Okomo v KCB Bank Kenya Limited (Cause 80 of 2019)
[2023] KEELRC 945 (KLR) (20 April 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 80 OF 2019

BOM MANANI, J

APRIL 20, 2023

BETWEEN

GABRIEL ODHIAMBO OKOMO ..... CLAIMANT

AND

KCB BANK KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. This is a claim for unfair termination. The Claimant, who until 9th November 2018 was an employee of the Respondent, was summarily dismissed from employment for gross misconduct. The Claimant has brought this action to challenge the legality of this decision.

2. The Respondent does not admit liability for the claim. According to the Respondent the Claimant was regularly dismissed from employment. The Respondent posits that the decision to terminate the Claimant's contract was anchored on valid grounds and was in accordance with fair procedure.

Claimant's Case

3. According to the Claimant, he was hired by the Respondent sometime in 2007. His first engagement was as a Direct Sales Representative. The Claimant states that he rose through the ranks until 9th November 2018 when he was relieved of his employment.

4. On 2nd August 2018, the Claimant states that he was elected as the chair of the Central Staff Committee, a trade union committee operating within the Respondent's workplace. This position brought the Claimant into the leadership of the Banking, Insurance and Finance Union (Kenya), a trade union registered to champion the welfare of employees in the banking and insurance sectors in Kenya.

5. Upon his election to the position of Chair Central Staff Committee, the Claimant states that he assumed duality of roles at the workplace. First, he continued serving as an employee of the Respondent. Second, he was required to attend to various staff welfare issues in his capacity as a shop

floor representative. He indicates that some of the matters that required his attention as a union official included accompanying employees who were members of the union to staff disciplinary sessions.

6. The Claimant indicates that because of his active involvement in trade union activities at the workplace, there was a sense of disaffection towards him by the Respondent's management. This, the Claimant suggests, was demonstrated by the several unplanned transfers that the Respondent subjected him to. The Claimant suggests that the transfers were intended to impede his ability to effectively serve in his new role as the Chairman of the Central Staff Committee.

7. The Claimant asserts that his opposition to the manner in which the Respondent was undertaking staff appraisals placed him at loggerheads with the Respondent. This conflict, the Claimant suggests, was exacerbated by the filing of cause number 1619 of 2017 through which the trade union succeeded in getting interim relief barring the Respondent from finalizing the 2017 staff evaluation process.

8. The court order that was issued in August 2017 barred the Respondent from processing the performance evaluation pending finalization of the case. It is alleged that the Respondent procured a consent order on either 6th or 7th September 2018 (Consent Order) setting aside the order of August 2017 with the consequence that the Respondent was at liberty to finalize the performance review process. Not convinced about the Consent Order, the Claimant circulated a text message asking unionized members of staff not to submit their evaluation forms.

9. The Claimant states that his resistance to the Respondent's attempts to kick-start the evaluation process triggered the Respondent's decision to institute disciplinary action against him. The Claimant states that he filed cause number 1423 of 2018 seeking the court's protection. However, the court did not grant him the orders that he sought. When the court failed to issue restraining orders, the Respondent took the Claimant through a disciplinary process and terminated his contract of employment.

10. The Claimant has a dim view of the disciplinary process that he was subjected to. He argues that he was issued with a letter requiring him to explain why he had circulated a text message to unionized employees urging them not to submit their evaluation forms to the Respondent's management. According to the Claimant, the text message in question was of a private nature shared between members of a WhatsApp group on a platform that was encrypted. The Claimant questions how the Respondent's management obtained the text from the platform and whether it was legitimate for the Respondent to use such confidential text to open the disciplinary process against the Claimant.

11. The Claimant further contends that upon receipt of the letter requiring him to show cause, he wrote to the Respondent asking for further information on the accusations leveled against him to enable an appropriate response. However, the Respondent did not act on the request.

12. The Claimant states that the Respondent required him to respond to seven (7) accusations leveled against him within twenty four (24) hours. In his view, this denied him sufficient time to act on the matter.

13. It is the Claimant's case that despite these constraints, he responded to the show cause letter on 2nd October 2018 whereupon he was summoned for a disciplinary session on 5th October 2018. However, he was unable to attend this session due to poor health. The Claimant states that he eventually attended the adjourned session on 15th October 2018.

14. It is the Claimant's case that whilst the notice to show cause contained seven (7) accusations, the letter inviting him for the disciplinary session contained eight (8) charges. In the Claimant's view, this development denied him the opportunity to adequately answer to the added charge.

15. The Claimant states that he was issued with a letter of termination dated 9th November 2018. He appealed the decision.

