



Guracha v Ethics and Anti-Corruption Commission & another (Cause 1081 of 2018) [2023] KEELRC 2046 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2046 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1081 OF 2018
MN NDUMA, J
AUGUST 24, 2023**

BETWEEN

ADAN MORO GURACHA CLAIMANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

HALAKHE D. WAQO 2ND RESPONDENT

JUDGMENT

1. The claimant filed suit vide Memorandum of Claim dated 26/6/2018 which was amended on 12/2/2021. The claimant prays for the following reliefs:-
 - (a) Reinstatement to the position held by the claimant together with salary and allowances from October, 2017 till date of reinstatement without loss of any accrued benefits.
 - (b) Damages for unlawful and unfair termination being the equivalent of 12 months' salary in compensation for the unlawful and unfair termination.
 - (c) Damages for discrimination.
 - (d) Special damages.
 - (e) Costs and interest.
2. The respondent filed a Statement of Response dated 1/8/2018 and response to the amended statement of claim dated 15/3/2021.
3. C.W.1, the claimant testified that he was employed by the 1st Respondent/hereinafter (EACC) as an Intelligence Officer 2 in the Department of Intelligence and Operations Directorate of Investigations on 1/1/2015 and was posted to Malaba satellite office where he served for a period of One year.



4. C.W.1 was then transferred to Nairobi Headquarters and was placed at KLIF office until 1st February, 2017, when he was transferred to Lower Coast Regional Office, Mombasa. That as at September, 2017, C.W.1 held the position of Investigations Officer 2 earning a monthly salary of Kshs.178,090.
5. That sometimes in December, 2016, the claimant proceeded on leave with permission but his supervisor claimed that C.W.1 was absent from office without permission except for five (5) days leave that had been authorized. C.W.1 testified that he had accumulated 20 days leave from his previous approved leave applications and so he was entitled to be away on leave during the period his supervisor alleged he was absent from office. C.W.1 produced an email dated 2/2/2016 written by Abraham Kemboi to one Solomon Lemunen in which Abraham Kemboi advised that C.W.1 was transferred from Malaba office, to Headquarters with effect from 1st February, 2016. That while in Malaba, C.W.1 had utilized 13 days of his annual leave; and he was therefore entitled to additional 17 leave days in the financial year 2015/2016.
6. C.W.1 produced letter dated 8/1/2016, through which he was transferred from Malaba office to Nairobi Headquarters with effect from 1/2/2016. C.W.1 also produced letter dated 21/2/2016, through which C.W.1 was transferred from Nairobi, Headquarters to Mombasa with effect from 1/2/2017.
7. In both letters, Mrs P. Kyengo, who wrote on behalf of the Chief Executive Officer Ethics & Anti-corruption Commission concluded :-

“It is expected that you will continue to discharge your duties and responsibilities prudently and with a high degree of integrity.”
8. C.W.1 testified that he was on 1/3/2016 served with a notice to show cause of instant date written by T. Baithalu Deputy Director Intelligence and Operations in which C.W.1 was accused of gross misconduct and Absenteeing himself from duty without leave. That the alleged disciplinary offence was committed on 29/2/2016.
9. C.W.1 was requested to show cause why a disciplinary action should not be taken against him.
10. C.W.1 told the Court that he was not called to a hearing regarding that matter and he received another letter dated 20/4/2016 written by one Abdi Mohammed, Director Investigations, calling upon him to show cause why he had absented himself from work without leave on 29th, 30th, 31st March, 2016 and 19th April, 2016 despite warning from his supervisor.
11. The letter also accused C.W.1 that on 14/4/2016, at 2 p.m. his supervisor found him asleep in the office in the presence of external clients. C.W.1 was asked to respond to the allegations by 22/4/2016 at 5 pm. This letter was received by C.W.1 on 20/4/2016.
12. C.W.1 responded to the notice to show cause by a letter dated 21/4/2016 in which he explained that on 29/2/2016, he had reported to office as usual and left at 02.30 hours to accomplish an assignment (profiling of tax evasion cartels) given to him by the Deputy Director, Mr. Baithalu. That he had explained the nature of the task to Mr. Baithalu that he would require to meet various people in that regard and he went to work accordingly. That at mid-day, on the same date, C.W.1 had received a call from Mr. Baithalu and he had explained to him his whereabouts. That on 2/3/2016, Mr. Baithalu asked C.W.1 to give a written explanation for absences.
13. Secondly, C.W.1 explained that Mr. Baithalu may have miscalculated his leave days. That when he went for his leave on 11/3/2016, C.W.1 had requested for 7 days leave but Mr. Baithalu had insisted that he takes all his pending days and approved the same. That this then included two (2) more days of 30th



and 31st March, 2016. C.W.1 stated that he was to resume duty on 1/4/2016 which he did. C.W.1 had attached to this explanation approvals/calculations.

