



REPUBLIC OF KENYA



**Ndinyo & another v The Kenya Utalii College (Cause 2515 of 2017)
[2023] KEELRC 1854 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1854 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2515 OF 2017**

JK GAKERI, J

JULY 26, 2023

BETWEEN

JOSEPH SUDI NDINYO 1ST CLAIMANT

KAZUNGU MWANGO 2ND CLAIMANT

AND

THE KENYA UTALII COLLEGE RESPONDENT

JUDGMENT

1. The Claimants commenced this suit by an amended Memorandum of Claim filed on 23rd March, 2018.
2. The Claimants were employed by the Respondent in 2005 and 2008 respectively on permanent and pensionable terms.
3. The 1st Claimant was appointed Acting Financial Controller in 2013 and the 2nd Claimant as Acting Principal in January 2016 until January 2017.
4. That the 1st Claimant was not confirmed as Financial Controller for 4 years.
5. The Claimants allege that they were unfairly dismissed from employment on 15th December, 2017 at the age of 44 while earning Kshs.2,143,367.26 (SK) and Kshs.208,200.04 respectively.
6. The Claimants aver that they served the Respondent diligently for 8 years.
7. That the College Council had a bad working relationship with the 2nd Claimant for inter alia having declined to call a meeting as requested by some members of the council.
8. That on one occasion, members of council stormed the College and since the 2nd Claimant was away, they were received by the 1st Claimant who demanded to know who they were as they had not been introduced, and subsequently the 2nd Claimant protested to the Ministry in writing.



9. The Claimants allege that their dismissal from employment was malicious.
10. That the new Principal, Mr. Hashim D. Mohamed appointed in January 2017 started making unfounded allegations against the Claimants and issued a notice to show cause to the 1st Claimant on 13th March, 2017 demanding a response within 24 hours.
11. The Claimants further aver that on 13th July, 2017, the Principal issued letters to the Claimants raising several issues on professional misconduct demanding responses within 3 days and the Claimants responded on 19th July, 2017 and were interdicted on 20th July, 2017, an act they allege was malicious as no wrong doing had been proved against them.
12. The Claimants alleged that they were invited for a hearing 4 months later on 27th November, 2017 when they were hurriedly heard and no evidence was presented.
13. They aver that they were only taken through the Principal's letter dated 13th July, 2017.
14. The Claimants plead that the Respondent acted maliciously in that;
 - i. The disciplinary committee was biased by stating openly that the Claimants should be sacked.
 - ii. Short notice to show cause.
 - iii. Interdiction before being found guilty.
 - iv. Dismissal without investigation.
 - v. Hostility during the hearing.
15. That as a consequence of the termination of employment, they suffered loss of wages and allowances.
16. The Claimants pray for;
 - i. Declaration that their dismissal from employment was unfair, malicious and unlawful.
 - ii. Payment of all accrued salary and allowances from July 2017 to the date of judgement.
 - iii. Reinstatement to their positions as at 15th December, 2017 or re-engagement on similar or better terms.
 - iv. Damages for wrongful dismissal.
 - v. 1st Claimant be confirmed or appointed as Financial Controller.
 - vi. Any other order the court may deem fit to grant.
 - vii. Costs of this suit.

Respondent's case

17. In its Reply to the Statement of Claim filed on 16th February, 2018, the Respondent avers that the Claimants were not employed under the same terms and were appointed to act in the capacities to prevent a governance vacuum.



18. The Respondent denies having terminated the Claimant's employment maliciously as both committed acts of gross misconduct and violated the law.
19. It is the Respondent's case that the Council was formally introduced by Gazette Notice Number 2878 dated 27th April, 2015 and No. 7450 dated 2nd October, 2015 and the Council maintained a cordial and professional working relationship with the Claimants during their tenure.
20. That the 1st Claimant acted disrespectful during a Council meeting which was brought to his attention vide letter dated 18th March, 2017 and he responded and council gave him an opportunity to improve.
21. The Respondent avers that the Respondent's Council discovered that the Claimants had been involved in transactions marred by improprieties and irregularities and investigated the same which led to the letters dated 13th July, 2017 and the Respondent granted them more time to respond on request.
22. That the Claimants were interdicted to enable the Respondent conduct further investigations of the allegations against the Claimants and on conclusion of the investigation, they were invited for a hearing on 23rd November, 2017 and were given an opportunity to choose the most convenient date.
23. It is the Respondent's case that the evidence produced in support of the allegations was sufficient and the Claimants were supplied with documents for the second time and were accorded time to request for other documents but did not do so.
24. That Council acted with cordiality.
25. The Respondent prays for dismissal of the suit.