16. After the appeal, the Claimant states that his lawyers called for information on the process from the Respondent but this request was not granted fully. There was only a partial release of the documents called for.

17. The Claimant further argues that despite having appealed against the decision of the Disciplinary Committee, the appeal was not heard. It is the Claimant's case that the Respondent's overall conduct of the matter violated his rights to fair labour practice and fair administrative action, conduct which exposed the Claimant to emotional anguish and trauma.

Respondent's Case

18. The Respondent's reaction was that the Claimant was the author of his own misfortunes. That despite the parties having recorded a consent in court on 6th September 2018 lifting the order of August 2017 and allowing the finalization of the performance evaluation process, the Claimant wrote a text message to unionized employees asking them not to submit to the exercise.

19. According to the Respondent, to the extent that this text was communicating a position that was contrary to the Consent Order that had been recorded in court on 6th September 2018, it was misleading. In this context, it was the Respondent's case that the Claimant had through disseminating the text, instigated a process of misinformation of staff in contravention of the applicable policies governing the conduct of employees of the Respondent. The Respondent further contends that the Claimant had through the text made certain accusatory and false remarks against the Respondent which had the potential of affecting the Respondent's good standing in society.

20. Concerned about this turn of events, the Respondent states that it issued the Claimant with two letters requiring him to confirm ownership of the text message and explain why he had found it necessary to disseminate unsubstantiated information to the unionized employees. It is the Respondent's case that the Claimant defied this directive prompting the Respondent to issue him with a notice to show cause.

21. The notice to show cause, as would be expected, escalated into a full blown disciplinary hearing after the Respondent found the Claimant's response unsatisfactory. The Respondent indicates that after the disciplinary session, the Disciplinary Committee recommended that the Claimant's contract of employment be terminated. Accordingly, the Respondent issued the Claimant with a letter terminating his contract of service.

22. The Respondent confirms that the Claimant filed an appeal against the decision. It is the Respondent's case that this appeal was processed and found to be without merit. Accordingly, it was rejected.

23. The Respondent maintains that the Claimant's case was processed in strict compliance with the applicable law. The Respondent states that it had valid grounds to sever its employment relation with the Claimant. Further, it is the Respondent's case that it processed the Claimant's release in accordance with due process.

Issues for determination

24. It is perhaps important to point out that the parties did not file a joint list of agreed issues. Nevertheless, they did frame their individual lists of issues.

25. After analyzing the individual issues, the pleadings and the evidence on record, the court is of the view that there is no contest about existence of an employment relationship between the parties. The only

questions in dispute relate to whether this relation was lawfully closed and whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

26. The record shows that the exact date when the alleged Consent Order was recorded in September 2018 is unclear. In some documents, the Respondent suggests that it was recorded on 6th September 2018. In others, the Respondent refers to the date of the consent as 7th September 2018. On the other hand, the Claimant talks of 7th September 2018 as the date of the contested consent. For purposes of consistency, I will in this decision refer to the date of the contested consent as 7th September 2018.

27. As submitted by the Respondent's lawyers, the obligation to prove the reason for termination of a contract of service rests with the employer. It is also correct as submitted by the defense that in order to discharge this burden, the employer must prove the following: that there was a fair reason to warrant the decision to terminate the contract; that the reason related to the employee's conduct, capacity or compatibility; and that the employment was terminated in accordance with fair procedure.

28. It is acknowledged that the court is not entitled to substitute the managerial decision of the employer with its own merely because the judicial officer considers that had he been in the employer's shoes, he would have made a decision that is different. In this context, when reviewing the fairness of the employer's managerial action, the court's role is confined to evaluating the lawfulness of the action in the context of the fixed legal parameters that the employer must observe whilst processing the decision. Importantly, the law requires that the employer acts in accordance with justice and equity in terminating the employment of the employee.

29. In this case, the primary reason why the Respondent terminated the Claimant's employment was the Claimant's decision to circulate a text message urging the Respondent's unionized employees not to submit their performance appraisal forms. This message is said to have been sent out on 15th September 2018 in defiance of a court order and the Respondent's directive on the matter.

30. In order to contextualize the matter, the circumstances surrounding circulation of the impugned text are material. As mentioned earlier, the Claimant wore two hats at the time of the impugned action. He was acting as an employee of the Respondent and a trade union representative. In the circumstances, the Claimant was serving the interests of the Respondent in his capacity as an employee and the trade union in his capacity as a shop floor representative.

