



Owuor v Sarova Hotels Limited (Employment and Labour Relations Cause E017 of 2020) [2023] KEELRC 1856 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1856 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E017 OF 2020**

HS WASILWA, J

JULY 31, 2023

BETWEEN

MICHAEL ARUM OWUOR CLAIMANT

AND

SAROVA HOTELS LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 26th November, 2020, the claimant sued the Respondent alleging to have been unfairly terminated and sought the following orders; -
 - a. The Honourable Court be pleased to find the Respondent's decision to terminate the claimant's employment unfair labour practice.
 - b. The Honourable court be pleased to reinstate the aggrieved employee unconditionally without loss of any pecuniary benefits.
 - c. In the alternative the Honorable court be pleased to pay accrued rights and offer maximum compensation to the aggrieved employee for his unfair termination as tabulated herein above.
 - d. The Honourable Court be pleased to order the Respondent to pay costs of this suit and interest on the amount so awarded.
2. The claimant states that he was employed by the Respondent as a security guard with effect from 22nd January, 1999 and served in that position for 20 years till his termination on 22nd January, 2019.
3. During his tenure, he served in several establishment of the Respondent distributed all over the country. That he served diligently and had a good record that earned him several awards and salary increase from time to time, so that at the time of termination he as earning Basic salary of Kshs 48,750 and House allowance of Kshs. 16,250. Within the time the claimant was terminated, the other



- employee's salary was increased by 10%, which meant that the claimant could have earned a basic salary of Kshs 53,625 and House allowance of Kshs 17,875.
4. He stated that his tribulations started on 26th December, 2018 when the Respondent's Engineer loaded scrap metals left by Tanzanite company for delivery, which consignment was intercepted by security at the gate because the gate pass had not been raised but the delivery was approved and authorized, which issue raised questions.
 5. He stated that Tanzanite company is a dealer of scrap metal items that had purchased obsolete items from the Respondent and transported some leaving behind a few and instructed the Respondent's engineer to deliver the remainder.
 6. The claimant avers that due to the questions raised on the delivery of the remainder of the Scrap metals, he was summoned by the Human Resource coordinator on 27th December, 2018 to write a statement regarding the loading of scrap metal that was intercepted at the main gate.
 7. On the same day, the Engineer was also asked to give his statement on the issues, which he did. The next day on 28th December, 2018, he was suspended from duty and on 8th January, 2019, he was served with a notice to show cause, together with Security report and witness statement.
 8. He responded to the show cause letter on 10th January, 2019 and received invitation for the disciplinary hearing that was scheduled on 16th January, 2019. The hearing was conducted as planned and in attendance were the management agents who were his main accusers. He was heard in his defence but the Respondent terminated his services by the letter of 22nd January, 2019.
 9. He appealed the decision by his letter of Appeal of 1st February, 2019. While he was awaiting the decision for the appeal disciplinary committee, he received information that the scrap metals, Subject of the termination, had been collected by the scrap metal dealers on the 4th February, 2019. Therefore that there was no loss occasioned on the Respondent.
 10. The Appeal was heard on 11th February, 2019 at Sarova Woodlands Hotel and a decision was made on 15th February, 2019 upholding the dismissal by the disciplinary committee.
 11. Aggrieved by this decision, the claimant reported the matter to his Union, Kenya Hotels and Allied Workers Union on the 25th February, 2019 who followed up for an amicable solution to no avail.
 12. The claimant was directed to collect his terminal dues from the Respondent which he did on the 7th March, 2019 but was not satisfied with the computation of his terminal dues.
 13. He stated that prior to termination, the claimant had been suspended from March, 2003 to 4th August, 2005 and on reinstatement he was to be paid all his dues for the period of suspension, but was not paid to date, which and he now claims.
 14. The claimant therefore prays for payment of pay in lieu of notice balance of 3 months amounting to Kshs. 214,500, balance of termination gratuity of Kshs 283,000, having received Kshs. 432,000 instead of Kshs 715,000. Ex-gratia pay for the month of October –December, 2018 of Kshs 7,000, reinstatement pecuniary pay for 30 months amounting to Kshs 2,145,000 and maximum compensation for unfair termination of Kshs 858,000. All these amounting to Kshs 3, 507,500.
 15. During hearing, the claimant testified as CW-1 and adopted his witness statement of 4.9.2020 and produced the list of documents of 26.11.2020 and a further list of 20.3.2023. He stated that he was terminated on 22.1.2019 and a salary increase was effected in March, 2019, therefore that he was supposed to benefit from the salary increase. He testified that Notice period was 4 months as per clause



