



**Rukwaro v CIC Insurance Group Limited (Cause 1626 of 2015)
[2023] KEELRC 1885 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1885 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1626 OF 2015**

**SC RUTTO, J
JULY 31, 2023**

BETWEEN

DR. EDWARD RUKWARO CLAIMANT

AND

CIC INSURANCE GROUP LIMITED RESPONDENT

JUDGMENT

1. It is not in dispute that the Claimant was employed by the Respondent as a General Manager- Medical division with effect from June 24, 2013. He avers that he was confirmed to the said position in January, 2014 after successfully concluding his probation hence was employed on permanent and pensionable terms. He further states that his letter of appointment was reviewed and his termination notice extended from one month to three months. According to the Claimant, he offered the Respondent diligent and competent services for one and a half years with a clean record during which period he enjoyed a cordial working relationship with all employees including his immediate superiors without any single warning letter being issued to him. The Claimant avers that the cordial working relationship with his superiors continued until it was abruptly disrupted on April 24, 2015 when the newly recruited Group Chief Executive Officer (CEO) suspended him from employment for one month. After expiry of the suspension period, he was issued with a letter of summary dismissal. It is that summary dismissal that has triggered the instant suit through which the Claimant seeks against the Respondent several declaratory reliefs, reinstatement, three (3) months' salary in lieu of notice, compensatory damages, employer's pension contribution, life insurance cover, personal accident insurance and medical cover for 15 months with equivalent benefit. He further seeks general and aggravated damages as well as loss of future earnings due to unlawful and unconstitutional termination of his employment.
2. In response to the Claim, the Respondent filed a Statement of Response and Counterclaim on May 5, 2016. The Respondent avers that on April 16, 2015, it instructed an independent forensic analyst to conduct a forensic audit of its medical division following allegations of fraud in Claims and Business



Acquisition Cost (BAC) by some of its staff members. That the forensic audit revealed that the Claimant occasioned the Respondent the loss of Kshs 430 million in claims and Kshs 350 million on BAC. The Respondent further contends that the Claimant was summarily dismissed due to his gross misconduct in accordance with Section 44 of the *Employment Act*. It further avers that reasonably based on the sufficient grounds in the forensic report of 17th June, 2015, it suspected the Claimant to have committed a criminal offence against or to the detriment of its business and property.

3. The Respondent further counterclaimed against the Claimant the sum of Kshs 4,513,889.25 being the outstanding car loan facility advanced to him. According to the Respondent, the Claimant defaulted to repay the outstanding car loan following his summary dismissal. That the outstanding car loan as at January, 2016 was Kshs 4,513,889.25 and the same continues to attract interest at the rate of 15% per annum. On account of the foregoing, the Respondent prays that the Claimant's suit be dismissed with costs and judgment be entered against him for the sum of Kshs 4,513,889.25 and Kshs 430 million. The Respondent further prays for a declaration that the Claimant's termination was lawful and fair.
4. Through its Reply to the Respondent's Response and Defence to Counterclaim filed on June 4, 2018, the Claimant denied the Respondent's averments and reiterated the averments in his Statement of Claim. The Claimant further averred that he requested on a without prejudice basis to be furnished with the details of his terminal dues and current statement of the loan to enable him make an informed decision on a mutually agreed manner on how to resolve the matter but the Respondent refused and/or neglected to respond to the said letter. He further stated that the Respondent was not entitled to offset his terminal dues with the loan without affording him a right to be heard and that in any event, the loan required it to be repaid by monthly instalments and not by one lumpsum. He further contended that the Respondent had no legal right to send auctioneers to repossess the motor vehicle without a court order. On this account, the Claimant asked the Court to dismiss the Counterclaim with costs.
5. The matter proceeded for part hearing on October 25, 2022 when the Court took the Claimant's case. The defense side presented its case on February 20, 2023 and upon conclusion, trial closed and parties directed to file submissions.