31. As has been indicated earlier, when the Respondent commenced the employee evaluation process for 2017, the trade union representing the Respondent's unionized employees moved to court to stop the exercise. The parties are in agreement that sometime in August 2017, the court issued an order stopping the exercise pending the hearing and determination of the cause by the trade union. The consequence of the court order was that the evaluation process was suspended for the duration that the order was to remain in force. The parties to the dispute had the singular duty of upholding the sanctity of the court order.

32. The Respondent argues that on 6th September 2018 (also suggested to be 7th September 2018), a consent order was recorded in the cause whose effect was to immediately lift the stoppage of the evaluation exercise. The Consent Order is said to have been recorded between the Respondent and the Banking Insurance and Finance Union, the trade union that was representing the Claimant and other unionized employees in the cause.

33. The Respondent's case is that upon lifting of the stoppage order, it issued its unionized employees a letter dated 10th September 2018 requiring them to submit their self evaluation forms in order to

finalize the 2017 performance evaluation. It is the Respondent's case that the exercise was however disrupted when the Claimant sent out a text message to unionized employees urging them not to submit to the process.

34. From inception, the Claimant denied that there was a court order whose consequence was to lift the order that was issued in August 2017 freezing the evaluation process. The Claimant's position was that the Consent Order submitted to court on 7th September 2018 was to take effect, if at all, on 20th September 2018. As a matter of fact, the Claimant described the Consent Order as ''a suspended order that was to take effect on the 20th September 2018''. Put differently, the Claimant contested the Respondent's position that there was an order lifting the court order of August 2017 as from 6th September 2018 (or 7th September 2018 as the case may be).

35. The consequence of the foregoing is that whereas the parties had notice of and understood the import of the court order of August 2017 which stopped the evaluation process, there was disagreement regarding the consequence of the Consent Order. Whilst the Respondent contended that the Consent Order immediately lifted the orders of August 2017, the Claimant's position was that there was no such order in place.

36. Proceeding on the premise that it had a valid order lifting the stoppage of the performance evaluation process, the Respondent instructed its unionized members of staff to submit their self evaluation forms. On the other hand, believing that the order of August 2017 was still in force, the Claimant, exercising his mandate as a representative of the trade union, instructed the said employees to disregard the Respondent's instructions on the process.

37. It is because of this latter action by the Claimant that the Respondent decided to take disciplinary action against him. According to the Respondent, by asking other employees not to submit to the evaluation process, the Claimant was not only guilty of insubordination but was also acting in defiance of a valid court order. The Claimant, in the circumstances, was guilty of inciting employees to defy lawful orders both by the court and the employer.

38. On the other hand, the Claimant asserted at the disciplinary session and during the trial before this court that he did not incite members of staff to defy lawful orders either by the court or the Respondent. On the contrary, he argued that he acted in the manner that he did in order to uphold the sanctity of the court order of August 2017 that had suspended the performance review process.

39. Undoubtedly, the reason for the Respondent's decision to terminate the Claimant's employment was that he defied a valid court order and incited unionized employees to disregard lawful instructions based on the alleged order. To prove the validity of this reason, the Respondent had a duty under sections 43 and 45 of the *Employment Act*, to establish the existence of the Consent Order that allegedly immediately lifted the injunction that was issued in August 2017. It is only by doing this that the Respondent can be said to have established the reason for terminating the Claimant's contract.

40. The Respondent appears to have proceeded on the assumption that the Claimant and indeed the rest of the unionized employees were aware that the Consent Order lifted the order of August 2017. However and as is clear from the record, the Claimant who was acting as the trade union's shop floor representative at the time, denied that the Consent Order lifted the court order of August 2017 as alleged.

41. Since the Claimant disputed that the Consent Order lifted the court orders of August 2017, he in effect disputed the validity of the reason proposed for his termination. In so far as the basis of the decision to terminate the Claimant's contract was founded on the existence and consequence of the Consent Order, it became the duty of the Respondent to prove not just the existence of the Consent Order but

also its effect in relation to the order of August 2017. This was necessary in order for the Respondent to prove the validity of the reason to terminate the Claimant.

42. Respectfully, the order that the parties are shown to have been aware of both in terms of its content and effect was the one that was issued in August 2017 stopping the performance review process. Whether the Consent Order altered this position as from 6th or 7th September 2018 or at all can only have been established after scrutiny of the Consent Order. This is particularly because the Claimant, who was the representative of the unionized employees, denied that the order of August 2017 had been lifted as alleged. In my view, it is only after evaluation of the Consent Order that it would have been permissible to suggest that the Claimant had acted in defiance of it.