- 9(c) of the CBA at page 41 and since he was paid 1-month notice, the Respondent should be compelled to pay the balance of 3 months.
16. It was his testimony that, the head of department such as the Engineering department in this case, was the one responsible of procuring gate passes and the security was merely tasked with counterchecking the items to be taken out against the gate pass approved. He stated that some people who sat in the disciplinary committee also sat in the Appeal committee, therefore that the Appeal was not fairly done.
 17. He testified that when the matter was referred to the labour office, the parties were heard and the labour officer concluded that the reasons for termination was not justified and recommended his reinstatement, however the Respondent refused to hid the recommendation by the labour office.
 18. Upon cross examination, he stated that he was employed in 1991 and by 2019 he was Assistant Head Security. He stated that on material date on 24th December, 2018, he was on duty and assigned a security guard to oversee the loading of the scrap metals. He stated that fire extinguishers were listed under the scrap metals but he did not capture the same in his statement of 28th December, 2018. He also testified that he was not the one that approved the use of company truck in loading the scrap metals. Further that the company driver was not issued with gate pass and that he did not inform the management of the issue. He denied knowledge of the fact that the garbage truck left the premises with car tyres. He stated that when the car was intercepted at the gate, he reported the issue to the lodge manager.
 19. On re-examination, he testified that the Engineer was present throughout when the scrap metal was being loaded to the vehicles. He added that the Unit head was in the process of obtaining authorization. He testified that he followed up on reasons why fire extinguishers were loaded with scrap metal and one Mathenge gave him reasons why the extinguishers should be disposed. He stated that he was informed by the engineer that the fire extinguishers, tires and metal plates were part of the material that were to be taken out of the Respondent's premises. He stated that he was not part of the agreement between the engineer and the Stock dealer.

Respondent's case.

20. The Firm of Kisilu Wandati & Company Advocates entered appearance for the Respondent and filed a response to claim on the 19th January, 2023 denying the claim. The Respondent admitted to employing the claimant but denied the allegation of unfair termination and stated that the claimant was fired for gross misconduct of failing to adhere to strict standards of procedure before releasing goods held within the Respondent's area of business, which issue amounted to flouting security policies.
21. It is stated that having worked for the Respondent for over 20 years, the claimant ought to know better and abide by all the regulations of the Respondent. Its averred that the Claimant failed to observe the said rules, calling the Respondent to issue him with a show because letter dated 8th January, 2019, which the claimant responded to on 10th January, 2019. A disciplinary hearing was conducted on 16th January, 2019 and the committee resolved to terminate him and communicated by the letter of 22nd January, 2019.
22. It is stated that the procedure that was supposed to be followed before any property is removed from the Respondent's premises is that; the list of property of goods to be removed is lodged with the Respondent's management for approval. The Approval form should attach photographs of the goods to be removed and all items that is listed for removal has to be weighed before being loaded in the respective vehicles for transportation and claimant was to provide all vehicles transporting the goods with gate passes which are to be handed over at the main gate upon exit. It is stated that the claimant, in his response to show cause, admitted failing to raise the gate passes for the vehicles.