14. Thirdly, C.W.1 had explained that on 18/4/2016 he had gone to Nairobi Hospital to see Doctor Johnson Murila (an Orthopedic Surgeon) for undressing his injured left foot and review and the doctor had recommended two (2) days rest due to pain and swelling. C.W.1 told Court that he had submitted Doctor's sick off note which was produced before Court. C. W.1 added that he was involved in an accident on 31/3/2016 after arriving from Isiolo while boarding a motor bike at Jogoo road stage while heading home to Section 3 Eastleigh. That he had sustained numerous body injuries on his legs, foot, hand, head and shoulder. That the left foot injury was severely painful and was swollen and required an X-ray and a referral to Dr. Murila where he was dressed.
15. C.W.1 denied that he was found asleep at the office in the presence of clients. C.W.1 said that when Mr. Baithalu entered the office, he was facing the back window after opening it and did not at any time doze off. That the alleged client was Chief Inspector Joseph Ndhiwa with whom he had talked just before Mr. Baithalu came in.
16. C.W.1 testified that on 15/2/2017, he again received another notice to show cause for absenting himself from duty on 29/12/2016 and 6/2/2017 from P. Kyengo. C.W.1 was required to show cause by 28/2/2017. C.W.1 produced letter of explanation dated 27/2/2017 in which C.W.1 explained that during that time, he was on his annual leave which had accumulated to twenty (20) days including the balance of 17 days as at the date C.W.1 had reported to Nairobi from Malaba office on 1/2/2017.
18. C.W.1 explained further that he had applied for five (5) additional days in later December, 2016 and commenced the leave on 19th December, 2016 and proceeded for 25 days.
19. That at the time C.W.1 took leave on 19/12/2016, his supervisor was on leave but he had severally discussed the matter on phone and the supervisor had agreed for further approval of five (5) days in addition to the accumulated twenty (20) days.
20. That upon computation of the leave days, C.W.1 said he had reported back to KLIF, where the supervisor had instructed him to pick his letter of transfer. That the supervisor did not dispute his pending leave days and the additional 5 days approved. C.W.1 offered to reconcile the leave days taken for clarity, if it was not clear.
21. C.W.1 testified that by the time he arrived at Mombasa from leave, he was made aware of a memo dated 4/4/2017 written by one George Ojowi, Assistant Director, Lower Coast Regional office, reporting to Deputy Director, Human Resource of Ethics & Anti-corruption Commission that C.W.1 had absented himself from office from 29/3/2017 to 4/4/2017 and efforts to reach C.W.1 by phone had not borne fruits. That C.W.1 had also failed to turn up for duty on 6th 10th 16th 17th and 21st March, 2017. Mr. George Ojowi recommended that stern action be taken against C.W.1.
22. By a letter dated 4/8/2017, Mrs P. Kyengo wrote to C.W.1 informing him of all the allegations of absence made against C.W.1 vide letter dated 15/2/2017 and 12/4/2017 and C.W.1's responses dated 27/2/2017, 6/3/2017 and had then been referred to the Staff Disciplinary Committee for disciplinary action on allegation of:-

“Absence from duty without lawful authority contrary to Clause 9.16.1(i) of the EACC Human Resource Manual, 2013 and Section 44(4) (a) of the Employment Act, 2007.”