43. Whilst the Respondent asserts existence of the Consent Order, it did not produce it during the disciplinary hearing. There is nothing on record to demonstrate that the Respondent provided acceptable evidence at the disciplinary session that the Consent Order lifted the orders of August 2017. There is no evidence that the Respondent demonstrated to the disciplinary panel that at the time of disseminating the impugned text message, the Claimant was aware that the effect of the consent was to lift the court order of August 2017. This is notwithstanding that the Claimant had specifically disputed the fact that the order of August 2017 had been lifted by the Consent Order.

44. The Respondent has argued that by asking employees not to submit their evaluation forms, the Claimant acted in defiance of the Consent Order and lawful directions by the Respondent that the performance evaluation process proceeds based on the alleged new court order. Yet, the Respondent has offered no cogent evidence to prove that the Consent Order permitted the evaluation process to go on as from 6th or 7th September 2018.

45. Absent consensus between the parties that the Consent Order lifted the orders of August 2017, it cannot be assumed that the Consent Order did lift the order of August 2017 effective from 6th or 7th September 2018. The mere fact that the Respondent wrote a letter to its unionized employees alleging that the orders of August 2017 had been lifted by consent is not evidence of the orders having been lifted through the alleged Consent Order. The only acceptable evidence in this respect would have been the extracted Consent Order.

46. The burden lay with the Respondent to demonstrate that it had legitimate grounds to require unionized employees to resume the performance review process by reason of a new court order. Absent evidence by way of production of the extracted Consent Order and having regard to the fact that the only order that both parties were, prima facie, aware of at the time was the court order of August 2017 which had stopped the exercise, the Claimant was entitled to resist the Respondent's attempt to kick-start the process and advise those he represented to await evidence of lifting of the order of August 2017.

47. Looked at from this perspective, it is difficult to see how the Claimant's text to the unionized employees to hold off the performance review process could be deemed as inciting workers. He was only discharging his work as a union representative based on the information that he had to the effect that the union had an order stopping the process and that there was so far no order changing this position. The Respondent did not help matters by merely asserting that it had a Consent Order lifting the stoppage order effective 6th or 7th September 2018.

48. The Respondent accuses the Claimant of spreading falsehoods with respect to the alleged Consent Order. This presupposes that there was indeed an order issued on 6th or 7th September 2018 lifting the order of August 2017 as from 6th or 7th September 2018 which the Claimant was aware of. To be able to demonstrate the validity of this assertion in terms of sections 43 and 45 of the *Employment Act*,

the Respondent has to demonstrate that the Consent Order lifted the orders of August 2017 effective 6th or 7th September 2018 and show that the Claimant was aware of this at the time he released the impugned text.

49. From the record, there is no evidence that the Respondent produced the Consent Order and provided evidence that the Claimant was aware of its immediate application but elected to ignore it. In the premises, there is no proof that the Respondent established before its disciplinary panel and this court that it had valid reason to arrive at the conclusion that the Claimant acted in defiance of a lawful order by asking unionized employees to hold off finalizing the 2017 performance review process.

50. The Respondent has argued that the Consent Order was recorded by the Secretary General of the trade union suggesting that this was with the blessings of the unionized employees. That the employees must therefore have been aware of the order and its import. This position is only tenable where there is no dispute as to the existence of the alleged order in the first place. In this case, it is specifically denied that the trade union recorded a consent order immediately lifting the order of August 2017 effective 6th or 7th September 2018. In his response to the show cause letter, the Claimant alluded to this fact when he stated that his consultations with the Secretary General of the trade union made it clear that the consent deposited in court on 7th September 2018 was to become operative on 20th September 2018 and that the trade union had in any event not participated in crafting it. That the trade union had in fact applied, by way of a preliminary objection, to have the purported consent set aside.

51. The position expressed above clearly demonstrates that neither the trade union nor the Claimant admitted ownership of the Consent Order or that it had the effect of lifting the court order of August 2017. Consequently and in terms of sections 43 and 45 of the *Employment Act*, the duty lay with the Respondent to establish the validity of its assertions with respect to the Consent Order and therefore the reason for terminating the Claimant's contract of employment. From the available evidence, the Respondent failed to discharge this obligation.