Claimants' evidence

26. CWI's written statement dated and signed 22nd December, 2017 and the supplementary statement generally rehash the contents of the Memorandum of Claim.
27. In his oral testimony in court, the 1st Claimant testified that his gross salary was Kshs.214,000/=.
28. It was his testimony that he awarded tenders regularly and responded to queries asked by Council and the Principal.
29. He denied having seen any investigation report by the Respondent or any other body.
30. On cross-examination, the witness confirmed that he did not file a complaint for having acted as the Financial Controller.
31. He testified that he had a poor working relationship with the Respondent's Council and denied having acted disrespectfully.
32. It was his testimony that he had requested to travel abroad without authority of the Respondent's council.
33. He testified that he did not approve the contract to Maestro Ltd, that it was the Principal who did it and the prescribed process was followed and he witnessed the tender but was unaware of the duration it took for the contract to be signed.
34. That the amount paid to Maestro Ltd, Kshs.33,079,931/= was a percentage of the contractual sum.
35. That the procurement was approved before Council was on board.
36. The witness confirmed that he did not clear with the Respondent.



37. On re-examination, the witness testified that the Council was constituted in April 2016 and the complaints were made in July 2016 and he responded. He confirmed that the July letter was the second one.
38. He testified that the College Tender Committee made recommendations and the Principal approved.
39. CWII's written statement rehashes the contents of the Memorandum of Claim.
40. The witness testified that he was the Director of Research and Corporate Planning earning a gross salary of Kshs.210,000/= and acted as Principal for one year after which he reverted to his position.
41. The witness testified that during the hearing, he was taken through the issues raised in the notice to show cause.
42. That he asked whether the matter had been investigated but no report was provided on the six or seven issues including tender award, reinstatement of casuals or contractees he had engaged in the research department procedurally.
43. The witness confirmed that as the Acting Chief Executive Officer of the Respondent he awarded tenders on recommendation of the Tender Committee and an external counsel.
44. That no complaint or query had been raised by the internal or external auditor and was unaware of any investigation by the Respondent or any other organization.
45. It was his testimony that no report was availed during the hearing.
46. On cross-examination, the witness confirmed that he had no evidence to prove the hiring of employees and did not request for any report before the hearing.
47. On re-examination, the witness testified that he expected evidence from the Council.

Respondent's evidence

48. The Respondent filed its witness statements in December 2022.
49. RWI, Patrick Ngaara confirmed on cross-examination that he was the Procurement Officer/Supply Chain Officer employed by the Respondent in 2012 and his duties included preparing tender documents and was Secretary to the Tender Committee.
50. That the Claimants were dismissed on account of tenders. That he prepared the tender documents and offered a professional opinion after the Tender Committee had made a decision from 2016.
51. That the Tender Committee would make the decision and recommend to the Principal for award and after award, a notice was issued and the contract signed thereafter after review by the legal department.
52. That the contract was signed on 22nd January, 2016 having been awarded in August 2015.
53. He testified the award letter was not signed by Dr. Ombongi, the then Principal of the Respondent and the 2nd Claimant came into office on 18th December, 2015 and awarded the tender one (1) month later.
54. The witness was unsure as to who investigated the issue as the Principal from 2017 was Hashim Mohamed.
55. That the Claimants were not investigated by the police or the Ethics and Anti-Corruption Commission (EACC) and had no report and only saw the Report of the Auditor General dated 10th May, 2017.



56. The Report is dated 17th August, 2018 and contained a qualified opinion and did not relate to the period in question according to the witness.
57. On re-examination, the witness testified that the Claimants transferred funds from development to recurrent expenditure without approval of Council.
58. RWI, Irene Chepkangor confirmed on cross-examination that she was the Principal Accountant and acted as Senior Accountant in 2016/2017.
59. The witness could not tell who complained about the Claimants.
60. She testified that she was unaware of any investigation report or civil case or whether the Claimants were charged and did not approve payments.
61. The witness explained that before a payment was made, the Accountant checks the documents and the figures and other persons must sign before the payment is forwarded to the Principal for signature. At least four steps were necessary and the witness acted as a checker of the Accountant's work to ensure accuracy before the documents are handed over to the Finance Manager and the Principal.
62. That she did not participate in the hearing of the Claimants.
63. RWIII, Tecla Kigen confirmed on cross-examination that she was the Acting Human Resource and Administration Manager but substantively the Principal Human Resource Officer.
64. The witness further confirmed that the Claimants authorised unauthorised expenditure but was unaware of payment procedures and had no evidence that the Claimants added a workshop without authority.
65. The witness testified that she was unaware why the first notice to show cause had not been acted on or the source of complaints against the Claimants and did not sit at the disciplinary hearing. She testified that the College Council sat as the Committee.
66. Puzzlingly, the witness confirmed that although her statement stated that the Claimants were given the documents they wanted, she had no inventory of the documents, if any, were given.
67. The witness admitted that she was unaware as to who the Committee members were but quipped that the Principal was a member and was unaware of the Respondent's letter seeking an external investigation of the matters raised against the Claimants.
68. The witness testified that the Auditor General's Report did not relate to the Claimants.
69. On re-examination, the witness confirmed that both Claimants sought extension of time to respond to the notice to show cause and time was extended and responded accordingly and none requested for any material for purposes of the response.
70. That the Auditor General's Report implicated the role of the 1st and 2nd Claimant.