23. Charges made against the claimant by this letter of 4th August, 2017 were as follows:-
- “ (1). Between 29th December, 2016 to February, 2017;
and on
- (2). 29th March, 2017; 31st March, 2017; and 3rd April, 2017, it was reported on the following two occasions that you failed to report on duty without lawful authority.”
24. C.W.1 was asked to appear before the Staff Disciplinary Committee on 17/8/2017 to explain himself.
25. C.W.1 testified that though he appeared before the Disciplinary committee, he was not given a fair hearing. C.W.1 said he appeared before the said committee on 17/8/2017 but was not given opportunity to question officers who gave false testimony against him. That he was only allowed to question Mutembei and not the others.
26. C.W.1 produced letter of summary dismissal dated 29/9/2017 stating that the dismissal was unlawful and unfair. C.W.1 explained at length that he believed that he was victimized and discriminated against by his supervisor at Nairobi and Mombasa. That at Nairobi he was denied opportunity to conduct filed investigations which was part of his job requirements and was not offered training opportunities like his counterparts. That he was unfairly denied promotion and was generally discriminated against by his supervisors especially R.W.1 and R.w.3. That the disciplinary process was flawed and amounted to double jeopardy. That he did not therefore get a fair disciplinary process and his dismissal was not for a valid reason and his suit be allowed with costs.
27. C.W.2 Mohammed Guyo, CPL No. 64369 testified that he worked for DCI at Central Police Station. That C.W.1 was his friend from secondary school days. That he had joined EACC on 9/5/2016 and was stationed at the Integrity Centre at Nairobi on attachment for 15 months. That he worked with C.W.1 in May and June, 2016. That at the time C.W.1 was transferred to KLIF offices at Ngong road and soon after he was transferred to Mombasa. C.W.2 stated that he had no personal knowledge of C.W.1's leave days. That his attachment was terminated on 29/8/2017 on allegations that he had absented himself from work. That they were released as a team and he had no disciplinary case at EACC. C.W.2 stated that he knew C.W.1 as an honest and forthright person from his youth and was a top student at Isiolo Boys class of 1994 despite all odds and was one of the very few students who made it to the University of Nairobi from North Eastern Province then.
28. C.W.2 stated that he shared adjacent office with C.W.1 at EACC. C.W.2 stated that C.W.1 was treated badly by his supervisors and was not wanted and would be sidelined during tours of duty at the Integrity Centre. That he was conspicuously idle in his office mostly alone without work being allocated to him.
29. C.W.2 stated that C.W.1 was suspected by his supervisors to be an NIS mole, hence he was sidelined and discriminated at work from C.W.2's observation when he was at Integrity Centre. C.W.2 said C.W.1 informed him he was denied travel and training opportunities as a result of discrimination at Integrity Centre and was transferred most of the times. C.W.2 said he had advised C.W.1 to seek transfer to far stations like Garissa or Coast and that is how C.W.1 got a transfer to Mombasa upon C.W.2 personally taking him to a senior manager to plead his case.
30. R.W.1, Josphat Aleine Baithalu testified that he was EACC Deputy Director Head of North Rift Region since November, 2016 to date. That his jurisdiction covers, Garissa, Wajir, Mandera and Tana River Counties. That during the material time, at Nairobi, Headquarters, he was Head of



Intelligence and Operations and was therefore in charge of Intelligence collection and analysis as well as in charge of Operations. That C.W.1 was transferred to Nairobi office with effect from 1/2/2016 as an Intelligence Officer II. That C.W.1 was under direct supervision of R.W.1. That C.W.1 was stationed at the Intelligence analysis desk and his duty was to analyse and collect information and make reports on tasks assigned to him. This was mainly a desk job, that is, to analyse information provided by collectors. R.W.1 testified that upon C.W.1 reporting to work on 1/2/2016, he assigned him the duties of profiling KRA and Ministry of Lands. This included analyzing all reports made against staff of the aforesaid offices.

31. R.W.1 testified that, C.W.1 was unable to complete the assignment because he was absent most of the times. R.W.1 said he took over the assignment and did it himself.
32. R.W.1 denied that he had instructed C.W.1 to carry out a lifestyle audit/probe of Mr. Halakhe Waqo, as alleged or at all.
33. That it was standard practice for officers to sign the clock in register every day upon reporting to work except when away on duty or leave or on sick-off. That C.W.1 absented himself from duty without permission severally including on 29/2/2016; 30th and 31st March, 2016 and 18th April, 2016.
34. R.W.1 stated that he approved C.W.1's leave form dated 23/2/2016 wherein he requested for leave from 14/3/2016 to 28/3/2016. C.W.1 was to return on 29/3/2016. The claimant failed to return to work on 30th and 31st March despite the lapse of leave. R.W.1 issued C.W.1, a verbal warning to enable him improve and issued C.W.1 a Notice to Show Cause dated 1/3/2016 to explain his absence on 29/2/2016.
35. When C.W.1 failed to report to work on 18/4/2016, R.W.1 said he noted that C.W.1 did not heed his verbal warnings and the notice to show cause he had written to him. R.W.1 therefore escalated the matter to the Director, Investigations. R.W.1 wrote a memo dated 18/4/2016 to the Director to report on C.W.1's general conduct including absenting himself from duty. The Director wrote to C.W.1 Notice To Show Cause dated 20th April, 2016 to which C.W.1 responded on 21/4/2016. C.W.1 was then transferred to EACC office at KLIF (Kenya Leadership and Integrity Forum) Nairobi.
36. R.W.1 testified that he received a letter from the Human Resource Department summoning him to appear before the staff disciplinary committee on 30/8/2017 which he did and gave evidence on the C.W.1's absenteeism from duty.
37. R.W.2 Ellyjoy Bundi, testified that she is a senior Human Resource Officer of EACC. That she has served EACC for a period of 15 years. That C.W.1 was employed by EACC on 1/1/2015 as Intelligence Officer II under the Directorate of Investigations and was confirmed on 3/8/2015. That C.W.1 was posted to Mombasa Satellite office upon confirmation. On 1/2/2016, C.W.1 was transferred to Nairobi Headquarters and on 1/2/2017 to Mombasa. R.W.2 produced the letter of employment, confirmation and transfer.
38. R.W.2 produced Notices to show Cause written to Director Investigations reporting that C.W.1 absented himself from work on 29/2/2016, 30th and 31st March, 2016 and 18th April, 2016 and on 14/4/16, he was found sleeping in the office. That Director Investigators, Abdi, Mohammed wrote to C.W.1 a Notice To Show Cause dated 20/4/2016 to explain his absence on 29/2/2016; 30th & 31/3/2016 and 18/4/2016 and sleeping in office on 14/4/2016. On 2/4/2016, C.W.1 responded to the Notice to Show Cause explaining those matters. The letter of explanation was produced by R.W.2.
39. R.W.2 also produced Notice To Show Cause by one Mrs P. Kyengo to C.W.1 dated 15/2/2017 asking C.W.1 to show cause why he absented himself from duty on 29/2/2016 and 6/2/2017. C.W.1 explained