52. There were other grounds in support of the Respondent's decision to terminate the Claimant's contract of service. These include the following:-

    a. The Claimant violated the Respondent's Social Media Policy by issuing untrue and unlawful claims against the Respondent.

    b. The Claimant violated the Respondent's Employee Code of Ethical Business Conduct by issuing the impugned text message which in essence meant that the Claimant had engaged in activities that were in conflict with the interests of the Respondent.

    c. The Claimant violated the Respondent's Employee Code of Ethical Business Conduct on expected workplace behavior by failing to use established structures of grievance handling to report or raise his displeasure with the communication done by the Respondent through its letter of 10th September 2018.

    d. That the Claimant shared information on the controversy between the parties with the Standard Group Digital media.

    e. That the Claimant disobeyed the Respondent's instructions by failing to respond to the Respondent's letters of 17th September 2018 and 22nd September 2018.

53. In respect of the matter relating to issuing of untrue and unlawful claims against the Respondent in contravention of its Social Media Policy, the Respondent's case was that the Claimant had circulated incorrect information indicating that the Consent Order did not lift the court order of August 2017 as purported by the Respondent. However and as has been demonstrated, the Respondent did not

provide evidence to show that the Consent Order lifted the court order of August 2017 as from 6th or 7th September 2018 or at all. In the circumstances, the Claimant's challenge on the accuracy of the Respondent's assertion in this respect could not be construed as making of unlawful and unsubstantiated claims against the Respondent in violation of its Social Media Policy as alleged. Absent evidence demonstrating the incorrectness of the Claimant's contention that the consent of 7th September 2018 did not lift the order of August 2017, the aforesaid accusation against him cannot be said to have been established.

54. The other accusation was that the Claimant violated the Respondent's Employee Code of Ethical Business Conduct by issuing the impugned text message which in essence meant that the Claimant had engaged in activities that were in conflict with the interests of the Respondent. As has been demonstrated from the previous parts of the decision, whilst he worked for the Respondent, the Claimant was also a trade union representative.

55. As a shop floor representative, the law recognizes and protects the Claimant's right to participate in trade union activities. This includes his right to take up leadership roles in the trade union where he is a member.

56. The position of a shop floor representative is undoubtedly a leadership position in a trade union. And as the Claimant explained in his response to the show cause letter, this position obligated him to disseminate information that was necessary to those that he led.

57. The fact that the Claimant challenged the Respondent's letter of 10th September 2018 on the grounds that there was no order allowing the Respondent to kick-start the evaluation process cannot in my view and in the circumstances of this case have been construed as acting contrary to the Respondent's legitimate interest. To suggest so is to first insinuate that the Respondent had proved that it had an order allowing it to disregard the court order of August 2017. As has been demonstrated, the Respondent did not provide this evidence. Therefore, the Claimant was entitled to raise concern over the Respondent's move.

58. Second, such suggestion ignores the fact that the Claimant, in his position as a shop floor representative was under legitimate duty to protect the interests of the unionized employees much as he was an employee of the bank. In respect of the matter under consideration, the Claimant's obligation to protect the unionized employees' interests in the disputed performance review process was even more obvious as the matter was live at the time. It would have been against the trust bestowed on him by the unionized employees for the Claimant to close his eyes to matters that he genuinely believed were of concern to the employees and which he was legitimately expected to raise by virtue of his office.

59. Regarding the accusation that the Claimant shared information on the controversy between the parties with the Standard Group Digital media, it was the Claimant's evidence that indeed the information about the matter got to the media. However, he explained to the Disciplinary Panel that it was the media that reached out to him about the matter and only inquired whether he had been subjected to a disciplinary process as a result. It was his case that he responded to the media inquiry in the affirmative.

60. The record does not show that the Disciplinary Panel rejected this explanation. Neither does it indicate reasons for declining the explanation if at all. Yet, the Respondent proceeded to convict the Claimant on this ground.

61. As the Claimant argues, such action infringed on his right to fair administrative action contrary to article 47 of *the Constitution* as read with the *Fair Administrative Action Act*. In the disciplinary process against him, the Claimant was entitled to be supplied with the reasons for the decisions the Disciplinary Committee rendered against him. By not disclosing the grounds for rejection of the

Claimant's defense in this respect, the Respondent denied the Claimant the opportunity to know the reasons that informed the Respondent's decision against him with respect to this ground. This stifled the Claimant's legitimate right of appeal against the decision. In the absence of information about the reasons for the decision, the Claimant could not reasonably have hazarded a guess why the Respondent rejected his defense in this respect and whether the rejection was on valid, just, fair and equitable grounds.

62. On the alleged refusal by the Claimant to obey lawful directives from the Respondent by failing to respond to the Respondent's letters of 17th September 2018 and 22nd September 2018, the Claimant again offered an explanation for this failure both in his response to the show cause and during the disciplinary hearing on 15th October 2018. It was his position that the text message that the Respondent used to level accusations against him was a private message shared between members of a group on an encrypted platform.