Claimants' submissions

71. Although counsel isolated no specific issues for determination, he submitted on various issues and principally on the evidence on record.
72. Counsel faulted the Respondent's dismissal of the Claimants as it had neither investigated, conducted nor engaged an investigative agency to investigate the alleged malpractices by the Claimants.



73. Counsel submitted that this was critical as the allegations made raised heavy issues of a criminal nature and violations of Acts of Parliament. The Claimants ought to have been invited to respond to the queries, if any, before the hearing.
74. Counsel urged that the two Auditor General's Reports on record did not implicate the Claimants in wrong doing and indeed vindicated them.
75. On the Respondent's evidence, counsel submitted that RWI, Mr. Patrick Ngaara an experienced Supply Chain Officer confirmed that all Tenders were processed procedurally through Tender Committee and the Technical Evaluation Committees and were not a one person affair and no complaint had been raised.
76. That all witnesses confirmed that no investigation took place.
77. Counsel wondered why the Respondent, a public institution did not call for an independent investigation even after the Claimants requested for one by a memo dated 21st April, 2017 which appear to have been ignored.
78. Counsel further submitted that the evidence tendered by the Respondent's witnesses had no probative as neither was involved in the disciplinary hearing, none of them produced any of the documents on record or prepared them. That the persons intimately connected with the disciplinary process such as the Principal or member of the Council did not testify.
79. As to whether termination of the Claimants employment was unfair, counsel relied on the provisions of Sections 41, 43 and 45(2) of the [Employment Act](#), 2007 to urge that the Respondent was determined to dismiss the Claimants as a notice to show cause was issued to the 1st Claimant as early as 13th March, 2017, shortly after the new Principal had taken over in January 2017 on his relationship with the Council of the Respondent and the notice was never presented.
80. The submission that the new Council members demanded meetings before they were introduced was unsupported by evidence.
81. Counsel further urged that the allegations of professional misconduct were not investigated, that the charges emanated from the Principal's office who presented the same before a biased Council, as the witnesses could not explain who had complained about the Claimants.
82. Counsel urged the court to apply the test of reasonableness in determining whether there were valid and fair reasons for the Respondent to dismiss the Claimants from employment.
83. Reliance was made on the sentiments of Lord Denning in *British Leyland UK Ltd V Swift* (1981) I.R.L.R cited in *Joseph Mwaniki Nganga V United Millers Ltd*.
84. The Supreme Court decision in *Kenfreight EA Ltd V Benson K. Nguti* (2021) eKLR was also cited to buttress on the burden of proof of the employer and to urge that in this case the grounds of termination were unjustified as no funds were lost according to the Auditor General's Report and no criminal charges were preferred against the Claimants after termination of employment.
85. That the Principal and the Respondent's council acted with partiality in the disciplinary proceedings thus violating the Claimant's right to fair hearing.
86. Reliance was placed on the decision in *Alfred Mutuku Muindi V Rift Valley Railways (Ltd)* as was the Court of Appeal decision in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR on the remedy of reinstatement and *Kenya Broadcasting Corporation V Geoffrey Wakio* on the 12 months gross salary.



87. Finally, counsel urged that the Claimants were in the middle of their careers with dependant families and were servicing loans at the time and 12 months gross pay would be fair.

Respondent's submissions

88. Counsel identified two issues, namely;

- i. Whether termination of the Claimants employment was fair.
- ii. Whether the Claimants are entitled to the prayers sought.

89. On termination, counsel relied on the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* on the essentials of fair termination of employment as were the sentiments of the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR* to urge that the two tenders signed by the Claimants were valid grounds for termination of their employment.

90. Counsel urged that the letter of award was clear that the contract had to be signed within 30 days from the date of award letter but not later than 7 days from the date of award and the letter was dated 22nd January, 2016 and was signed on the same day in contravention of Section 135(3) and 176(1) of the *Public Procurement and Asset Disposal Act*, 2015 (PPAD) and the Respondent paid the company Kshs.10,365,885/= to Gitutho Asumbi without a budget.

91. Counsel adduced no evidence to show that there was no budgetary allocation for the project.

92. Counsel submitted that Maestro Architect were paid Kshs.33,007,931/= for consultancy services for design and supervision of a Practical Training Block without a budget and without consulting the Council.

93. That both Claimants approved the contracts in contravention of the conditions of the letter of award and this led to the show cause letter.

94. Counsel submitted that the contracts exposed the Respondent to civil claims as evidenced by demand letters dated 25th April, 2017 and 30th August, 2017.

95. That the Claimants approved the payments to Gatutho and Maestro.

96. Counsel further submitted that when Mr. Hashim Mohamed assumed office, he noticed inconsistencies which led to the disciplinary action against the Claimants.

97. According to counsel, the Respondent carried out investigations and prepared a comprehensive report which enumerated the allegations against the Claimants and the report was shared with the Claimants.

98. Counsel further urged that the Respondent had received Kshs.200 million as a development grant of which Kshs.59,738,395/= was utilized as recurrent expenditure and payment of consultancy services.

99. Reliance was made on the provisions of Section 47(6) of the *Public Finance Management Act* to urge that the payments made by the Claimants were illegal.

100. Reliance was also made on the Auditor General's Report for the year ended June 2017 as were the sentiments of the Court in *Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR* on the import of Section 43 of the *Employment Act*, 2007.

101. The decision in *Joseph Mwaniki Nganga V United Millers Ltd (2022) eKLR* was cited to underline the test of reasonableness in the termination of employment.



102. On procedural fairness, counsel urged that since the Respondent issued both Claimants detailed notices to show cause, and they responded by letters dated 17th July, 2017 and 19th July, 2017 respectively, were interdicted on 20th July, 2017 and subsequently invited them for a disciplinary hearing slated for 22nd November, 2017 and prior to the meeting, the Respondent shared all the documents it intended to rely on and heard them, their dismissal from employment was procedural as required by the provisions of Section 41 of the [Employment Act, 2007](#).
103. Reliance was made on the sentiments of the court in Thomas Sila Nzivo V Bamburi Cement Ltd (2014) eKLR cited in George Okello Munyolo V Unilever Kenya Ltd (2019) eKLR.
104. On entitlement to the reliefs sought, counsel relied on the decisions in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (Supra) to urge that reinstatement was unavailable to the Claimants and they had not proved that their termination was unfair.
105. As regards acting for 4 years by the 1st Claimant, counsel submitted that it did not create a legitimate expectation.
106. The Supreme Court decision in Communications Commission of Kenya and 5 others v Royal Media Services Ltd and 5 others (2014) eKLR was relied upon to urge the requirements of legitimate expectation.

Findings and determination

107. The issues for determination are;
 - i. Whether termination of the Claimants employment was unfair.
 - ii. Whether the Claimants are entitled to the reliefs sought.
108. As to whether termination of employment was unfair, the parties have adopted contrasting positions and provided reasons. While the Claimants allege that it was unfair and malicious, the Respondent submitted that it was lawful.
109. It is not in dispute that both Claimants were employees of the Respondent having been employed on 28th July, 2005 and 2008 respectively.
110. It is also not in contest that as at the date of interdiction and eventual termination of employment, the Claimants were acting as Financial Controller and Principal respectively having been appointed on 20th August, 2013 and 18th December, 2015 respectively.
111. As held by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (Supra), the provisions of the [Employment Act, 2007](#) provide the entire architecture on termination of employment including summary dismissal and redundancy.
112. The provisions are clear on notice, reason(s) for termination and proof or justification, elements of fair termination and procedure.
113. The foregoing provisions are unambiguous that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair. While the former relates to the reasons or grounds relied upon by the employer to terminate employment, the latter relates to the procedure employed by the employer as aptly captured by Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (Supra).



114. In *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR, the Court of Appeal held as follows;

“ . . . We wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

115. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant suit.

Reason(s) for termination

116. The customized summary dismissal letter dated 15th December, 2017 to the Claimants stated inter alia;

“We refer to the various correspondences in respect to your role in transactions contrary to the Public Procurement and Assets Disposal Act and *Public Finance Management Act*. Our letter Reference Number dated 13th July, 2017, your response dated 19th July, 2017, subsequent letter of interdiction of Reference Number dated 20th July, 2017 for gross misconduct and invitation letter to a disciplinary hearing dated 23rd November, 2017.

The Council gave due consideration to your written response and representation on the issues raised against the weight of the evidence supporting the charges and it was found sufficient to warrant severe disciplinary action.

Consequently, your conduct in the course of discharging official duties was unacceptable and warrants dismissal on account of gross misconduct as provided in the *Employment Act*, Laws of Kenya. Under the above circumstances, the College has no alternative but to summarily dismiss you . . .”

117. Evidently, the letter makes no reference to the reason(s) for summary dismissal.

118. Instructively, the letter states that the Claimants were interdicted for gross misconduct which would appear to suggest that subsequent procedures were superfluous or unnecessary.

119. The notice to show cause dated 13th July, 2017 accused the 1st Claimant for;

- i. Engagement of consultancy services and payment for the Design of Practical Training Block and Conference Facilities contrary to the law.
- ii. The Tender awarded to Maestro Architects who had quoted Kshs.971 million yet the budgetary allocation for the project for the year 2016/2017 was Kshs.200 million.



- iii. The tender was awarded on 10th August, 2015 and the contract signed on 22nd January, 2016 outside the 30 days period given by the award letter and no explanation for the delay and the council was not consulted.
 - iv. There was no budgetary allocation for the engagement of architects.
 - v. The tender awarded to Gitutho Architects and Planners was awarded to the second lowest bidder with no satisfactory explanation and the award letter and contract were signed by the Architect on 22nd January, 2017 contrary to the terms of the Award letter and a payment of Kshs.10,365,885.00 was made without consulting the council.
 - vi. Advised, recommended and allowed re-allocation of funds for development to recurrent expenditure contrary to the law and without advising the council.
 - vii. Absence of financial controls discipline and accountability.
120. The 2nd Claimant was accused of similar allegations except number (vi).
121. In addition, the 2nd Claimant was accused of the Financial Controller's failure to respond to the Principals queries on the project in addition to having fraudulently engaged two (2) members of staff without communication from the TRI Chief Executive Officer.
122. Finally, he was accused of prolonged handling of suspension cases of members of staff.
123. By letter dated 17th July, 2017, the 1st Claimant responded to the charges levelled against him.
124. On budgetary allocations for the Practical Training Block, he explained that it was a Multi-Year Project at a costs of Kshs.700 million spread out as follows; 2016/2017, 200 million, 2017/2018, 200 million and as Project Consultants Maestro Architects estimated the project to cost Kshs.971 million.
125. The 1st Claimant was unable to explain why the tender was awarded in August 2015 and the contract signed in January 2016.
126. He stated that payments by the Respondent were made and approved at various levels and did not require directions of Council.
127. According to him, there was a budgetary allocation for the project of Kshs.239.79 million after the grant of Kshs.50 million in the Supplementary budget.
128. The 1st Claimant did not deny the award and contract were made on the same day but stated that there was need to fast track the same.
129. On the award to the 2nd lowest bidder, the 1st Claimant referred to the decision of the Tender Committee as the answer to the query.
130. He denied having authorised the use of development funds in recurrent expenditure.
131. In his response dated 19th July, 2017, the 2nd Claimant clarified that the Practical Training Block was a phased project as captured in the MTEF at the National Treasury for 2016/2017, 2017/2018 and 2018/2019, a total of Kshs.700 million.
132. The figure of Kshs.971 million given by the Architect was an estimate by the consultant and Council was involved.



133. That the delay in signing the contract may have been occasioned by external lawyers and Council had not been constituted in January 2016.
134. According to the 2nd Claimant, payment for services rendered was a management function as Council had already approved the Procurement Plan.
135. That failure of the 1st Claimant to respond to queries did not relate to him and the Respondent had a budget after lobbying by Dr. Ombongi of KShs.50,000,000/= for the Development of a Master Plan and fleet of vehicles.
136. The 2nd Claimant admitted that he signed the contract contrary to the terms of the award letter and blames the opinion given by the Procurement Officer.
137. The witness admitted hiring two (2) casual employees through the Human Resource Department to facilitate the Chief Executive Officer of TRI, housed within the Respondent's compound and did so honestly and sincerely to save a situation and would have been discourteous to the Cabinet Secretary and did not believe the money paid to the casuals was misappropriated, “. . . extra ordinary times call for extraordinary measures” he stated.
138. Finally, the Claimant explained that the prolonged suspension was occasioned by court orders.
139. It is not in dispute that both Claimants sought time to respond to the notice to show cause and the same was granted.
140. None of the Claimants requested for any documents or other information.
141. It is common ground that after the Claimants responded to the notice to show cause, they were interdicted vide letter dated 20th July, 2017 which read in part;
- “. . . the College Council wishes to launch thorough investigations to establish the validity of the allegations.”
- In this regard, it has been decided that you be interdicted from the performance of your duties from the date of this letter to pave way for investigations. Please note that you will be required to be within reach during this period to facilitate investigations . . .”
142. From the evidence on record, Respondent's witnesses evidence and contrary to submissions by counsel for the Respondent, no investigation committee was established and no investigation report was prepared and/or filed in court. Neither of the Claimants was summoned to clarify any issue or respond to queries.
143. Equally, none of the three witnesses called by the Respondent testified about an investigation or report. All were emphatic that there was no report.
144. Puzzlingly, what the Respondent describes as a comprehensive report in his submission is nothing but an undated and unauthenticated 4 pages entitled “Summary of Allegations and Contraventions in the Case of Mr. Sudi Ndinyo/Charles Kazungu. Both contain a conclusion stating in part;
- “. . . it is submitted that there are sufficient and reasonable grounds to warrant further action.”
145. None of the Respondent's witnesses testified as to what these pages were, who prepared them and when.



146. Instructively, the Respondent filed its witness statements and documents after the Claimant had tendered their evidence.
147. Based on the documents filed by the Respondent, it is clear that the Respondent filed a copy of undated and unauthenticated Budget for 1st July, 2015 to 30th June, 2016 and Procurement Plan for 2015 – 2016.
148. In the case of the Budget, only the 1st page is legible. The other pages require a magnifier to discern its contents and the court had none.
149. It requires no belabouring that it is the duty of litigants and their counsel to ensure that documents produced in court are not only clear but legible to the naked eye.
150. Regrettably, a number of the allegations made by the Respondent against the Claimants were too general such as absence of budget, award of tender or to Maestro Architect for Kshs.971 million, signing of contracts and prolonged suspensions.
151. None of the witnesses called by the Respondent testified on these issues to demonstrate the transgressions alleged.
152. Be that as it may, both Claimants admitted having signed the contracts outside the duration prescribed by the award letter and appeared to blame unidentified external advocates the Respondent was relying on and none admitted as having forwarded the contract to the advocates and the Respondent had no legal officer.
153. As regards payments being made without consulting the Council, both Claimants appeared to be justifying their actions.
154. While the 1st Claimant relied on the multi-layered approval process of payments, testified about by the Principal, Accountant, RWII, the 2nd Claimant argued that it was a management function after all, the Procurement Plan had been approved by Council.
155. In its minutes dated 22nd February, 2016, the Respondent's Council had resolved that henceforth a Committee of Council would receive comprehensive procurement reports and all major procurements of Kshs.5,000,000/= and above must be reported to Council.
156. The minute of Council did not subject payments to approval by Council but reports on the specific procurements to be made for information.
157. Although procurement is not a board or Council process, the board/council as the policy making body and accountable to the public ought to be informed of activities by the management.
158. From the evidence on record, it is evident that the Claimants ignored a Council resolution without justification.
159. As regards the contract to M/s Maestro Architects, the award was made vide letter dated 10th August, 2015 and acceptance had to be confirmed by 17th August, 2015 and the contract had to be signed by the parties within 30 days but after the 7 days of the date of the letter.
160. For unexplained reasons, the then Principal of the College, Dr. Ombongi issued the award letter, entered into the contract but did not sign it.
161. With regard to the contract with M/s Gitutho Associates, the award was communicated by letter dated 22nd January, 2016, signed by the 2nd Claimant with similar terms to those in the letter to M/s Maestro



- Architects and was accepted on the same day and the contract signed on the same day contrary to the terms of the award letter.
162. As correctly submitted by the Respondent’s counsel, the letter of award was unambiguous “that the contract shall be signed within thirty (30) days from the date of the award letter but not earlier than seven (7) days from the date of the award.”
163. Similarly, Section 135(3) of the Public Procurement and Assets Disposal Act, 2015 provides that;
- “The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification, provided that a contract shall be signed within the tender validity period.”
164. This provision requires that a contract be entered into within the period specified in the letter of award but the same must be signed within the tender validity period.
165. Since the tender award was valid for the financial year 2015/2016, the contract was signed within the tender validity period.
166. The contract herein was entered into in contravention of the provisions of Section 135(3) of the *Public Procurement and Asset Disposal Act*, 2015 and thus irregularly.
167. Relatedly, both Claimants admitted having entered into the contract and in contravention of the provisions of the Act, the explanations given notwithstanding and approved payment to the Architects.
168. As regards re-allocation of funds from development budget to recurrent contrary to the *Public Finance Management Act*, the 1st Claimant denied having advised or recommended the same.
169. According to him, “urgent provisions consume available cash while those that take time to implement will utilize delayed inflow and when received.”
170. Puzzlingly, the 1st Claimant did not deny that it actually occurred.
171. The 2nd Claimant was not accused of directing development budget to recurrent.
172. However, in vindication of the Respondent’s allegation, the Auditor General’s Audit Report for the year ended 30th June, 2017 gave a qualified opinion of the Respondent’s financial statements for inter alia Kshs.59,738,395/= of the Development Grant of Kshs.100 million was utilized as recurrent expenditure without requisite approval of the Council and the National Treasury.
173. The 2nd Claimant was the Acting Principal for at least 6 months of the 2016/2017 financial year.
174. As regards the prolonged suspension of staff, the Respondent provided no specific details and the 2nd Claimant explained the same.
175. Finally, on the alleged misappropriation of College funds, the 2nd Claimant admitted that the College employed two (2) officers on behalf of TRI and without written communication from the Cabinet Secretary, who he alleges was behind the housing of the Chief Executive Officer of TRI at the Respondent’s premises.
176. From the evidence on record, it is clear that the matter was not reported to the relevant committee of Council for deliberation and approval. There was no management or the 2nd Claimant’s proposal to the relevant Committee of Council or the Council itself.



177. It is unclear to the court how the 2nd Claimant sourced for the funds to pay the two employees as their engagement had not been budgeted for.
178. The 2nd Claimant, as adverted to elsewhere in this judgement acted sincerely and honestly in applying the Respondent's funds for purposes other than that for which they had been budgeted for without authority of Council.
179. Section 43(2) of the *Employment Act*, 2007 provides that;
The reason or reasons for termination of a contract are 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.
180. As correctly held in *Galgalo Jarso Jillo V Agricultural Finance Corporation (Supra)* cited by the Respondent's counsel;
“ . . . it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exist . . . ”
181. Similarly, in *Kenya Revenue Authority V Reuwel Waitthaka Gitahi & 2 others (2019) eKLR*, the Court of Appeal observed that;
“ The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that it “genuinely believed to exist” causing it to terminate the employee's services. That is a partly subjective test.
182. The foregoing is consistent with the test of reasonableness as echoed by Lord Denning in *British Leyland UK Ltd V Swift (Supra)*,
“ The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view . . . ”
183. For the above stated reasons and guided by the foregoing statutory and judicial authorities, it is the finding of the court that the Respondent has on a preponderance of probabilities established that it had valid and fair reasons to terminate the employment of the 1st and 2nd Claimant.

Procedure

184. As the Court of Appeal held in *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*, Section 41 of the *Employment Act*, 2007 provides an elaborate and mandatory process to be complied with by the employer before termination of the employment contract.
185. The specific precepts of procedural fairness have been elaborated upon in various decisions such as *Postal Corporation of Kenya V Andrew K. Tanui*, where the Court of Appeal held that;
“ Four elements must thus be discernible for the procedure to pass muster: -
i. an explanation of the grounds of termination in a language understood by the employee;



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

186. I will now proceed to apply the requirements of Section 41 of the [Employment Act](#), 2007 to the facts of the instant case.

187. The gravamen of the Respondent’s case as regards the procedure adopted by the Respondent is that the law was complied with as the Claimants were issued with a notice to show cause and responded, were furnished with the evidence the Respondent would rely on and their responses and representations at the hearing were considered.

188. Although it is true that notices to show cause were issued and responded to and the Claimants were invited for a disciplinary hearing, that is the furthest the Respondent went and the process may be faulted in the following ways;

- 1. Although the invitation to the disciplinary hearing identified the date, time and venue of the meeting, it made no reference to the agenda of the meeting. The letter merely makes reference to the interdiction letter dated 20th July, 2017 and states that

“you are invited to a disciplinary hearing to accord you an opportunity to respond to various issues raised therein.”

189. Intriguingly, the interdiction letter did not raise any issue. It only promised

“thorough investigations to establish the validity of the allegations.”

190. In the courts view, since the Claimants were suspended in July 2017 for an investigation to be undertaken, the Respondent was obligated to either re-state the allegations as outlined in the notice to show cause or frame charges based on the outcome of the investigations.

191. Similarly, the notice failed to notify the Claimants of their right to be accompanied by another employee of their choice and the right to call witnesses.

192. In addressing the issue of contents of the invitation notice, the court is guided by the sentiments of the Court in *Postal Corporation of Kenya V Andrew K. Tanui* (Supra) as follows;

“In this case, the letter inviting the Respondent to appear before the board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination, and, if so inclined, make representations thereon. A hearing not so conducted is irregular. At the board meeting, there is no evidence that an explanation of the grounds of termination was made to the Respondent, and if so, in what language . . .”

193. These sentiments apply on all fours to the facts of the instant suit.



194. Secondly, the Respondent did not avails minutes of the disciplinary proceedings to enable the court understand what transpired at the hearing. The Claimants testified that they were questioned on the contents of the notice to show cause and no evidence was availed. The Respondent Counsel's submissions that the Respondent availed the documents it would use was unsupported by evidence and none of the Respondent's witnesses testified on the issue. RWIII had indicated that the documents were availed but on cross-examination stated that she had no letter or document with a list of what was availed.
195. The minutes of the meeting allegedly held on 27th November, 2017 by six (6) members of the Respondent's Council, including the Principal are neither dated nor authenticated by anyone nor the statements allegedly made by the Claimants and no attendance register is attached.
196. Similarly, none of the witnesses called by the Respondent attested to the fact that a hearing took place and a decision was made.
197. In the absence of authentic documentary evidence of minutes of the meeting allegedly held on 27th November, 2017 or credible evidence of what transpired, the court is of the view that the photocopied papers on record are of no probative value and would be unsafe to rely on.
198. In other words, the Respondent availed no evidence to show that it took the Claimants through a fair termination process consistent with the provisions of Section 41 of the *Employment Act, 2007*.
199. For the foregoing reasons, it is the finding of the court that the Respondent has failed to demonstrate that it accorded the Claimants a fair procedural process while terminating their employment.

Appropriate reliefs

- a. Having found that termination of the Claimants' employment was unfair for want of procedural propriety, a declaration to that effect is merited.
 - b. Accrued salary and allowances from July 2017 till date of judgement
200. The Claimants tendered no evidence of entitlement to any allowance after termination of employment on 15th December, 2017.
 201. However, since they were only paid half of the basic salary during interdiction, and having found that termination was unfair, they are entitled to the balance of the basic salary only.

Reinstatement

202. The remedy of reinstatement is provided for by Section 49(3) of the *Employment Act, 2007* and Section 12(3)(vii) of the *Employment and Labour Relations Court Act, 2011* and the remedy is discretionary.
203. Under Section 12(3)(vii) of the *Employment and Labour Relations Court Act, 2011*, the remedy is only available within 3 years from the date of termination of employment or dismissal.
204. In this case, since the Claimants employment was terminated on 15th December, 2017, the remedy is unavailable on this ground alone as was held in *Joshua Rodney Marimbah V Kenya Revenue Authority (2021) eKLR*.



Damages for wrongful dismissal

205. Having found that termination of the Claimants employment was procedurally unfair, the Claimants are entitled to the relief provided by Section 49(1)(c) of the Employment Act, 2007 subject to the provisions of Section 49(4) of the Act.

206. The court has taken into consideration the following;

- i. While the 1st Claimant was an employee of the Respondent for about 10 years and 4 months, the 2nd Claimant was an employee for about 7 years which is not too long.
- ii. The Claimants wished to continue in the Respondent's employment as exemplified by the prayer for the remedy of reinstatement.
- iii. The Claimants substantially contributed to the termination of employment.

207. In the circumstances, the court is persuaded that the equivalent of two (2) months gross salary is fair.

The 1st Claimant be substantively appointed/confirmed as the College Financial Controller for having acted for 4 years without full appointment.

208. Having found that the Claimants substantively contributed to the termination of their employment, the relief sought under this head is unavailable.

209. Equally, the 1st Claimant did not explain the circumstances in which he acted for that long and why the court should intervene at this late hour.

210. Significantly, appointment to office and promotion of employees is an employer's prerogative and courts seldom interfere unless it is shown that the employee has been treated unfairly or in a discriminatory manner.

In the circumstances of this case, no such evidence has been adduced.

The prayer is declined.

211. In conclusion, judgement is entered in favour of the Claimants against the Respondent as follows;

- a. Declaration that termination of the Claimants' employment was unfair.
- b. Unpaid basic salary during interdiction.
- c. Equivalent of two (2) months gross salary.
- d. Costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