- himself in a letter dated 27/2/2017 produced by R.W.2. R.W.2 produced all the leave forms filled by C.W.1 and the Clock in Registers. R.W.4, George Ojowi, wrote a Notice To Show Cause to C.W.1 dated 12/7/2017 for the claimant to explain his absence without permission between 29/3/2017 and 12/4/2017. The letter was produced by R.W.1.
40. R.W.2 also produced the explanation by C.W.1 dated 18/4/2017 and the note from Aga Khan Hospital dated 16/4/2017, when C.W.1 visited the hospital for review of acute Bronchitis and payment receipt of Kshs.1,317 from Aga Khan Hospital.
41. R.W.2 produced letter dated 24/1/2017 written to Director, Investigation by R.W.3, Mutembei, that on 29/12/2016, C.W.1 had absented himself from office without leave from 29/12/2016. That C.W.1 was due to return to office from leave taken from 19/12/2016 for 5 days to 28/12/2016 but never returned to office until 24/1/2017.
42. R.W.2 produced charges made against C.W.1 dated 4/8/2017. The specific charges made against C.W.1 were:-
- “It was reported on the following two occasions that you failed to report to duty without lawful authority:-
1. Between 29th December, 2016, to February, 2017.
and on
 2. 29th, 30th and 31st March, 2017.
and on
 3. 3rd, 4th, 5th, 6th, 7th, 10th, 12th, April, 2017.
43. C.W.1 was required to appear before the Staff Disciplinary Committee on 17/8/2017. The summon was by Secretary to the Chief Executive Officer.
44. R.W.2 produced the minutes of the disciplinary hearing which commenced on 3/8/2017 and also proceeded on 17/8/2017, 30/8/2017 and 5/9/2017. R.W.2 testified that C.W.1 appeared before the Committee on 17/8/2017 and was questioned on the stated charges and he explained as the record shows.
45. R.W.2 confirmed that C.W.1 was present at the disciplinary hearing when R.W.3, Mr. Mutembei Nyagah, testified against him and a joint session was held between C.W.1 and Mr. Mutembei on the leave application matters. R.W.2 also confirmed from the disciplinary committee minutes that on 30/8/2017, the disciplinary hearing continued but in the absence of C.W.1, when one Mr. Philip Kopkai, the supervisor of C.W.1 testified on the absence of C.W.1 between 29/12/2016 and 24/1/2017.
46. R.W.1 Japheth Baithalu also testified on 30/8/2017 in the absence of C.W.1 when R.W.1 testified regarding the absence of C.W.1 between 29/3/2016 and 1/4/2016.
47. R.W.2 also confirmed that R.W.4, George Ojowi, from the minutes, appeared before the disciplinary committee on 30/8/2017 and testified in the absence of C.W.1 as the minutes show. R.W.4 testified regarding the absence of C.W.1 from 29/3/2017 to 31/3/2017 and between 3rd to 17th April, 2017.
48. The minutes of proceedings produced by R.W.2 confirmed the allegations by C.W.1 that the entire disciplinary process took place in the absence of C.W.1, except on 17/8/2017 when C.W.1 was questioned and had a brief joint session with R.W.3 Mutembei Nyagah regarding the unutilized 20 days leave he had accumulated while at Malaba and the approved leave records of C.W.1.