63. The Claimant questioned the legitimacy of the Respondent's action to procure such text and use it as a basis for mounting its assault against him. In effect, the Claimant is understood to have been stating that the text message having been illegitimately procured, he was under no obligation to respond to inquiries on it.

64. The record shows that the Disciplinary Committee made no comments on the defense advanced by the Claimant in this respect. Yet, the dismissal letter indicates that the Claimant was found guilty of this charge. This again raises the same challenge of denial of information to enable a reasoned election on the right to appeal against this finding. In the absence of sharing the reasons for its decision on the charge, it was not possible for the Claimant to determine the grounds for the finding and whether they were fair, valid, just and equitable in order for him to determine his options with respect to the right of appeal.

65. Clause A5 (b (iv)) of the Collective Bargaining Agreement (CBA) between the parties provides that where an employee is found guilty of failing to obey lawful orders, he should be issued with at least two warnings before he is terminated from employment. Therefore and in the absence of evidence of previous warnings, the charge of disobeying lawful orders should have attracted a warning letter. In contravention of this provision of the CBA, the Respondent lumped together all the charges against the Claimant and treated them jointly and severally as serious infractions warranting summary dismissal.

66. The Claimant was also held to have violated the Respondent's Employee Code of Ethical Business Conduct on expected workplace behavior by failing to use established structures of grievance handling to report or raise his displeasure with the communication done by the Respondent through its letter of 10th September 2018. The Respondent accused the Claimant of attempting to address his grievance in a disorderly manner.

67. It is noteworthy that the basis for this accusation and subsequent finding was clause 18 of the Recognition Agreement between the Kenya Bankers (Employers) Association and the Banking Insurance and Finance Union. The Respondent's position was and remains that if the Claimant felt aggrieved by the content of the letter of 10th September 2018, he ought to have invoked the internal dispute resolution procedure at the bank by first raising his grievance with the Respondent's branch management team before escalating it to the Central Staff Committee and Control Office followed by the Negotiating Council and so on.

68. I have studied the clause on grievance resolution in the Recognition Agreement. This clause ought to be read together with clause 19 that sets up the Negotiating Council. Under clause 19 (d), (f) and (j)

of the agreement, the Negotiating Council has power to handle disputes that have not been resolved through the mechanism set up under clause 18. If the issue is not resolved at the Negotiating Council level, it is then escalated to the Ministry of Labour under the Trade Disputes Act (now repealed).

69. By virtue of section 84 of the *Labour Relations Act* (LRA), the Trade Disputes Act was repealed and replaced by the LRA. Under section 73 of the LRA, if a dispute that has been referred to the Ministry of Labour remains unresolved, it is to be referred to the Employment and Labour Relations Court.

70. I have set out the above procedure in order to demonstrate that what the Recognition Agreement as read with the applicable law contemplates on dispute resolution is an incremental process starting at the shop floor level and escalating all the way to court. In the case before me, the parties were already in court at the time the grievance about the legitimacy of the impugned consent arose. The matter had already transcended the initial dispute resolution mechanisms referred to in the Recognition Agreement.

71. As the Claimant pointed out in his response to the notice to show cause, the issue regarding the consent was in fact scheduled to be addressed in court on 20th September 2018. This fact is confirmed by the Respondent's witness who stated in cross-examination that when the appraisal dispute of 10th September 2018 arose, the matter had already gone through the conciliation stages without resolution. It would therefore not have been jurisdictionally sound for the parties to pursue parallel dispute adjudicatory attempts at that stage.

72. As for the other procedures of: issuing the Claimant with the notice to show cause; constituting a Disciplinary Panel to hear his case; permitting the Claimant to appear before the panel with his witness; admitting the Claimant's appeal to the Appeals Committee; and rendering a decision on appeal, there is evidence that these procedure was undertaken. However, it is important for the employer to ensure that the process is not cosmetic. The employer has a duty to ensure substantive procedural fairness to the employee during this process.

73. The Claimant has for instance questioned the propriety of the Respondent's decision to delay processing his appeal for approximately eight (8) months from the date he was summarily dismissed from employment. In his witness statement which he adopted as his evidence in chief, the Claimant stated that the Respondent's conduct caused him mental anguish and trauma.

74. In the Reply to Memorandum of Claim, the Respondent's explanation for the delay was that the Appeals Committee was yet to meet to process various appeals including the Claimant's. As a result, no decision had been made in relation to the Claimant's appeal at the time he filed his claim in February 2019. The position was to remain the same until July 2019 when the Respondent called the Claimant for hearing of the appeal.