Claimant's case

6. The Claimant testified in support of his case. He told the Court that he was reporting to the Managing Director-CIC General Insurance Limited and the Group Chief Executive Officer at the strategic level which meant that he had two reporting lines. It was his evidence that on April 24, 2015 he was suspended for one month. The letter was signed by the Respondent's new CEO, Tom Gitogo who had just joined the company. He was later summoned and given a letter of summary dismissal. It was the Claimant's case that the letter did not provide the reasons for his dismissal. He further termed the letter of suspension as vague.
7. It was his further evidence that he was not taken through a disciplinary hearing and was not afforded the right to be heard and to respond to the allegations contained in the letter of summary dismissal.
8. He tried to engage the Respondent and settle the matter amicably but there was silence from its end. He protested the termination and sought reasons and redress for the termination but the Respondent did not respond. After a while, he received an email from the Respondent tabulating his terminal dues.
9. The Claimant further testified that he had a car loan and at some point, the Respondent sent auctioneers to repossess the same. It is when he realized the seriousness of the issue, hence sought the Court's intervention. The Claimant further stated that he was relying on his employment to service the car loan and after his termination, he could not service the same as he had no other source of income.



10. He further testified that the BAC was an accepted cost and applied to all other forms of insurance and he does not know why the Respondent singled out medical. According to him, the BAC was a common practice.
11. It was the Claimant's further evidence that the Respondent did not favour him with a copy of the audit report from Geomatrix Consulting Ltd. That further, he was never asked to respond to the allegations contained in the said report.
12. He contended that any payments made in respect of the BAC was with the approval of the Group CEO and that he could not sign the same on his own.
13. It was his further testimony that the then Group CEO retired honourably and presently, is the Chairman of the Respondent. He further contended that no action was taken against other officers in the Respondent company who were involved.
14. With regards to payment of Claims, the Claimant testified that there is a process which involves verification by the medical team. He never saw any Claim paid devoid of approval or contrary to the terms. That he would only be involved when the Claims had been put in batches and a proposal for payment of the same made. That he was the first signatory then he would pass the same to his bosses.
15. It was the Claimant's further testimony that he had a team of about 40 members of staff below him and none of them was dismissed with regards to the payment of the Claims. In his view, it was vindictive and malicious of the Respondent to pick on him.
16. The Claimant stated in further testimony that it was impossible to collude with the hospitals as they were not paid directly.
17. Closing his testimony in chief, the Claimant asked the Court to allow his Claim as prayed and adopt the documents filed together with his Claim as his evidence.

Respondent's case

18. The Respondent called oral evidence through its Group Company Secretary, Ms. Gail Odongo, who testified as RW1. Ms. Odongo started by adopting her two witness statements to constitute her evidence in chief. She went ahead to produce the Respondent's documents as exhibits before Court. This was with the exception of the Audit Report by Geomatrix Consulting Limited.
19. It was her evidence that the Claimant was to report to the Managing Director CIC General Insurance Limited at the operational level and the Group Chief Executive Officer at the strategic level. That the two reporting levels was applicable during the transition period before the medical division was transformed to a strategic business unit and a stand-alone entity.
20. It was her further evidence that the Claimant's key role was to transform the division and position it into a stand-alone, fully capitalized medical insurer. He was to recommend the yearly budget for Board approval and prudently manage the Respondent's resources within the budget guidelines.
21. Ms. Odongo testified that the Claimant was responsible for the Respondent's medical business and during the Board Management meeting held on November 28, 2013, in which he was in attendance, it was resolved that all quotations, tenders and commission payment for medical would be centralized and the General Manager- Medical would have full authority.
22. It was her further evidence that the administration of the Respondent's medical schemes to various governmental and quasi-governmental bodies was to be conducted directly between the policy holders



- and the Respondent and not through any brokers, agents or intermediaries whatsoever, which fact was well within the knowledge of the Claimant by virtue of his position at the material time.
23. Ms. Odongo further stated in evidence that on or about April, 2015, the Respondent's Board commissioned a forensic audit of the medical division following allegations of fraud in Claims and BAC by some of its members of staff. The forensic audit was conducted by Geomatrix Consulting Limited and was limited to the period from January 1, 2013 to April 30, 2015. She confirmed that the Claimant participated in the investigation process.
 24. As a result, the Respondent vide a letter dated April 24, 2015, suspended the Claimant for a period of one (1) month to pave way for the ongoing forensic audit. During the said period of suspension, the Claimant was paid full salary.
 25. The investigations revealed that between January 2013 and April 2015, the Respondent incurred losses of Kshs 430 million paid contrary to the policy terms. Further, the Respondent lost Kshs 137.85 million as claims paid above the benefit limit. That 73% of these losses, related to the judiciary scheme.
 26. She further testified that the Respondent incurred and paid Claims worth Kshs 20.07 million, yet the Claims had no active cover period. The Kenya Road Medical Scheme topped the list representing 35% of these total Claims. During the period under review, Claims amounting to Kshs 13.82 million were incurred and paid yet there was no associated data of members. That 67% of these Claims related to Commission of Revenue Allocation and Kenya Trade Network Agency.
 27. It was her further evidence that the Respondent established that during the period under review, Claims amounting to Kshs 8.9 Million were paid from the Respondent's coffers yet no active cover for members existed. That SASRA, NIS, Judiciary and TSC Schemes, represented 54% of the paid amount.
 28. The Respondent further established that Claims amounting to Kshs 5.96 million were paid for members deleted from the cover, with the Teachers Service Commission and Judiciary medical schemes representing 43% of the paid Claims.
 29. Ms. Odongo further testified that the Respondent established that Claims amounting to Kshs 3.93 million were paid yet no member could be validated. The Kenya Animal Genetic Resource Centre and National Aid Control Council schemes represented a combined 68.62% of the total Claims paid. It was further established that Claims amounting to Kshs 9.6 Million were paid to 261 providers as a result of the providers submitting invoices with different invoice numbers from the genuine ones submitted earlier and paid.
 30. The Respondent established that on various dates under the period under review, the Claimant, jointly and separately conspired to defraud the medical division a total of Kshs 350 Million paid as BAC contrary to approvals set out by the Board of Directors.
 31. It was Ms. Odongo's evidence that the Respondent received letters from 3 policy holders namely, National Drought Management Authority (NDMA), Teachers Service Commission (TSC) and Nairobi Bottlers, stating that they did not appoint any insurance intermediary to act on their behalf. Despite there being no appointment of intermediaries, the medical division paid Kshs 6,391,742 as BAC to National Drought Management Authority (NDMA), Kshs 3,695,547 as BAC to Nairobi Bottlers and Kshs 51,768,658 as BAC to Teachers Service Commission (TSC).
 32. That further, it was established that Kshs 135,345,341 was paid to the Judiciary as BAC, Kshs 71,759,247 to the Kenya Forest Service, Kshs 59,481,783 to the National Intelligence Service; Kshs 5,083,429 to the Kenyan Urban Roads Authority; and Kshs 1,987,020 to the Salaries and



Remuneration Commission contrary to the instructions and approvals set out by the Respondent's Board on BAC.

33. The losses were occasioned to the Respondent as a result of among others, the Claimant's actions contrary to the instructions or approval set by the Respondent's Board and also failure to follow laid down procedures in approving claims payments.
34. From the findings of the Forensic Report, the Claimant together with other officials and third parties hatched a scheme to defraud the Respondent by authorizing the transfer of funds to third parties as agents or brokers whilst the medical scheme was being operated directly between the Respondent and the various governmental and quasi-governmental bodies.
35. According to Ms. Odongo, the Claimant failed to put in place processes and procedures to ensure accurate payment of Claims. She further stated that the Claimant was under a duty to ensure correctness in the Claims' payment and settlement. In addition, the Claimant was enjoined to perpetuate values of honesty and zero tolerance to fraud in terms of the agreed performance goals.
36. She believes that the Respondent suffered loss as a result of the Claimant's failure to follow the laid down procedures in approving Claims' payment.
37. Ms. Odongo further stated that the Respondent reasonably, based on the sufficient grounds contained in the forensic report of June 17, 2015, suspected the Claimant to have committed fraud against or to the detriment of its business and property and as a consequence, on June 22, 2015, issued him with a summary dismissal letter for gross misconduct. That the Respondent was entitled to dismiss the Claimant summarily without notice on account of gross misconduct.
38. It was her further testimony that the Respondent duly computed the Claimant's final dues in the sum of Kshs.653,846.45. Pursuant to the summary dismissal letter of June 22, 2015 and the Claimant's letter of June 23, 2015, the Respondent offset the outstanding car loan from the final dues payable to the Claimant. After the set off, the outstanding car loan balance stood at Kshs. 3,957,957.40. The outstanding car loan balance before the offset was Kshs. 4,611,803.85. That following the Claimant's failure in repayment of the outstanding car loan, the Respondent was entitled to repossess and sell the said motor vehicle pursuant to the Loan Agreement.

Submissions

39. At the outset, I must point out that both parties failed to comply with the directions with regards to filing of submissions. In this case, the parties surpassed the timelines given by a long margin. No explanation for this delay was given. It goes without saying that failure to comply with the court's directions, is a bad practice that should not be tolerated. Be that as it may, I will consider the said submissions in the interest of justice.
40. It was submitted on the part of the Claimant, that his summary dismissal lacked procedural fairness as he was not afforded a right to be heard and to defend himself as is required under Section 41 of the [*Employment Act*](#).
41. He further argued that the Respondent failed to follow due process under the [*Employment Act*](#) and its Human Resource Handbook prior to terminating him and as a result, the termination failed to adhere to the fairness threshold set out in Section 45 of the [*Employment Act*](#).
42. It was the Claimant's further submission that while the Respondent sought to rely on a forensic audit when building the case of termination against him, the same was neither produced in Court as evidence, nor was its author presented to Court to enable cross examination to be done.



43. In further submission, the Claimant stated that it was grossly unfair and discriminatory to single him out for any losses in the medical division while sparing the rest of the members of staff of the division as it would have been impossible for him to single handedly cause loses to the tune of Kshs. 350 million. He contended that the same imputes malice on the Respondent's part.
44. The Claimant further argued that by failing and/or neglecting to pay him his terminal dues or even furnishing him with the tabulation of his dues, the Respondent infringed on his constitutional right of access to information under Article 35 (1)(b) of *the Constitution* and Section 18 of the *Employment Act*. In support of its position, the Claimant placed reliance on the case of Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2014) eKLR.
45. With regards to the Counterclaim, the Claimant submitted that whereas he applied for a car loan and the same was advanced to him, there was no loan agreement executed between the parties. That therefore, the Respondent had no legal right to send auctioneers to repossess the motor vehicle without a court order.
46. The Claimant further argued that by unilaterally applying his terminal dues to repay the car loan, the Respondent was in breach of Section 19(3) of the *Employment Act* as well as the conditions of the car loan as the same denied him an opportunity to make payments as was agreed upon in the loan agreement. That since a party should not be entitled to take advantage of its own breach of the contract against another party, the Respondent should not be allowed to benefit from its unlawful termination by increasing the interest rate on the loan to 15%. On this score, he sought to rely on the case of Abu Chiaba Mohammed vs Mohammed Bwana Bakari & 2 others (2005) eKLR.
47. It was the Claimant's further submission that the Counterclaim of Kshs. 430 million is a special damage claim which must be specifically pleaded and strictly proved and in this case, the Respondent has failed to do so. He urged the Court to dismiss the Counterclaim.
48. On its part, the Respondent submitted that it took the necessary steps, legally and procedurally when investigating the Claimant's conduct. The Respondent further argued that it caused a fair hearing to occur wherein the Claimant as an attendee, was given a right to respond and appeal the final decision and consequently, was procedurally terminated.
49. The Respondent further submitted that it was justified in summarily dismissing the Claimant on grounds of misconduct as it genuinely and reasonably believed that the Claimant conspired to defraud the company. In support of this argument, the Respondent placed reliance on the case of George Onyango Akuti vs G4S Security Services Kenya Ltd (2013) eKLR.
50. It was the Respondent's further submission that the Claimant was responsible for its medical insurance business and during the board meeting held on November 28, 2013, the Claimant who was in attendance among other individuals, resolved that he would have authority over all quotations, tenders and commission payment which would be centralised. That therefore, it was in order to find him answerable in the manner in which he conducted some transactions in its medical division. As such it was entitled to summarily dismiss him pursuant to Section 47 (5) of the *Employment Act*.
51. Citing the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 Others (2016) eKLR, the Respondent further argued that the Claimant has failed to discharge the burden of proof to demonstrate that his summary dismissal was unfair.
52. In further submission, the Respondent stated that there is an undeniable common law right of an employer to dismiss an employee without notice as long as it is able to demonstrate that the employee's gross misconduct. That such a dismissal is not only lawful but is a right espoused to every employer



- in the common law jurisdiction. In support of its arguments, the Respondent invited the Court to consider the determination in the cases of *Judicial Service Commission vs Gladys Boss Shollei* (2014) eKLR and *Linus Barasa Odhiambo vs Wells Fargo Limited* (2012) eKLR.
53. Referencing the provisions of Section 44 of the *Employment Act*, it was the Respondent's further submission that while the Claimant's main argument is that proper notice was not served to him, summary dismissal does not require sufficient notice to be served on the employee.
 54. In respect to its Counterclaim, the Respondent submitted that the same is merited as the Claimant still owes Kshs.4,513,889.25 together with interest at commercial rates. That the same remains unsettled. It further submitted that the Claimant has not refuted the amount nor has he shown that he has cleared the loan. Therefore, this is not a matter in dispute and should be allowed as the figure attracts 15% annual interest on the principal to date.
 55. Still on the Counterclaim, the Respondent submitted that as the General Manager of its Medical Division, the Claimant had the duty to ensure the correctness of the Claims, payment and settlement. That he failed to follow the laid down procedure in approving the Claims hence resulting in the loss of Kshs 430 million.
 56. It was the Respondent's further argument that the Claimant did not file a Defence to the Counterclaim hence the Court was urged to allow the same. In support of its position, the Respondent relied on the case of *Mark Macauley vs Rob De Boer & Fina De Boer* (2002) eKLR.

Analysis and determination

57. Having reviewed the record before me constituting the pleadings, evidence and the rival submissions, the following are the issues falling for the Court's determination;
 - a. Whether the Claimant's termination from the Respondent's employment was unfair and unlawful;
 - b. Is the Respondent's Counterclaim justified?
 - c. Is the Claimant entitled to the reliefs sought?

Unfair and unlawful termination?

58. The parameters for determining fair termination are two-fold that is, substantive justification and procedural fairness. In order to prove fair termination, these elements ought to be satisfied by the employer. I will proceed to address the two elements under separate heads.

i.Substantive justification

59. Substantive justification is provided for under Section 43(1) of the *Employment Act* (Act). In this regard, an employer is required to prove the reasons for an employee's termination, and in absence thereof, such termination is deemed to be unfair. That is not all. Section 45 (2)(a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements. It is instructive to note that the burden of proof in this instance, lies with the employer.
60. This position has been restated by the courts time and again. Case in point is the holding by the Court of Appeal in *Chairman Board of Directors (National Water Conservation and Pipeline Corporation)*



vs Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015, where the Learned Judges rendered themselves thus:

“In light of the above provision, termination of employment will be unfair if the Court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the *Employment Act* deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

61. Turning to the case herein, it is evident that the Claimant was summarily dismissed on account of gross misconduct. The particulars of the alleged misconduct were set out in the Claimant’s letter of summary dismissal which is partly couched:

“...The said forensic audit findings revealed that you were grossly negligent in your duties as the General Manager for Medical Business. The report indicates that on various dates in the period between January 2013 and April, 2015, you conspired to defraud CIC Medical Division a total of Kshs 350M contrary to the instructions/approvals set out by the Board on Commissions for CIC Cooperative(sic) clients. You also failed to follow the laid down procedures in approving claims payment resulting into a loss of more than Kshs 430M. this constitutes grounds for summary dismissal as provided for in the *Employment Act*, 2007 Section 44(4) (c) which states that “if an employee willfully neglects to perform any work which it has his duty, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly” and Section 44(4) (g) which states....“if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or the substantial detriment of his employer of his employer’s property, that employee may be summarily dismissed.”

Further, pursuant to the report, you have been implicated with involvement in fraudulent activities which also constitutes ground for summary dismissal under section 44(4) (g). In view of the foregoing, you have been summarily dismissed from employment with effect from the date of this letter on the (sic) grounds of gross negligence....”

62. It is worth pointing out that the Audit Report referenced in the letter of summary dismissal was not exhibited in Court as the author of the said report declined to attend Court. Its probative value was therefore not tested.
63. It is evident from the Claimant’s letter of summary dismissal that the allegations against him were in respect of payments relating to the Business Acquisition Cost (BAC) and Claims. It was the Respondent’s case that it conducted business directly with its policy holders and that there were no brokers, agents or intermediaries. What I hear the Respondent to be saying is that the BAC payments were irregular and that they were paid contrary to approvals set by the Board. Thus, the question that begs to be answered is, if the BAC payments were irregular in the first place, why did the Respondent’s then Group CEO cosign the same, thus authorizing them?
64. That is not all. It is apparent that some payments were cosigned by other senior officers in the Respondent company besides the Claimant. For instance, the payments made in favour of Ambrose Nyamwezi were signed off by Joel Gatune, the Group Finance and Investment Manager and Kenneth Kimani, the MD CIC General Insurance Limited. Further to that, the payments in favour CIC Sacco Society Limited have been cosigned by David Ronoh, MD CIC Life Assurance and Joel Gatune,



the Group Finance and Investment Manager. Another example is the payment in favour of Ronken Insurance which has been cosigned by the Claimant together with Joel Gatune, the Group Finance and Investment Manager.

65. The foregoing set of circumstances discounts the Respondent's claim that the BAC payments were irregular and were paid contrary to the approvals set by the Board.
66. In further support of its case that the BAC payments were irregular, the Respondent exhibited letters from the Judiciary, the Teachers Service Commission and the National Drought Management Authority in which the said entities confirmed that they had not engaged or appointed an insurance agent or broker. Alongside the said letters, the Respondent exhibited copies of BAC payment authorization in favour of Mambro Insurance Agency, Universal Marketing Insurance Agencies Limited, Transparent Insurance Agency and Affluent Properties Limited.
67. It is however notable that no correlation was established between the said payments to the insurance brokers and the above named entities. Therefore, it is not possible to ascertain whether the payments are in respect of the said entities which had expressly stated that they did not engage brokers.
68. With regards to the Judiciary, evidence of payment was exhibited with regards to the period September 1, 2013 to August 31, 2014 whereas the letter stating that it had not engaged an insurance broker or agent, is dated June 25, 2015. It is therefore not clear whether the said confirmation was in respect of the period under review, that is, September 1, 2013 to August 31, 2014.
69. Turning to the question of Claims, the Respondent averred that payments were paid in some instances yet the Claims had no active cover. It further averred that money was incurred and paid yet there was no associated data for members. In this regard, the Respondent cited the Commission Revenue Allocation and Kenya Trade Network Agency. It was further averred by the Respondent that payments were made in respect of Claims yet members had been deleted from the cover.
70. Notwithstanding the Respondent's assertions, it did not adduce evidence to prove that payments had indeed, been made as alleged with respect to Claims. In addition, the specific period for which the said payments were allegedly made, was not provided.
71. Indeed, the foregoing gaps impair the Respondent's case and dispel its assertions that the Claimant was negligent in his duties and was involved in fraudulent activities. The net effect is that the Respondent has failed to prove its allegations against the Claimant to the requisite standard.
72. In total sum, I cannot help but conclude that the Respondent has failed to prove that it was substantively justified to terminate the Claimant from its employment.
73. Therefore, the Claimant's termination was unfair as the Respondent has failed to satisfy the requirements set out under Section 43(1) as read together with Section 45(2) (a) and (b) of the Act.

ii. Procedural fairness

74. The requirement of procedural fairness is generally provided for under Section 45(2) (c) of the Act. The specific requirements of what entails fair procedure are spelt out under Section 41(1) of the Act. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations. In making such a representation, the employee is entitled to be accompanied by a fellow employee or a union representative of his or her own choice.



75. In this case, the Claimant has contended that he was not issued with a show cause letter and neither was he subjected to a disciplinary hearing. Despite the Respondent's assertions that the Claimant's termination was undertaken legally and procedurally, there was no evidence to prove as much.
76. Indeed, there is no evidence that the Claimant was notified of the allegations against him and that he was given an opportunity to respond to the same either in writing or through an oral hearing. This fact was confirmed by Ms. Odongo during cross examination.
77. Beyond the letter of suspension, there is no proof that the Claimant was subjected to any process as what followed was the letter of summary dismissal. As a matter of fact, there is no evidence that the Claimant's dismissal was in line with any single requirement stipulated under Section 41 of the Act.
78. It is worth pointing out that the requirements under Section 41 of the Act are mandatory in nature and notwithstanding the transgressions alleged to have been committed by an employee, the employer is still duty bound to comply with the same. My position is fortified by the finding of the Court of Appeal in the case of Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR where the learned Judges reckoned 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 is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
79. Needless to say, as the Respondent failed to comply with the requirements of Section 41 of the Act, it failed the test of procedural fairness hence the Claimant's termination was unlawful.
80. It goes without saying that the allegations against the Claimant had the potential of wrecking his career and indeed, this came to pass. Therefore, the least the Respondent could have done is afford him a right to be heard on any allegations it may have had against him before effecting his termination.
81. The upshot of the foregoing, is that the Court finds that there was no substantive justification to warrant the Claimant's termination, and he was not accorded procedural fairness. This fell short of the requirements stipulated under Sections 41, 43 and 45 of the Act hence the Claimant's termination was unfair and unlawful.

Counterclaim?

82. The Respondent's Counterclaim against the Claimant is for the sum of Kshs 4,513,889.25 and Kshs 430 million. As the Court has found that the Respondent has not proved that there was substantive justification to terminate the Claimant from its employment, it follows that the Counterclaim with regards to Kshs 430 million cannot be sustained hence it collapses. This leaves the Counterclaim with regards to the car loan as the only residual issue under this head.
83. It is notable that the Claimant did not deny the existence of the car loan. As a matter of fact, through his letter of June 23, 2015, he promised to continue paying the monthly instalments and even offered to have the outstanding amount reduced from his terminal dues. In support of its Counterclaim,



the Respondent exhibited a statement of account showing the balance of the car loan as being Kshs 4,513,889.25 as at July 10, 2015.

84. Testifying under cross examination, Ms. Odongo stated that the outstanding net amount of the said car loan is Kshs 3,957,957.40. From the record, there is no evidence that the Claimant has settled the outstanding car loan amount hence I find that the Respondent is entitled to payment as appropriate. To that extent, the Respondent's Counterclaim against the Claimant succeeds the extent of Kshs 3,957,957.40.

Reliefs?

85. As the Court has found that the Claimant's termination was unfair and unlawful termination, he is awarded three (3) month's salary in lieu of notice as per his contractual terms contained in the letter dated November 25, 2013. He is further awarded five (5) month's gross salary as compensatory damages. This award takes into account amongst other factors, the fact that the Respondent has not proved that it had a justifiable reason to terminate the Claimant's employment and in so doing, failed to comply with the requirements of a fair process.
86. The claim with regards to pension, life insurance cover, medical cover, and personal accident cover, are declined as any entitlement to the same terminated upon the severance of the employment relationship between the parties. Besides, no justification for payment of the same has been made.
87. The claim for loss of future earnings, general damages and aggravated damages is similarly declined as the objective of compensation is to make good the employee's loss and not to punish the employer. On this issue, I adopt the position taken by the Court in the case of David Mwangi Gioko and 51 others vs Nairobi City Water & Sewerage Company Limited, [2013] eKLR where it was held that:

“This court has in the past held that there is need in resolving employment disputes to pay heed to the principle of a fair go all round. This principle requires the court to balance the interest of the employer and that of the employee.

88. My position is further augmented by the determination of the Court of Appeal in the case of D K Njagi Marete vs Teachers Service Commission [2020] eKLR, thus: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word „permanent employment?.”



Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”

Orders

89. In the end, I enter Judgment in favour of the Claimant against the Respondent as follows:
- a. A declaration that the Claimant’s termination from employment by the Respondent, was unfair and unlawful.
 - b. The Claimant is awarded three (3) month’s salary in lieu of notice being the sum of Kshs 3,588,156.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 5,980,260.00 being equivalent to five (5) months of his gross salary.
 - d. The total award is Kshs 9,568,416.00.
90. In view of the fact that the Respondent’s Counterclaim has partially succeeded to the extent of Kshs 3,957,957.40, the said sum will be set off against the award of Kshs 9,568,416.00, hence the final award due to the Claimant stands at Kshs 5,610,458.60.
91. The final award, shall attract interest at court rates from the date of Judgment until payment in full.
92. The Claimant shall also be entitled to a Certificate of Service in line with Section 51(1) of the Act. This shall issue within 30 days from the date of this Judgment.
93. Considering that the Claim has been allowed and the Counterclaim has partially succeeded, each party shall bear its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Thuo

For the Respondent Mr. Andole

Court Assistant Abdimalik Hussein

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 had 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.



STELLA RUTTO

JUDGE

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