49. R.W.2 concluded that EACC had valid reasons to summarily dismiss C.W.1 from Employment and that EACC followed a fair procedure in effecting the summary dismissal. That the suit be dismissed with costs
50. R.W.3, Mutembei Nyagah, testified that he now worked for Kenya Revenue Authority (KRA) as a Deputy Commissioner in charge of enforcement. That he was Assistant Director in charge of intelligence and surveillance at EACC from the year 2015 up to September, 2019 when he was transferred to Rift Valley as Head of Investigations. R.W.3 relied on a witness statement dated 2/8/2018.
51. R.W.3 testified that C.W.1 like all other intelligence officers in the commission reported to him through their supervisors. That C.W.1 was transferred to the KLIF office in June, 2016 as an Intelligence Officer. That the duty of C.W.1 was to collect intelligence and generate reports. That C.W.1 was under his supervision and would take instructions from R.W.1 or from his supervisors directly and directly reported to R.W.1.
52. That by the time C.W.1 reported to KLIF, R.W.3 was aware of his conduct from his file handed over by his previous supervisor Mr. Baithalu. That the file had Show Cause letters from Mr. Baithalu and from the Director of Investigations.
53. That C.W.1 had several incidences of lateness and absenteeism. That R.W.3 counseled C.W.1 with the aim of assisting him to improve his conduct.
54. That while R.W.3 was on leave between 16/12/2016 and 3rd January, 2017, his deputy Mr. Kapkai was in charge of intelligence division.
55. That on 29/12/2016, Mr. Kapakai called R.W.3 by phone and informed him that C.W.1 had applied to go on a 5 days leave from 19th to 28th December, 2016. R.W.3 stated that he was then informed that C.W.1 had not reported to work as explained. R.W.3 informed Kopakai that he would resolve the issue once he returned to office on 3/1/2017.
56. That on 3/1/2017, C.W.1 had not yet returned to office, so they decided to trace him since his phone was off. C.W.1 called a colleague by phone stating that he had lost his phone. He was enquiring about the office.
57. That since C.W.1 had been away for a period of over one month between 29th December, 2016 to 24th January, 2017, R.W.3 escalated the matter to the Director Investigations vide a memo dated 24th January, 2017.
58. That C.W.1 reported to office on 6th February, 2017 but by that time he had been transferred to Lower Coast Region at Mombasa and the letter of transfer had been delivered to the office. That the transfer to Mombasa was with effect from 2nd February, 2017. That C.W.1 came to clear at KLIF to enable him report to Mombasa.
59. R.W.3 testified that he was summoned by the Human Resource Department of the Commission to appear before the Staff Disciplinary Committee on 17th August, 2017. R.W.3 stated that he gave evidence on the C.W.1's absenteeism from duty.
60. R.W.3 denied that he victimized C.W.1 due to any case he was investigating. R.W.3 denied that C.W.1 was ever tasked to investigate the National Youth Service (NYS) scandal of 2015/2016. R.W.3 stated that contrary to allegations by C.W.1 that the investigations were stopped prematurely, that the said investigations were concluded and the culprits were arrested and charged before the Chief Magistrate's



- Court. That with respect to the Lamu Coal fired Power generation project in 2017, C.W.1 was not involved being an office at Mombasa since that was a Malindi matter.
61. That C.W.1 was never part of the Garbage Collection Investigation which was still ongoing.
 62. That C.W.1 was not part of the Sugar Import Tax Evasion Investigation at Kenya Ports Authority as alleged or at all and the same was still underway.
 63. R.W.3 denied allegations of bias, discrimination and failure to allocate C.W.1 work as alleged by the claimant or at all. R.W.3 said that C.W.1 could not directly report to Halakhe D. Waqo, Chief Executive Officer of EACC. That he reported to his supervisor who would in turn report to R.W.3. That there could be no competition between R.W.3 and C.W.1 since he was an Assistant Director at level 5 while the claimant was an Intelligence Officer at level 8. Issue of conflict and competition between the two could therefore not arise as alleged or at all.
 64. R.W.3 was cross-examined by the claimant in person extensively. R.W.3 insisted that C.W.1 had exhausted his leave days and was absent without authority from 29th December, 2016 up to the time he reported in January, 2017. R.W.3 insisted on his version of number of days applied for and taken by C.W.1 whereas C.W.1 insisted that he had lawfully utilized his unutilized 17 days over and above the leave days taken for the period 2015/2016.
 65. R.W.3 said C.W.1 utilised all his 25 days and did not have any further 20 days as alleged by C.W.1 or at all. However, R.W.3 conceded that the leave form dated 15/12/2016 in which C.W.1 had applied for 5 days indicated that C.W.1 had a leave balance of 25 days for the financial year 2016/2017. R.W.3 insisted that he had not personally approved the leave days for C.W.1 but had delegated that to Kapkai since he was already on leave at the time and he did not take leave at the same time with C.W.1. R.W.3 said if C.W.1 had unutilized leave days from Malaba, he needed further approval at Headquarters to take them. R.W.3 said he was not aware of the reason why C.W.1 was transferred to Mombasa. R.W.3 denied that he had malice towards C.W.1 and did not deny him work or training as alleged or at all and that, there was a training policy and procedure which was followed at EACC.
 66. R.W.3 denied having given negative reference to prospective employers of C.W.1 to ensure that he did not get any other job as alleged by C.W.1. R.W.3 also denied he had blocked C.W.1 for promotions at EACC. R.W.3 did not agree that C.W.1 ought to be in level 6 and not 8 as he alleged stating that he was not aware that vacancy had arisen while C.W.1 was serving under him.
 67. R.W.4 George Ojowi testified that he was an Assistant Director Investigations and the Head of Lower Coast Regional Office Mombasa since 1/2/2016 to date. That he was previously Head of Upper Coast Regional Office in Malindi since 1/10/2016. That his jurisdiction covered Mombasa, Kwale and Taita Taveta counties.
 68. That C.W.1 was transferred to Mombasa office from Nairobi with effect from 1/2/2017 as an Intelligence Officer. That he was under his supervision.
 69. That officers signed an attendance book or clocked to register every day upon reporting to work except an officer who was away on duty or official leave or on sick off with the permission of the supervisor.
 70. R.W.4 testified that C.W.1 absented himself from duty without official permission severally including on 6th, 7th, 10th, 16th, 12th, 20th and 21st March, 2017 and for an extended period from 29th March, 2017 to 12th April, 2017.
 71. That on the sporadic dates C.W.1 failed to report to work. R.W.4 issued him verbal warnings with the aim of giving C.W.1 opportunity to improve his conduct.