75. During his oral testimony in court, the Respondent's witness sought to assign a different justification for the delay in concluding the disciplinary process against the Claimant. This time, he attributed the delay in hearing the appeal to the fact that the Claimant had filed other matters in court which, as I understand him to imply, distracted the Respondent from processing the appeal. This is notwithstanding that there is evidence that the Claimant had withdrawn cause number 1423 of 2018 on 1st February 2019 and that it is generally appreciated that in law, the internal disciplinary process by the employer is distinct and separate from the external court process.

76. Article 47 of *the Constitution* of Kenya 2010 as infused in the *Fair Administrative Action Act* entitles everyone to the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Looking at the delay in processing the Claimant's appeal and considering the reasons offered by the Respondent to justify the delay, it is difficult to arrive at the conclusion that the

Respondent's action upheld the Claimant's right to have his appeal handled in a manner that was expeditious, efficient, reasonable and fair. Although the Respondent's disciplinary manual does not set timelines for processing appeals, this must nevertheless be done within reasonable time. The conclusion that the Claimant was exposed to unnecessary anguish as a result of the Respondent's action becomes inescapable.

77. The Claimant has also questioned the Respondent's failure to supply him with information at the various stages of the disciplinary process. For instance, at the notice to show cause stage, the Claimant wrote to the Respondent an internal memo dated 27th September 2018 calling for a signed copy of the impugned consent recorded on 7th September 2018. The Claimant also called for details of the Respondent's policies that were said to have been violated. Besides the belated assertions during the trial in court that its policies were easily accessible to employees online, there is no evidence that the Respondent reacted to this request before the disciplinary or appeal hearing. Yet, the information called for lay at the heart of the dispute between the parties and the subsequent disciplinary action against the Claimant.

78. On 9th January 2019 the Claimant's lawyers wrote to the Respondent asking for a variety of information relating to the just concluded disciplinary case against their client. Particularly, they requested for the recommendations of every of the panel members that sat in the Disciplinary Committee meeting of 15th October 2018. This information was called for pursuant to the rights protected under articles 41 and 47 of *the Constitution*.

79. In its response of 18th January 2019, the Respondent elected to share minutes of the meetings of 5th and 15th October 2018 which did not contain the recommendations of the panel members. It is only during the trial that the Respondent's witness sought to explain that the minutes with the recommendation were not supplied to the Claimant or filed in court. In the absence of release of these minutes, the court is entitled to draw an adverse inference that they either do not exist or if they do, they contain information that is adverse to the Respondent's case.

80. The Claimant's case is that the withholding of the information prejudiced his right to fair administrative action. The Respondent's response is that the Claimant lodged his appeal anyway. Therefore, he suffered no prejudice. I think that the position expressed by the Claimant on the matter is correct. In my view, the refusal and or reluctance by the Respondent to fully release material information to the Claimant at the various stages of the disciplinary process was bound to impede the Claimant's ability to effectively pursue his case. This should explain why the appeal ended up being handled in the matter that the parties alluded to.

81. It is indicated that the Claimant (and the Claimant admits this) submitted his evaluation form days after he had sent out a text message asking unionized members not to submit their forms. The Respondent has relied on this action by the Claimant to suggest that the Claimant had either come to the realization that he was misguided about the matter or that he was simply being dishonest and mischievous about it. The Respondent's witness stated that the Claimant's conduct in this regard was incapable of comprehension.

82. The Claimant admitted handing in his evaluation forms as suggested by the Respondent. He also stated that he advised unionized employees to submit their forms days after he had asked them not to. However, the Claimant stated that he did this because he believed that there was room to resolve the dispute with the Respondent and that he felt coerced over the matter. In essence, there was no admission of guilt by the Claimant over his impugned text.

83. During the disciplinary session the Claimant was quoted as expressing himself on the matter as follows:-

> ''I did not intend to incite but to share information with union members. I did my scorecard on 17th September 2018 and also posted a further Whatsapp to members which reads 'Comrades, since we are coerced to do appraisal despite the matter being before the Court of Appeal, I advise that you just complete 2017 BSC as we explore legal options. I will give further directions today. Regards, Chairman.''

84. The content and purport of the message cannot be construed as suggesting that the Claimant had changed his position about the legitimacy of the impugned staff appraisal process. However, he had submitted to the exercise and advised other unionized members to do so for the reasons that are self evident in the text.