23. During disciplinary hearing, the claimant was accompanied by a representative of his choice one Vincent Siro, therefore that the termination was both procedural and substantively sound.
24. The Respondent denied the prayers sought and stated with regard to notice pay that the claimant was paid on monthly basis as such entitled to one-month notice pay, which was duly paid and not the 3 months' pay sought in the claim. Moreover, that the contract did not provide for payment of such notice.
25. On gratuity pay, the Respondent stated that they paid the claimant half of his salary for each year completed as such no balance is owing under this head. He denied payment of ex-gratia and stated that having paid gratuity pay and being that ex-gratia is discretionary, no money is owing to the claimant.
26. The Respondent stated with regard to the 30 months' pay for the period between March, 2003 and August, 2005, when the claimant was suspended, that the claim herein is time barred.
27. On compensation for unfair termination, the Respondent stated that the termination was justified in the circumstances as provided for under Section 44 of the *Employment Act*, as such the claimant is not entitled to claim compensation.
28. The Respondent maintained that they terminated the services of the claimant for failing to do his job of raising gate passes and following procedure before releasing goods that were at the Respondent's premises which act could have prejudiced the Respondent had it not been stopped and checked by the claimant's colleague.
29. The Respondent, summoned its Human Resource Manager, Winston Ayaya as RW-1. He adopted his witness statement of 10.1.2023 and stated that the claimant was an employee of the Respondent with his last position being Assistant Lodge Security Officer. He testified that when the issue arose, the claimant was taken through the disciplinary process but did not complain about *the constitution* of the disciplinary panel. He stated that the claimant failed to explain why he failed to comply with the company policy. he testified that the company driver, the Engineer and the security guard at the gate gave evidence regarding the claimant's case.
30. On cross examination, he testified that the claimant being the Lodge security guard was the one that was to raise the gate passes. He stated that the security officers are the ones tasked with ensuring all goods that leave the Respondent's premises have gate passes. He clarified that gate passes are procured by the Head of department and users department and in this instance Mr. Mathenge was the one that was to raise gate passes, obtain necessary signatures including the one for security and the security guard was to ensure the vehicle had gate passes before they are allowed to exit the premises.
31. He admitted that the claimant was not aware beforehand the panelist in the disciplinary committee and the Appeal committee as such he could not raise any concerns. He testified that the list of goods approved for disposal did not include the fire extinguishers. He stated that the said fire extinguishers were loaded because the scrap metal dealer had paid Kshs 10,000 but could not ascertain who had received the said payment. He also stated that they did not lodge any complaint at the police because the hotel did not suffer any loss since it was averted. He finally stated that the goods left the premises on instructions of the security officer that gave the green light.
32. On re-examination, he testified that the role of the security officer is to ensure all policies and procedures are followed. Therefore, that they terminated the claimant because he admitted that he failed to ensure the rules of the Respondent were followed. He also stated that he chaired the initial disciplinary Hearing, while Mr. Chege chaired the Appeal where he sat at the said Appeal as the HR person.



Claimant's Submissions.

33. The claimant submitted on two issues; whether the claimant is entitled to the reliefs sought and who should bear costs of this suit.
34. On the first issue, it was submitted for the claimant that the claimant was the custodian of the gate passes, whose duty was to issue to any department that needed to use the pass, then release the gate pass to the user department after use, therefore that they were not in control of how the gate pass was being used. It was argued that in this circumstances, the Engineering department was the one that was to raise the gate pass and seek all approvals from the various department and not the claimant. He stated that the fire extinguishers in question that had been withheld on 24th December, 2018 were later released on 4th February, 2019 and in all this instance, the Respondent did not suffer any loss, raising questions on the reasons for terminating the services of the claimant. He argued that the failure by the Engineering department to procure a gate pass should not be blamed on the claimant's security department. He added that the security department confirmed the list of goods as appearing in approved list of goods and released it and therefore there was no breach of procedure or fraud as alleged by the Respondent. He argued that all goods left the Respondent's premises after a gate pass was eventually procured, therefore that no loss was occasioned on the Respondent and the claimant did not breach any policies and regulations.
35. The claimant submitted that he was suspended in march, 2003 and reinstated by the letter dated 5th August, 2005 for a period of 31 months which he was supposed to get all his benefits for the duration of suspension and despite following up the said payments through several letter none was paid to him. He urged this Court to order for the payment of the said dues and relied on the case of *Sabina Mutua v Amedo Centre Kenya Limited* [2017] eKLR where the Court held that;-

“Therefore, the Withholding of an Employee's salary cannot be a disciplinary sanction. The salary remains protected in law even during suspension. The contract of employment is still in force. To withhold an employee's salary is contrary to the rights in employment and fair labour practice as held in *Peterson Ndung'u & 5 Others versus KP&L Company Limited* [2014], the court held that;The salary remains protected under Part IV of the *Employment Act*, even during suspension. The contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages. The Claimant is entitled to the salary and allowances for the duration he was under suspension. To uphold the Respondent's decision in withholding these would mean that the Claimant is punished twice, over the same employment wrong.”

36. The claimant also relied on the case of *Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & Another* [2012] eKLR the court held that;-

“An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension. To keep an employee on suspension, without pay for over 7 months, waiting for them to blink first is not only unlawful but also inhumane.”



37. To put more emphasize on their argument, they relied on the case of Philemon Musembi Muhindi v Chairman Board of Management Keveye Youth Polytechnic [2015] eKLR, where the Court held that; -

“Donald C. Avude vs Kenya Forest Service [2015] eKLR the Employment and Labour Relations Court citing the Supreme Court of Canada in the case of Cabiakman vs Industrial Alliance Life Assurance Co. [2004] 3SCR 195 SCC 55 where there were similar facts as the instant case stated thus;

“Gilbert Cabiakman (“Cabiakman”) was a sales manager at Industrial Alliance Life Insurance Co. (“Industrial Alliance”). Three months after Cabiakman was hired, he was arrested and charged with conspiracy to extort money. Once Industrial Alliance got wind of these charges, it suspended Cabiakman because of the connection between the nature of the charges and Cabiakman’s position.

Cabiakman had been on an indefinite suspension without pay for two years while the charge was pending. After Cabiakman was acquitted of all charges, he was reinstated in his position at Industrial Alliance. Cabiakman commenced proceedings against Industrial Alliance for lost wages during the period of suspension and for moral and punitive damages.

The Supreme Court of Canada (“SCC” or “Court”) upheld the decision of the Quebec Court of Appeal that ruled that Industrial Alliance was not justified in suspending Cabiakman without pay and awarded him \$200,000 in damages. However, the SCC affirmed the employer’s right to suspend an employee for administrative reasons. The court stated that employer conducted itself properly, however, since the suspension remained administrative in nature at all times, there was no reason to refuse Cabiakman’s salary as he remained available to work.”

Whilst in Transport Workers Union v African Safari Diani Adventure [2013] eKLR it was stated thus;

“Unless there is a contractual or statutory basis for salary during a period of suspension it is not open to an employer to suspend an employee without pay. The legal obligation at common law on an employer is to pay wages not to provide work. Unless it is varied by statute or contract the obligation continues even during suspension.”

Therefore that the period of suspension in this case was from 5th April 2004 to 27th May 2007. No contractual or statutory basis for withholding Philemon’s salary during that period was evident from the record. As such, from the aforesaid excerpts, the findings of which we adopt, there was no reason why Philemon could not have received his salary for the period of suspension which was three years. Accordingly, we find that Philemon was entitled to his salary for the period of suspension stipulated in the suspension letter which commenced from the date of suspension, upto the date when the case was decided. In so saying, we find that we must interfere with the decision of the High Court. Accordingly we set aside the award of the High Court, and make the following orders in favour of the appellant: Unpaid salary for the period of suspension from 5th April 2004 to 27th May 2007 at Kshs. 10,200/- per month together with interest at Court rates for the aforesaid period.”

38. Similarly, it was submitted that the suspension was not justified as is evidenced by his reinstatement, therefore that he is entitled to the 31 months’ salary which the Respondent had withheld from him.



39. The claimant submitted that the person that presided over the Disciplinary committee also presided over the Appeal to merely rubberstamp the decision that had already been made in the disciplinary committee, and therefore the appeal was not presided over by an impartial panel, which rendered the Appeal and the entire disciplinary process unfair.
40. It was submitted further that when the matter was referred to labour officer, parties were heard and the conciliator concluded that the reasons for termination was not justified and ordered the Respondent to pay the claimant 12 months' salary compensation for the unfair termination in accordance with the remedies that can be awarded under section 49 of the *Employment Act*.
41. On the reliefs sought, the claimant submitted that the claimant having worked for over 10 years, the CBA provides for payment of gratuity of one and half months' salary and one and half house allowance at the rate applicable at the time of termination for every completed year of service. Accordingly, that the gratuity paid was not calculated as per the CBA and urged this Court to direct the payments be made as per the CBA.
42. In conclusion, the claimant urged this Court to be persuaded by its submissions, find in his favour and grant the reliefs sought as prayed.

Respondent's Submissions.

43. The Respondent submitted on three issues; Whether there were valid reasons for the Respondent to terminate the Claimant's employment; Whether the Respondent observed procedural fairness and or principles of natural justice in terminating the Claimant's services and Whether the Claimant is entitled to the terminal benefits sought in the statement of claim.
44. With regard to the first issue, it was submitted that the claimant's employment was terminated due to the Claimant's contravention of the Company's policies and procedures by being involved in the exit and further attempted exit of items from the Respondent Company without following due process as was required. It was submitted that the Respondent has standard procedures in place to regulate the handling and disposal of discarded scrap metal items within the lodge premises which entail; population of a list of authorized items by the Lodge management and in this case the engineering department, then the security team to closely supervise the loading and for each trip, a gate pass must be processed by the requesting department and issued by the security team, which pass must be presented at the gate before the property is permitted to leave the lodge. These procedures ensure proper functioning, security, and compliance of the company's operations.
45. Therefore, that since the claimant was the the Assistant Lodge Security Officer, he held a position of significant responsibility. As such, he was entrusted with the duty of enforcing and upholding the company's policies. Thus the incidents that occurred on the 24th, 26th, and 27th of December 2018 revealed a pattern of deliberate non-compliance and/or aiding and abetting non-compliance with company policies and procedures by the Claimant.
46. It was submitted that the loading process was supervised by the claimant alongside Guard Patricia and Kavinza, Mr. Mwangi (assistant lodge engineer). However, that the claimant and Mr. Mwangi instructed Guard Patricia to open the jerrican store and in violation of the company's policies and procedures, removed old fire extinguisher cylinders and loaded into the scrap dealer's truck. Which items were not listed as authorized discard items on the approved list. Furthermore, that no gate pass was raised during the two trips made by the scrap metal dealer on 24th December 2018 in clear violation of the policies of the Respondent. Also that the use of the Respondent's truck in transporting the scrap metals was done without seeking approval and authorization in clear breach of company policies and a



misuse of company resources. Additionally, That, on 27th December 2018, a garbage truck attempted to take old tyres from the Respondent's premises on instruction of the claimant in violation of the rules.

47. To support their argument, the Respondent relied on the case of *Laws v London Chronicle Limited* [1959] 2ALL L.R 285 where the English Court of Appeal, expressed itself on this, thus;

“Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that the general law of contract will be applicable, it follows that if a summary dismissal is claimed to be justifiable the question must be whether the conduct complained is such as to show the servant to have disregarded the essential conditions of the contract of service.”

48. Similarly, that the Claimant's actions on the 24th, 26th and 27th of December 2018, specifically the unauthorized removal of items and attempts to convince security staff to flout the gate pass policy, compromised the Claimant's position and role as the Assistant Lodge Security Officer. As the custodian of security matters, the claimant's actions undermined the integrity of the company's security protocols and policies and the Claimant's submissions that he bears no responsibility for the absence of gate passes, attributing it to the engineering department, is fundamentally flawed. Additionally, that the fact that no loss was occasioned on the Respondent does not discharge the claimant from his substantive obligation because trust between the Respondent and the claimant was compromised, justifying the termination.

49. The Respondent submits that in terms of Section 43 of the *Employment Act* and the Court of Appeal's decision in *Kenya Revenue Authority versus Reuwel Waithaka Gitahi & 2 others* [2019] eKLR the Court held that; an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists. It is the Respondent's view that what the law is concerned with is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.

50. Similarly, Halsbury's Laws of England provides as follows:

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

51. It was submitted that, the decision to take disciplinary action against the claimant was informed by a comprehensive investigation report submitted on 7th January 2019, which revealed the Claimant's failure to fulfill his duties appropriately. The Respondent at all material time ensured that the Claimant was served with a Notice to Show Cause and afforded opportunity to present his case. Subsequently,



a disciplinary hearing and an appeal hearing were conducted, further solidifying the Claimant's involvement in the events under scrutiny. Based on the evidence and proceedings presented, the Respondent resolved to terminate the claimant's services, thus the termination was justified both in reason and procedure.

52. With regard to procedural fairness, the Respondent relied on the case of Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR where the court held as follows: -

“We have said earlier that where dismissal is on the grounds of misconduct, poor performance or physical incapacity the employer, by the provisions of section 41 is bound, not only to explain the reason for which the employee's dismissal is contemplated but also to hear and consider any representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he/she wishes, another employee or a shop floor union representative of his choice.

53. They also relied in the case of Postal Corporation of Kenya versus. Andrew K. Tanui [2019] eKLR which the court cited with approval by the Court of Appeal case in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR that laid down four elements that 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 is made;(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

54. Accordingly, that the Respondent complied by the said requirement by firstly issuing the claimant with a show cause letter dated 8th January 2019 setting out the Respondent's grievance with him; afforded the claimant an opportunity to give written response to the Show Cause Letter; the Claimant was invited to attend a disciplinary Hearing on 16th January 2019 and communication of the termination by the letter dated 22nd January 2019. The Claimant was also notified of his right to Appeal the disciplinary committee's decision which he indeed exercised by lodging an Appeal 1st February 2019.

55. The Respondent submitted that the Claimant's submissions regarding bias during the Appeal hearing, solely based on the presence of Mr. Winston Ayaya in both the disciplinary committee and the appeal panel, lack merit and factual basis, because the said Mr. Winston Ayaya sat in the Appeal Hearing in his official capacity as the Respondent's Human Resource Manager. Accordingly, the Respondent urged this Court to find that not only did the Respondent have a valid reason to terminate the Claimant's employment; but also, that the process followed was fair and therefore the Claimant's termination was ultimately fair and lawful.

56. On whether the Claimant is entitled to the terminal benefits sought , it was submitted with regard to the 3 months' pay in lieu of notice that the claimant is not entitled to such notice because the Claimant was paid monthly and therefore could only be entitled to one months' pay in lieu of notice, amount which was duly paid to him following his termination. On balance for termination gratuity of Kshs.283,000. The Respondent relied on the case of Bamburi Cement Limited versus William Kilonzi [2016] eKLR, where the Court of Appeal observed that:-

“Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or



his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer”.

57. It was argued that, given the discretionary nature of the amount payable, the Respondent paid the Claimant half of his salary for each year of completed employment.
58. On Exgratia pay for months October-December 2018 amounting to Kshs.7,000.00. The Respondent submitted that this Claim is not payable as the Claimant has already received gratuity pay. In any case, that Ex Gratia payments are of a discretionary nature, which the employer is not bound by any contractual obligation to pay.
59. On reinstatement of pecuniary pay of 30 months of Kshs. 2,145,000. The Respondent argued that, in so far as this Claim relates to causes of action that allegedly accrued between March 2003 and August 2005, this claim is time barred under the provisions of Section 90 of the Employment Act of 2007. The Court therefore lacks jurisdiction to grant this Claim.
60. On Compensation for unfair termination of Kshs. 858,000. It was submitted that this Claim is not payable since the Claimant’s termination was lawful, and fair as demonstrated herein above.
61. In conclusion, the Respondent submitted that they had valid reasons for terminating the claimant’s services and followed due procedure as such the suit should be dismissed with costs to the Respondent.
62. I have examined all evidence and submissions of the parties herein. The issues for this court’s determination are;-
 1. Whether the claimant was terminated fairly and justly.
 2. Whether the claimant is entitled to the remedies sought.
63. On issue number 1, the claimant has submitted that he was unfairly terminated in that he was terminated for no apparent reason.
64. He indicated in his evidence that the issue of allowing scrap metal to leave the respondent’s premises without a gate pass was not his responsibility as the gate pass was to be issued by the user department which was engineering department.
65. The respondents on their part indicated that the claimant didn’t observe the companies policies and procedures involved in exit of items from the respondent.
66. The claimant was invited for disciplinary process over allegations of flouting company procedures.
67. During the hearing, the claimant was cross examined about the company procedures of allowing scrap metal out the respondent’s premises. He admitted that the company driver was not issued with gate pass and that he didn’t inform the management of the issue.
68. The respondents witness when cross examined indicated that the claimant didn’t follow company procedure because the company security officers were the ones tasked with ensuring all goods that leave the respondents premises have gate passes.
69. He also admitted that one Mathenge was the one to raise gate passes, obtain necessary signatures including one for security but that the security guards were to ensure that the vehicles had gate passes before they are allowed to exit the premises.
70. The RW1 also indicated that goods approved for disposal did not include the fire extinguishers but were loaded because the scrap metal dealers had paid 10,000/= but could not ascertain who had received the said payment.