72. However, when C.W.1 absented himself for an extended period between 29th March, 2017 and 12th April, 2017, R.W.4 was under an obligation to escalate the matter to the Head office. Then he wrote a memo dated 4/4/2017 to the Deputy Director Human Resource in this regard. That he had tried to reach C.W.1 on his phone number 0723955354 without success. His colleagues had also failed to get him.
73. That C.W.1 resurfaced on 12/4/2017 when R.W.4 served him with a notice to show cause which made reference to several verbal warnings that R.W.4 had issued C.W.1. C.W.1 was required to respond within 7 days why disciplinary action should not be taken against him.
74. C.W.1 responded by a letter dated 18/4/2017. That in the letter, C.W.1 confirmed that he had switched off his phone to enable him have a good rest. C.W.1 said he had been unwell and was on medication. That he had gone for review at Aga Khan Hospital Mombasa. C.W.1 produced a treatment note and receipt of payment in support of this assertion.
75. R.W.4 testified that upon scrutiny of the documents in support, R.W.4 noted that, the treatment note and receipt were dated 16/4/2017 which was four days after he had returned to work on 12/4/2017. R.W.4 concluded that there was nothing to show that C.W.1 was unwell during the 14 days he had failed to report to work. R.W.4 told the Court that he had arrived at the conclusion that C.W.1 was dishonest about his claim that he was unwell and had therefore absconded duty. R.W.4 escalated the matter to Headquarters – Human Resource Department. Human Resource Department wrote to C.W.1 on 4/8/2017. R.W.4 was summoned by a letter dated 4/8/2017 to appear before the Staff disciplinary Committee on 17/8/2017 to give evidence produced before Court in the minutes of the disciplinary hearing of C.W.1.
76. R.W.4 denied allegations or knowledge of work allegedly done by C.W.1 including NYS Scandal of 2015/2016; Lamu Coal Fired Power Generation Project in 2017; The Garbage Collection Investigation and the Sugar Import Tax Evasion Investigations in respect of which C.W.1 alleged was the cause of his problems.
77. R.W.4 said he had never sanctioned C.W.1 to carry out any of those investigations at Mombasa or Malindi as alleged or at all. R.W.4 concluded that the summary dismissal of C.W.1 was for a valid reason and fair procedure was followed in the disciplinary process.
78. R.W.4 was subjected to lengthy cross-examination by C.W.1 and he constantly repeated his explanation on the circumstances leading to the summary dismissal of C.W.1.

Determination

79. The parties filed comprehensive written submissions which the Court has carefully considered together with the evidence adduced by C.W.1, C.W.2, R.W.1, R.W.2, R.W.3 and R.W.4. The Court has delineated the following issues for determination.
 - a. Whether EACC had proved it had valid reason (s) to summarily dismiss the claimant from employment and if EACC followed a fair procedure in effecting the summary dismissal of the claimant.
 - b. Whether the claimant is entitled to the reliefs sought.
80. In answering issue (a) above, it is pertinent to note that the charges for which the claimant was brought before a disciplinary committee were specifically set out in the charge sheet dated 4/8/2017 made against the claimant by the Chief Executive Officer being:-



- (a) Absenteeing himself without lawful authority between 29th December, 2016 to unnamed date in February, 2017.
 - b. Absenteeing himself without lawful authority between 29th March to 31st March, 2017.
- and
- b. Absenteeing himself without lawful authority between 3rd to 12th April, 2017.
81. The report regarding charge (a) above was made to Director Investigations by J.A. Baithalu R.W.1, by a letter dated 18/4/2016. Director Investigations asked C.W.1 to explain the absence by a Notice To Show Cause dated 20/4/2016; C.W.1 explained his absence in a letter dated 21/4/2016.
 82. This matter was then left in abeyance and no further action was taken against C.W.1 regarding that specific absence until the officer was later transferred to Mombasa. C.W.1 reiterated his explanation at the disciplinary hearing from the minutes produced by R.W.2 in the absence of his accuser R.W.1. R.W.1 was then called to testify against C.W.1 in the absence of C.W.1 as shown in the minutes produced by R.W.2. It is without doubt that C.W.1 did not have opportunity to hear the testimony made against him by R.W.1 Mr. Baithalu, nor was he given opportunity to ask him questions.
 83. With regard to charge (b) on Absenteeing himself from office without authority between 29th to 31st ^b March, 2017, these allegations were first contained in a notice to show cause written to C.W.1 on 15/2/2017 by the Chief Executive Officer.
 84. C.W.1 had explained that he was on extended 20 days leave and had produced confirmation of the untaken leave days by his supervisor at Malaba Mr. Kemboi. From the minutes of the disciplinary hearing, Mr. Kemboi was not called to testify on the matter. R.W.3, Mr. Mutembei did not provide any clear evidence before Court regarding the untaken leave days by C.W.1 while he was at Malaba. C.W.1 had insisted that this matter was discussed between C.W.1 and himself while Mr. Mutembei was on leave and had allowed C.W.1 to extend his approved leave days to include the untaken leave days and the matter would be regularised when C.W.1 and Mr. Mutembei returned to the office. C.W.1 had consistently made this explanation in his response to the Notice To Show Cause, at the disciplinary hearing, and before this Court.
 85. The testimony by Mr. Mutembei under cross-examination by C.W.1 left a lot to be desired and he did not come out as a witness telling the truth or one fully appraised of the facts surrounding the issue of the 17 untaken leave days by C.W.1. The Court believes the testimony by C.W.1 that indeed Mr. Mutembei had verbally allowed C.W.1 to extend his approved leave in lieu of the 17 untaken leave days while he was at Malaba. The letter by Mr. Kemboi, the supervisor of C.W.1 who was not called to the disciplinary hearing or to testify before this Court collaborates the version by C.W.1.
 86. With regard to the 3rd charge of unlawful absenting himself between 3rd to 12th April, 2017, R.W.4, Mr. Ojowi the supervisor of C.W.1 at Mombasa, was the accuser but again was called to testify against C.W.1 before the Disciplinary Committee in the absence of C.W.1. C.W.1 had explained himself in his response to the notice to show cause and before the disciplinary tribunal.
 87. E.A.C.C. is an organ with the mandate to conduct investigations to bring out the truth of the matters they are seized of. The Court takes notice of the high professional qualifications and experience of R.W.1, R.W.2, R.W.3 and R.W.4 who testified before this Court and their vast experiences in matters investigation.
 88. However, in this matter, it is difficult to understand why an employee charged with misconduct, likely to result in summary dismissal was called upon to testify before the Human Resource, disciplinary



Committee before the key witnesses who had made various allegations against him testified before the committee so as to provide C.W.1 the opportunity to rebut their testimony before the committee.

89. It is also difficult to understand why these key witnesses were called to testify before the committee in the absence of C.W.1 except R.W.3. It is also important, where an employer is in a position to conduct an elaborate disciplinary process in compliance with Section 41 of the *Employment Act*, and its own internal processes, that the employer gives the employee fair opportunity to exculpate him/herself by providing the employee opportunity to ask the key witnesses who accuse him/her of misconduct questions in the presence of the committee members.
90. The manner in which the 1st respondent conducted the disciplinary hearing from the minutes produced by R.W.2 left a lot to be desired and the Court is in agreement with C.W.1 that he was not given adequate opportunity to fairly defend himself. The Court finds that the entire disciplinary process was flawed and did not satisfy the provisions of Section 41 of the *Employment Act*, and the Rules of natural justice. The net result of this flawed process was to deny C.W.1 fair hearing in violation of Section 41 and 45 of the *Employment Act*, and the 1st respondent opportunity to find out the truth so as to establish a valid reason to summarily dismiss C.W.1 from employment in terms of Section 43(1) and (2) as read with Section 44 and 45 of the *Employment Act*, 2007.
91. It is noteworthy that C.W.1 had worked for the 1st respondent for about two (2) years. In that short period, he had served at four different stations including Malaba EACC Headquarters, KLIF (Ngong Road) and Mombasa. It is not far-fetched for the Court to conclude that C.W.1 was not given opportunity to settle down and this in some way gives credence to the grievances presented by C.W.1 against some of his supervisors.
92. C.W.1 is not on trial before this Court and probably his work ethics had gaps, but the manner in which allegations of absence were left hanging and not concluded one after another only to be revived after two years in one disciplinary process, also in the Court's finding rendered the entire process unprocedural and unreasonable. Once a Notice To Show Cause is issued and then is responded to, it must be brought to an end by a pardon, warning, or a full blown disciplinary process and not be let to hover above the head of an employee like a floating charge.
93. In the final analysis, the Court finds that the respondent did not prove it had valid reason(s) to summarily dismiss the claimant from employment and that the 1st respondent failed the fairness test in violation of Section 45(1) and (2) of the *Employment Act* 2007. Following the Decision of the Supreme Court in the case of Ken freight (EA) Limited –vs- Benson K. Nguti [2016] eKLR where it was held that:-

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair,” and the case of Walter Ogal Anuro -vs- Teachers Service Commission 2013 eKLR where this Court held that:-

“There must be both substantive justification and procedural fairness and that substantive fairness has got to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination,”

the Court finds in favour of the claimant on the issue of liability.

Remedies

94. The claimant sought various remedies in the amended statement of claim including:-



- (a) Reinstatement
 - (b) Compensation
 - (c) General damages for discrimination
 - (d) Pecuniary damages.
 - (e) Interest and costs.
95. The Supreme Court in (Kenfreight case) determined that upon finding that an employee has been unlawfully dismissed from employment, remedies available to the employee are as provided under Section 49 of the *Employment Act*, 2007. The Court in this respect finds that the claimant left employment in the year 2017. That the claimant has demonstrated that he has since that time tried to get alternative employment in vain. The claimant has attributed the inability to get alternative employment to the nature of his job as an intelligent officer and so places where he can work are limited. The claimant has also adduced evidence that whenever he has been called to an interview and is about to get employed, the 1st respondent has provided negative reference to the prospective employers thereby thwarting his efforts to get employed. Though the 1st respondent has denied these allegations by the claimant, the evidence by the claimant that indeed bad references have been made by the 1st respondent against prospective employers bears some truth from the documentation produced before Court.
96. The claimant has not come across as an officer who did not partly contribute to his predicament. C.W.1 has to bear some responsibility for the matters which befell him especially with regard to his work ethics, punctuality and availability at the work place. The evidence before Court does not persuade this Court, given the long passage of time from the time of separation to date, that this is a proper case for reinstatement of the claimant to his previous employment. The sweeping allegations made by C.W.1 against his employer in general does not suit his prayer to be reinstated to his employment.
97. Accordingly, the Court finds this case unsuitable to order reinstatement of the claimant to his previous employment.
98. The Court however finds that the claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the *Employment Act*, 2007.
99. In this regard, the claimant earned a monthly salary of Kshs.178,090 at the time of dismissal. The claimant was summarily dismissed without notice and is entitled to payment in lieu of one month notice if that payment was not made to him in the sum of Kshs.178,090.
100. The claimant had served the respondent for a period of (2) years. The claimant has however remained without employment to date for reasons partly attributed to negative references made against him by the 1st respondent. The Court finds that the claimant contributed to his loss of employment even though this did not justify the unlawful and unfair termination of his employment.
101. C.W.1 made sweeping allegations of discrimination by his employer which allegations were not satisfactorily proved by the claimant. Indeed, the Court finds that the allegation of discrimination by the C.W.1 against the 1st respondent have not been proved on a balance of probabilities.
102. The claimant was not paid terminal benefits upon dismissal because the same was summary in nature.
103. The claimant has suffered loss of income and support for self and family due to the unlawful conduct by the 1st respondent. The Court considered the cases of Kenfreight (E.A) Limited -vs- Benson K. Nguti (2019) eKLR and Walter Ogal Anuro -vs- Teachers Service Commission 2013 eKLR (supra) and has



found it appropriate to award the claimant the equivalent of six (6) months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs.1,068,540.

104. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
- (a) Kshs.178,090 in lieu of one month notice
 - (b) Kshs.1,068,540 being the equivalent of (6) months' salary in compensation for the unlawful dismissal.
 - (c) Interest at Court rates from date of judgment till payment in full.
- b. Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 24TH DAY OF AUGUST, 2023.

Mathews N. Nduma

Judge

Appearance

Claimant in person

Ms Kibogy for Respondent

Ekale: Court Assistant