Determination

85. After analyzing the evidence on record, it is clear to me that the decision to terminate the Claimant's contract of employment was unfair. The validity of the reason to terminate the contract was not proved. At the same time, the process leading to the decision and informing the appeal from the decision was marred by procedural flaws.

86. I find that in the circumstances, the Respondent did not act in accordance with the requirements of justice and equity in terminating the employment of the Claimant. Accordingly, I declare the impugned termination of the Claimant's contract as unlawful.

87. In reaching this conclusion, I have considered all the parameters that an employer must uphold whilst processing the release of an employee. I have considered the requirements under sections 41, 43 and 45 of the *Employment Act*.

88. I have in particular considered the following as stipulated under section 45 of the *Employment Act*:-

    a. I have considered the procedure adopted by the Respondent in reaching the decision to dismiss the Claimant and the handling of the appeal against the decision. There were significant procedural flaws at both levels of the disciplinary process in relation to supply of critical information and failure to process the appeal in a manner that was expeditious, efficient and procedurally fair.

    b. I have considered the extent to which the Respondent complied with the statutory requirements connected with the termination. In this respect, I have reached the conclusion that there was failure by the Respondent to uphold the various provisions of the *Employment Act* and the *Fair Administrative Action Act* as read with articles 41 and 47 of *the Constitution*.

89. In relation to compensatory reliefs, I note that the Claimant has asked for severance pay. This head of compensation only applies to redundancy payouts under section 40 of the *Employment Act*. It is not available to a party pursuing relief for unfair termination under section 49 of the *Employment Act*. Perhaps the Claimant intended to claim for service pay under section 35 of the *Employment Act*. Even then, the pay slip he has produced in evidence shows that he was registered under the National Social Security Fund, a matter that excludes him from claiming service pay under the said section. In view of the foregoing, I decline to grant this prayer.

90. The Claimant has claimed for bonus pay being gross salary for one month. However, no evidence was provided to establish that this was an entitlement under his terms of service or that if it was, it had fallen due. In the premises, I will not grant the prayer.

91. The Claimant has prayed for loss of earnings for twenty three (23) years. This prayer presupposes that the Claimant's employment could not have terminated in any other lawful way prior to his retirement age. This supposition is wrong. There is no guarantee of permanency in employment. The relation could terminate for various other reasons at any time before the accepted retirement age. Therefore, it is impermissible to suggest, even for a moment, that an employee whose contract of employment has been terminated prematurely ought to be compensated by way of salary until his retirement age.

92. One can only expect payment for work done or reasonable compensation for wrongful termination. To suggest otherwise appears outrageous. This position is made plain in the case of Lenny Kimathi Murungi v Kenya Wine Agencies Limited Civil Appeal No. E016 of 2021 (unreported) when the learned Judge expressed herself as follows:-

> ''I agree with the observation by Makau J in Mary Saru Mwandawiro v Kenya Ports Authority [2016] eKLR that a person alleging to be in the employment of another cannot expect to be paid for work not done. As the court observed, such proposition goes against public policy. It is contrary to the dictates of good conscience.''

93. Having regard to the foregoing, the claim for salary for twenty three (23) years being the balance of the years that the Claimant would have worked before retirement is impermissible. Accordingly, the claim is declined.

94. The Claimant has claimed for compensation that is equivalent to his gross salary for twelve months. The principles that guide the court in making assessment of the quantum of damages under this head are stipulated in section 49 of the *Employment Act*. These include:the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under the Act or his contract of service; the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; the employee's length of service with the employer among others.

95. I am also alive to the general guide that except in very exceptional circumstances, the court should not grant the maximum award under this head. Put differently, the court must provide a justification for making a maximum award under this head of damages (seeOl Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR).

96. I have considered the fact that the Claimant's tribulations and eventual job loss appear to have been triggered by the Respondent's displeasure with his actions arising from his position as a union representative. I have considered the traumatic experience that the Claimant was subjected to following the unjustified delay in closing the disciplinary case against him. I also take note of the fact that prior to their separation the Claimant had served the Respondent for close to ten years without blemish.

97. From the pay slip appearing as document number twenty two (22) in the Claimant's bundle of documents, his exit gross salary was Ksh. 161,093.00. I award him compensation that is equivalent to his gross monthly pay for seven (7) months (Ksh. 161,093.00 x 7 = Ksh. 1,127,651.00).

98. This award is subject to the applicable taxes.

99. I award the Claimant interest on this sum at court rates from the date of this decision.

100. I award the Claimant costs of the case.

101. I order that the Respondent issues the Claimant with the Certificate of Service.

DATED, SIGNED AND DELIVERED ON THE 20TH DAY OF APRIL, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI