and mandatory procedure to be complied with before termination or dismissal of an employee. (See Pius Machafu Isindu V Lavington Security Guards (2017) eKLR).
75. In addition, Section 44(4) of the *Employment Act* identifies seven (7) examples of what could amount to gross misconduct. The Act has no definition of the phrase gross misconduct though Section 44(4) of the Act is inexhaustive.
76. Employers typically enumerate what they consider to amount to gross misconduct in their Human Resource Manual or operations guidelines. These, typically comprise serious transgressions such as absence without leave or lawful cause, intoxication during office hours, use of abusive or insulting language, disobedience, wilful neglect, arrest for a criminal offence or commission or suspicion of having committed a criminal offence against or to the substantial detriment of the employer.
77. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reason(s) for termination

78. The notice to show cause dated 31st January, 2014 accuses the Claimant for;
- i. Assisting Mr. Charles Murigi of Mwiki process for a meter connection by having paid for the survey and deposit on 20th September.
 - ii. Taking Meter No. 12-31280 to the customer two weeks later.
79. The summary dismissal letter dated 18th September, 2014 states that the Claimant had irregularly processed Meter No. 12-31280 for one Mr. Charles Murigi of Mwiki and installed the same from the Central Region.
80. The alleged admission of taking the Meter from the Central Region to the Northern Region allegedly contained in a statement dated 25th January, 2014 was vehemently denied by the Claimant who alleged that the statement was procured by duress.
81. None of the parties filed the statement in court for its perusal and assessment of its probative value.
82. In the circumstances, the alleged admission remains an allegation.
83. The dismissal letter singles out the irregular processing of the Meter No. 12-31280 and its installation at Mwiki.
84. In his response to the notice to show cause, the Claimant denied having moved the meter from the Central Region to Mwiki. The Claimant urged the Respondent to carry out further investigations on the matter to uncover the truth.
85. According to the Respondent, the Claimant's response was insufficient and precipitated a suspension to facilitate further investigations as suggested by the Claimant.
86. The first investigation conducted by one Mr. Peter Adigora dated 3rd February, 2014 found that;
- i. The three persons had forged receipts to make an illegal connection at Mwiki.
 - ii. That the alleged payments by the Claimant were false.
 - iii. The three were sabotaging the Respondent.



- iv. The customer would have accessed the Respondent's water free of charge.
87. The investigator recommended;
- i. Further investigation in the Central Region to ascertain how the meter was removed from the stores.
 - ii. That if found to have been unprocedural, the culprits be dealt with sternly to serve as an example to others.
 - iii. That disciplinary action be taken against the Claimant.
88. A second investigation conducted by the Investigation Supervisor, one Mr. Musa Ouma dated 21st May, 2014 found that there was no record of movement of Meter No. 12-31280 after its return to the Central Region store on 29th July, 2013.
89. Another disturbing finding was that the store was accessible to all artisans in metering which was only addressed after the loss of the meter was reported.
90. The Investigation Supervisor could not attribute the loss of Meter No. 12-31280 to anyone.
91. In addition, meters were stocked and could be taken by anyone with access to the store.
92. The Investigation Supervisor recommended inter alia;
- i. Stores be accessible to a few authorised staff for accountability.
 - ii. Meters should not be stocked.
 - iii. CCTV System be reinstated.
 - iv. The Claimant and the customer be interrogated further.
93. According to the Respondent, these reports sealed the Claimant's fate, their inconclusive nature notwithstanding. Both reports recommended further investigations to unearth the facts of the case.
94. This position is reinforced by the recommendations of the Corporate Disciplinary Committee held on 30th May, 2014, which the Claimant attended. The meeting found inter alia, the Claimant explained the purpose of the Kshs.6,000/= received from the customer, deposits and receipts were not verified in the system, there was no record/report on how Meter No. 12-31280 was removed from the store or a statement from the stores person. The Claimant alleged that the Investigating Officer received a bribe of Kshs.80,000/= which required investigation.
95. The Committee made a singular recommendation that the matter be deferred to pave way for further investigation.
96. The Claimant was notified of the deferral via letter dated 11th June, 2014.
97. The letter stated in part;

“RE: Deffered Case

Following your appearance before the Corporate Disciplinary Committee on Friday 30th May, 2014 and subsequent proceeding, the committee noted that the case required further investigation in order to determine the case fairly.

In view of the above, your case has been deferred and the secretary will advise you on the next hearing date through a summon letter as soon as possible.



Yours faithfully,

Signed

Rose Naliaka

Secretary-Corporate Disciplinary Committee”

98. Documentary evidence availed by Respondent reveal that the Corporate Disciplinary Committee held a meeting on 15th July, 2014 and the Claimant’s case was Minute/3/30/5/2014.
99. Although RWI intimated that the Claimant was invited for the meeting, he adduced no evidence of the invitation or the Claimant’s participation.
100. The minutes make reference to an inconclusive investigation report on authenticity of the receipts.
101. Only three of the original members of the committee were present.
102. The committee found that the receipts provided did not relate to the property and connection in question, there was deliberate attempt to alter customer data, Claimant handled customer’s money in contravention of the Respondent’s policy, investigations failed to establish how the meter was removed from the Central Region Stores and contradictory investigation reports.
103. The Committee recommended summary dismissal of the Claimant for violating the Human Resource Manual on integrity and corruption.
104. Puzzlingly, after the Claimant was dismissed and appealed on 1st October, 2014, at its meeting on 24th February, 2015, the Committee recommended that the matter be deferred for further investigation on the movement of the Meter No. 12-31280 and authenticity of the receipt.
105. In sum, the entire matter be investigated.
106. At its meeting held on 4th April, 2015, the Corporate Appeals Committee received a Special Review on Northern Region Illegal Water Connections – September 2014 by the Internal Audit Department.
107. The review was exclusively based on the investigations conducted by one Musa Ouma dated 21st May, 2014 and the other by one Peter Adigora dated 3rd February, 2014. Instructively, the Corporate Disciplinary Committee hearing was deferred to pave way for further investigation which never took place.
108. The undated and unauthenticated document is entitled ‘Special Review on Northern Region Illegal Water Connections – September 2014.’ The report castigated the Northern Region Security Team for failure to carry out thorough investigation on the alleged illegal water connection.
109. The internal audit failed to establish whether there was illegal connection being carried out.
110. The committee recommended that the matter be remanded to the Corporate Disciplinary Committee for consideration of the new evidence.
111. The Committee sat on 26th September, 2017 and upheld its earlier decision. Of the original seven members of the Committee, only one attended the meeting.
112. From the forgoing, it is clear that the allegations that the Claimant forged receipts, removed Meter No. 12-31280 from Central Region Stores to the Northern Region were not established. The only outstanding charge was receipt of Kshs.6,000/= from Mr. Charles Murigi which the Respondent’s counsel submitted amounted to gross misconduct.



113. Paragraph 8.23.2 of the Respondent's Human Resource Manual, 2013 catalogues what the organization considers as gross misconduct.
114. The salient question is whether receipt of Kshs.6,000/= by the Claimant from his friend Charles Murigi was a bribe and thus a criminal offence or denied the Respondent revenue, or amounted to misappropriation of funds under paragraph 8.23.2(viii) of the Human Resource Manual.
115. RWI confirmed on cross-examination that the investigations by the Respondent revealed that the payments made by the Claimant was genuine as were the receipts issued by the Respondent.
116. The audit report on record revealed that the money in question was accounted for.
117. Similarly, RWI confirmed that the Claimant was neither arrested nor charged for a criminal offence. The alleged compromise under the provisions of the Water Act was neither testified about nor demonstrated.
118. It requires no emphasis that the Respondent's Human Resource Manual did not recognize payment for services on behalf of 3rd parties by staff as a gross misconduct. Relatedly, it was not demonstrated that the Claimant committed a criminal offence by receiving monies from Charles Murigi and making payments on his behalf, a fact he admitted in his statement and in court. He testified that he did not use any portion of the cash as fare.
119. Unsurprisingly, the Corporate Appellate Committee remanded the case to the Corporate Disciplinary Committee.
120. From the foregoing, it is the finding of the court that the Respondent has failed to demonstrate on a balance of probabilities that it had a valid and fair reason to summarily dismiss the Claimant on 18th September, 2014.

Procedure

121. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal underscored the essence of procedural fairness as follows;

“A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination . . .”

122. Similarly, in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal itemised the elements of procedural fairness as set out in Section 41 of the Employment Act as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”



123. The court further stated;
- “... It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.”
124. Applying the forgoing provisions and principles of law to the facts of the instant suit, it is clear that although the Respondent attempted to comply with the provisions of Section of the [Employment Act, 2007](#), it did not do so as it ought to have done.
125. As adverted to elsewhere in this judgement, the Respondent issued a notice to show cause, the Claimant responded, was subsequently suspended indefinitely and invited for a disciplinary hearing slated for 30th May, 2014 which he attended and made submissions, as did the Investigating Officer, Northern Region and the union.
126. From the minutes dated 27th June, 2014, it is unclear as to whether the Claimant cross-examined the Investigating Officer.
127. The findings of the Committee necessitated further investigations and the matter was deferred and the Claimant was notified of the deferment via letter dated 11th June, 2014. Contrary to the testimony of RWI, the Respondent did not invite the Claimant for another hearing thereafter but issued a summary dismissal letter three months after the deferment letter.
128. For unknown reasons, the Claimant was not invited for the Corporate Disciplinary Committee meeting held on 15th July, 2014, whose principal agenda was disciplinary cases.
129. Two persons were absent with apologies. None of the two staff members under deliberation appear to have been invited as no apologies were recorded.
130. Strangely, the meeting commenced at 8.30 am and ended at 4.00 pm but the Respondent conveniently omitted the deliberations and only filed 4 pages out of the 19 page of the minutes.
131. Regrettably, the 4 pages on record make no reference to an investigation report or new evidence which occasioned the deferral of the matter on 30th May, 2014.
132. Intriguingly, the Committee relied on the minutes of the earlier meeting hook, line and sinker to hold the Claimant liable for summary dismissal and in his absence.
133. In the court's view, what the Corporate Disciplinary Committee did on 15th July, 2014 can pass neither the test of good faith nor fairness.
134. Having notified the Claimant that his matter had been deferred for further investigation in order to ensure fairness, the Committee was obligated to keep the Claimant apprised of any developments including the outcome of the investigations and subsequent hearing date.
135. The minutes make no reference to any urgency with which the matter had to be disposed of before further investigation was conducted. The salient issue is why the Claimant was condemned on the basis of investigation reports which the original Corporate Disciplinary Committee chaired by one Paul Omondi found unsubstantiated and called for further investigation.
136. In the court's view, the fact that the Respondent neither availed the investigation report nor invite the Claimant to rebut the new evidence shows that the Claimant was condemned unheard, the subsequent appellate process notwithstanding.



137. The Corporate Appeals Committee concluded that the Special Review Report by the Internal Auditor was new evidence which the Corporate Disciplinary Committee had not considered and remanded the matter to the Committee.
138. Incidentally, the report confirmed that the payments made by the Claimant were genuine as were the receipts. Similarly, the auditor lamented about the inadequacy of the investigation by the Northern Region Security Team. For instance the team did not question the Plumber, One Mr. Ezekiel Muchai who was arrested on site making the connection.
139. In a nutshell, the Special Review Report laid it bare that the Respondent had no sustainable case against the Claimant. As the report is dated September 2014, it is clear that the Claimant's employment was terminated before the report was considered by the Corporate Disciplinary Committee.
140. Finally, the Corporate Disciplinary Committee met on 26th September, 2019 to determine the Claimant's case in light of the recommendation of the Corporate Appeals Committee meeting held on 5th February, 2016.
141. The only substantive agenda of the meeting was to hear the Claimant's disciplinary case.
142. The Respondent furnished no evidence to show that it invited the Claimant for the new hearing or provided the Special Review Report to him for rebuttal.
143. The new Committee chaired by another person upheld the earlier decision of summary dismissal of the Claimant.
144. The minutes make reference to a comprehensive investigation report dated 1st July, 2014 which the Respondent neither availed to the Claimant nor the court for perusal. It is unclear as to who conducted the investigation and what its findings were.
145. Oddly, the Committee faulted the Appeals Committee for not determining the case in the first instance and according to the members, the new information did not exculpate the Claimant.
146. Instructively, the Corporate Disciplinary Committee meeting held on 26th September, 2017 was not an appeal. It was a new hearing of the Claimant's case based on the new evidence before the Committee.
147. The fact that the Committee found it not prudent to invite the Claimant and proceeded to condemn him meant that the Committee was condemning the Claimant unheard for a second time.
148. For the above-stated reasons, the court is satisfied and finds that the Respondent has failed to prove on a balance of probabilities that it conducted the termination of the Claimant's employment in accordance with a fair procedure as ordained by the provisions of Section 45(2) of the *Employment Act*, 2007.
149. In sum, it is the finding of the court that the summary dismissal of the Claimant by the Respondent was neither substantively justifiable nor procedurally fair and thus violated the provisions of the *Employment Act*, 2007.

Reliefs

150. As regards entitlement to reliefs, the court proceeds as follows;

i. Reinstatement

151. The Claimant's case is based on the remedy of reinstatement as the salient remedy. The remedy of reinstatement is provided for by the provisions of Section 49(3)(a) of the *Employment Act* as read with Section 12(3)(vii) of the Employment and *Labour Relations Act*, 2011.



152. It is a discretionary remedy dependent on the merits of the case based on the principles of fairness and justice (See Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR.
153. Under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011, an order of reinstatement may be made within 3 years of dismissal, subject to such conditions as the court thinks fit to impose. This would have been a strong case for reinstatement. However, the Claimant's employment was terminated on 18th September, 2014, the suit was filed on 30th March, 2017 and heard on 2nd November, 2022 and 24th January, 2023. Evidently, the Claimant took considerably long to file the case if his principal remedy was reinstatement.
154. Similarly on cross-examination, the Claimant stated; "I am not interested in reinstatement any more. I am interested in reinstatement."
155. The ambivalence is understandable owing to passage of time.
156. Equally, the Claimant's counsel did not urge the remedy forcefully.
157. In a nutshell, the remedy of reinstatement is not available in this case on account of passage of time.
158. Surprisingly, the Claimant did not pray for compensation, which the court would have awarded as a relief under Section 49(1)(c) of the *Employment Act*, 2007.

ii. Salary and other benefits due from date of suspension to date

159. Under paragraph 8.24 of the Respondent's Human Resource Manual, 2013, the maximum duration of suspension was 90 days and a further 30 days extension after which reinstatement was mandatory. In this case, the Claimant was suspended on 14th February, 2014 and dismissed from employment on 18th September, 2014 while on suspension a total of 7 months and should have been reinstated on 14th June, 2014 but was not since the Human Resource Manual permitted the Respondent to withhold the salary during suspension for upto 4 months the Claimant prays for 3 months salary for the 3 months when he was not supposed to be on suspension and the court is persuaded that the same is due in the interest of justice.
160. The Respondent without any justification refused, ignored, failed and neglected to follow its Human Resource Manual. Retaining an employee on indefinite suspension is antithetical to fair labour practice as it subjects the employee to untold anxiety.
161. The Claimant is awarded the salary due to him for the last 3 months of the suspension.

iii. Having found that termination of the Claimant's employment was unfair and unlawful for want of justification and fair procedure, the court is satisfied that he is entitled to the withheld salary for the first 4 months of the suspension as ordained by paragraph 8.24 of the Respondent's Human Resource Manual, 2013.

iv. Salary and benefits to date 14th May, 2014 to date 8 years 9 months

162. This claim, in the court's view is patently not sustainable for the simple reason that the Claimant did not render any services to the Respondent after termination of employment on 18th September, 2014 and cannot be presumed to have been rendering services by virtue of the automatic reinstatement by virtue of paragraph 8.24 of the Respondent's Human Resource Manual. The claim herein is analogous to a claim for anticipatory earnings which has no anchorage in law as held by the Court of Appeal in



DK Njagi Marete V Teachers Service Commission (2020) eKLR as well as Elizabeth Wakanyi Kibe V Telkom Kenya Ltd (2014) eKLR.

163. In the circumstances, the claim for salary to date is disallowed.
164. In the end, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Salary for the entire duration of suspension.
 - b. Costs of this suit.
 - c. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