71. In view of the above analysis, it is evident that there were company procedures that were flouted by the claimant in allowing goods to leave the respondents premises without a gate pass.
72. Though the goods were intercepted by the security guards there was an obvious lapse of procedure. There were therefore valid reasons to warrant termination of the claimant as provided for under Section 43 of the *Employment Act* 2007 which states as follows;



<p>“43.</p>	<p>Proof of reason for termination</p> <table border="1"> <tr> <td data-bbox="858 271 1123 837">(1)</td> <td data-bbox="1123 271 1390 837"> <p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p> </td> </tr> <tr> <td data-bbox="858 837 1123 1404">(2)</td> <td data-bbox="1123 837 1390 1404"> <p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”</p> </td> </tr> </table>	(1)	<p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p>	(2)	<p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”</p>
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73. In terms of the disciplinary process the claimant has complained that he was subjected to an unfair process because the disciplinary committee and the Appeals Committee was compromised of the same persons.
74. The RW1 admitted to this fact and indicated that the claimant was not aware before about the composition of the panelist of these committees in order to raise any concerns.
75. A right to be heard indeed includes a right to be heard by a fair tribunal as envisaged under the *Fair Administrative Action Act* No. 4 of 2015 and it is indeed unfair for an employee to be subjected to a disciplinary committee and thereafter to an Appeal process compromising members who sat in the initial disciplinary committee.
76. This actually defeats the purpose of an Appeal and with RW1 admitting that she sat both in the disciplinary committee and thereafter in the appeals committee then the claimants right to a fair disciplinary process flouted.
77. Section 45 (2) of the *Employment Act* 2007 states as follows;

“PARA 45.

- (1)
- (2) A termination of employment is unfair if the employer fails to prove-
- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason-
- (i) related to the employee’s conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure”.

78. The claimant was terminated for valid reasons but the disciplinary process was not fair, it is therefore my finding that his termination was unfair and I declare that so.
79. Having found as above, the next issue for this court’s determination is in relation to remedies sought.
80. The claimant sought a number of remedies including a reinstatement. However given that the termination occurred on 22/1/2019 and in view of the provision of Section 12 of the ELRC Act which envisages that a reinstatement can only be effected within 3 years from the time the cause of action arose, prayer for reinstatement cannot be granted.
81. However given the fact that the claimant was denied a fair disciplinary process and given that there were valid reasons for his termination, I find 6 months compensation for the unfairness is reasonable.
1. I accordingly award him 6 months salary as compensation for the unfair termination = 6 x 65,000/= = 390,000/=.
 2. I also award him 3 month’s salary in lieu of notice as per clause 9 of the CBA = 65,000 x 3 = 195,000/=



3. On gratuity, the claimant indicated that he was underpaid but he has not demonstrated the genesis of the underpayment.
4. So I award him a total of kshs.585,000/= less statutory deductions.
5. The respondents will pay costs of this case.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31ST DAY O JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanyanga for claimant present

No appearance for respondent

Court Assistant - Fred

