



Mboya v Mini Bakeries (N) Limited (Employment and Labour Relations Cause E035 of 2022) [2023] KEELRC 2701 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2701 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E035 OF 2022**

**JW KELI, J
OCTOBER 31, 2023**

BETWEEN

RICHARD ODHIAMBO MBOYA CLAIMANT

AND

MINI BAKERIES (N) LIMITED RESPONDENT

JUDGMENT

1. The Claimant following dismissal from employment, filed a Memorandum of claim dated 13th December 2022 and received by Court on 16th December 2022 against the Respondent seeking the following reliefs:-
 - i. A declaration that the Respondent's actions in dismissing the claimant from employment was unlawful and unfair hence, amounts to wrongful dismissal and /or unlawful termination.
 - ii. The respondent be compelled to pay to the claimant sum of Kshs. 2,880,152.50 as particularized at paragraphs 9,41,43,44 and 45 above.
 - iii. Cost of this claim and interest thereon(b) above at present court rates from date of filing suit until payment in full.
2. The Claimant in addition filed his verifying affidavit sworn on the 13th December, 2022, claimant's list of witnesses, claimant's witness statement all of even date of 13th December, 2022. The claimant on the 11th January, 2023 filed claimant's list of documents dated 9th January 2023 together with the bundle of documents. The claimant on 26th January 2023 filed a further list of documents dated 9th January 2023 together with the bundle of documents.
3. The claim was opposed. The Respondent entered appearance through the law firm of Owiti, Otieno & Ragot Advocates by filing memorandum of appearance dated 10th January 2023 and received in court on the 11th January 2023. The respondent filed statement of defence dated 24th January 2023.



The respondent on 16th march 2023 filed list of witnesses dated 13th march 2023, respondent's witness statement by Solomon Kavita dated 14th march 2023 and respondent's list of documents dated 13th march 2023 together with the bundle of documents. The court requested for bound bundle of the respondent's documents. The bundle was filed in court on the 10th august 2023.

4. The claimant on the 21st February 2023 filed reply dated 15th February to the defence.

Claimant's evidence

5. The Claimant's case was heard on the 2nd May 2023 with the claimant testifying on oath as CW in his case. CW adopted his witness statement dated 13th December 2022 as his evidence in chief. CW produced as his evidence documents under list of documents dated 9th January 2023(C- exhibits 1-14) and documents under further list of documents of even date as C- exhibit 15. CW was cross-examined by counsel for the respondent Otieno Monica. CW was the only witness of fact in his case.

Respondent's evidence

6. The Respondent's case was heard on the 25th July 2023 with one of witness of fact namely Solomon Muia Kavita(DW) who testified on oath, adopted his statement dated 14th March 2023 as the respondent's evidence in chief, produced the respondent's documents under list of documents dated 13th march 2023 and produced the documents as respondent's exhibits numbers 1 to 57. The witness was cross-examined by the Claimant's Counsel Mr. Ajulu. Mr. Kavita was the only witness of fact for the respondent.

Claimant's case in summary

7. The Claimant stated that he was initially employed by the Respondent as a Charge Hand Baker from 1/10/2016 earning Kshs. 29,704.00 and rose through the ranks to the Position of Manager 3 as at the time of his dismissal, earning a gross salary of Kshs. 109,250.00. The claimant worked in various positions until he was transferred to Bungoma in September 2021 as a branch manager. He agreed to the transfer and left his family.
8. The claimant stated that he worked without any form of disciplinary action against him. The Claimant stated that he encountered an unethical work environment at his new work station at Bungoma, where integrity was ignored. It was his case that, the supervisors solicited for bribes before hiring casuals to meet the respondent's human resource demand; casual workers were hired based on personal connections and that the supervisors allowed employees to go home with bread every day in exchange of some money and that Bags of Unga normally 50 kg or 25kg were underweight when supplied.
9. The Claimant stated that as the branch manager he received complaints from casual workers daily and he reported the matter to his immediate boss who was the Assistant Operations Manager but no action was taken. He took the initiative and liaised with the watchmen at the gate to undertake a search of employees before they left work and it was noticed that employees were leaving work with loaves of bread. It was his case that when the supervisors heard that he was questioning the issue of workers leaving work with bread, they went on a full sabotage rampage by allowing more breads to be taken by employees and promised to frustrate the claimant whom they claimed was from Nairobi. One of the supervisors called the Regional office to discredit the claimant.
10. That on or about 26.11.2021, on receipt of the call from the alleged supervisor, a stock audit was conducted that indicated a shortfall of Bread worth Kshs. 95,015/-, the claimant stated that on being queried about the shortfall, his response was that he was being sabotaged due to his recent decision



to raise concerns of malpractices within the branch and the shortfall was due to the handing out of bread to the casuals.

11. The claimant maintained that the shortfall was stage managed by supervisors and other senior managers who did not like the Claimant's management style of dealing with malpractices. He states that the issue was referred to the Security personnel for investigation who confirmed that one loaf of bread was given to each employee after work.
12. The claimant stated that he was summoned to the regional office in Kisumu and a recommendation was issued that the shortfall be paid by all employees at the Bungoma branch. That this recommendation was frustrated and the shortfall pinned on the Claimant who had worked in the said station for less than 2 months.
13. The Claimant argued that the security investigation report was forwarded to the Disciplinary Committee and he was invited to the Respondent's disciplinary hearing on 9/12/2021.
14. The claimant stated that after the hearing a decision was communicated to him on the 15th December 2021, seven days after the hearing as per the Respondent's Human Resource Policies 2016, recommending that the shortfall be shared between him and the Assistant operations Manager. He executed a Deduction Form Number 50641 to be deducted Kshs. 47,507 and he was of the opinion that the matter was settled.
15. The Claimant stated that he later on applied for leave which was granted starting from 15th December 2021 to 26th January 2022 which included his untaken leave days.. He states that while on leave he was summoned to the office and given his summary dismissal letter dated 21st December 2021, which intimated that the recommendations of the disciplinary committee for deduction of the shortfall was too lenient. He states that the decision arriving at his summary dismissal failed to consider evidence of witnesses.
16. The claimant states that he was dismissed without being heard as the decision of the panel he faced was not upheld. He states that his dismissal was draconian and instigated by persons he had collided with before. He states that he had only served in the new station for two months and he alone was dismissed despite having reported to his immediate boss of the issue of the one loaf been given to employees by supervisors daily. The Assistant Operations Manager was suspended for two weeks while he was dismissed.
17. The claimant argued that as per Clause c (pg.22)of the Respondent's Human Resource policy, he could either be dismissed or a shortfall recovered from his salary and not both at the same time. He states that his dismissal was an afterthought undertaken after the shortfall sum was recovered from him and thus contravened the Human Resource Policy. The claimant states that no wrongdoing on his part was established on his part and he was therefore unfairly dismissed.
18. The Claimant argues that his summary dismissal was unfair by ignoring the findings of the hearing committee, dismissing him with no reason; subjecting him to double punishment by deducting and summarily dismissing him in contravention with the Respondent's human resource policy; failing to communicate the outcome of the hearing within seven days in contravention with the Respondent's human resource policy, summarily dismissing him against the Recommendations of its own hearing committee ; dismissing him against the weight of evidence and discriminating the claimant.
19. The claimant claims that his house allowance was underpaid throughout his employment; prays for the refund of the amount deducted since he was dismissed, compensation for unfair dismissal and gratuity.



The Respondent's case

20. The Respondent's case is that the Claimant was employed by the Respondent since 29th June 2016. The Respondent states that the Claimant was on or about 18th August 2021 accused of laxity at work over the manner he was conducting his operations. That the Claimant was duly paid his house allowance until his termination on 21st December 2021; and in any event the said claim for house allowance is statute barred.
21. The respondent urges that the Claimant did not curb the vices he alleged were in his station when he was in charge of the said casuals and it had been proved that the claimant was engaged in the said vices which lead to disciplinary action against him and subsequent dismissal. The Respondent urges that the claimant's position obligated him to report the vices he witnessed to the proper authorities , but he failed or neglected to take any action.
22. Th Respondent argues that theft was rampant in the claimant's domain which warrantied an audit. That the Respondent had a right to undertake an audit as it was incurring losses under the management of the Claimant.
23. The Respondent states that due to the persistent theft, the claimant was issued with a show cause letter on 1st December 2021. The Respondent stated that the investigations were based on evidence of losses and not as a set up as alleged by the Claimant.
24. The Respondent states that investigations and the audit was lawful and it was binding on the Claimant. That on 9th December 2021, the Disciplinary finding after the investigation and audit established that the claimant was dishonest as a Branch Manager and his subordinates had lost their faith and trust in him which led the dismissal notice on 15th December 2021 which was lawful and justified.
25. The Respondent submits that the claimant was given sufficient Notice in writing and in a language he understood and accorded all necessary principles of natural justice.
26. The Respondent states that after the disciplinary action, the claimant was not remorseful and continued to engage in the gross acts of negligence and malpractice. He was then dismissed on 21st December 2021. The respondent states that there was justifiable reasons to dismiss the Claimant.
27. The Respondent submits that notice to sue was never served upon it and the Claimant's termination was founded on sufficient grounds and the Claimant is not entitled to the reliefs sought.

Written submissions

28. The parties filed written submissions after the hearing. The claimant's written submissions drawn by Ajulu & Associates were dated 9th August 2023 were received in court on the 10th August, 2023. The Respondent's written submissions drawn by Owiti , Otieno and Ragot Advocates were dated 20th September 2023 and received in court on the 21st September 2023.

Determination

Issues for determination.

29. The Claimant filed a list of issues for determination dated 31st March 2023 titled "The Claimant's and Respondent's List of issues for determination" and filed on even date stating:-
 - i. Whether the Claimant during his employment with the Respondent engaged in continuous gross violation of his terms of employment?



- ii. Whether there was a valid reasons to warrant summary dismissal of the Claimant?
 - iii. Whether the Respondent ought to have abided by the decision of the hearing committee conducted on the 9th December ,2021 and executed on 15th December 2021?
 - iv. Whether the Respondent complied with its own human resource policy 2016 in terminating the Claimant.
 - v. Whether the Claimant continued to engage in gross act of negligence and malpractice after the disciplinary proceedings against him that culminated into a deduction for his salary on 15th December 2021.
 - vi. Whether the Claimant’s summary dismissal was procedurally justified.
 - vii. Whether the Claimant is entitled to the prayers sought in the Memorandum of Claim.
30. In his submissions, the Claimant identified the following issues for determination:-
- a. Whether the termination was unlawful and irregular?
 - b. Reliefs
31. The Respondent on the other hand identified the following issues for determination:-
- a. Whether the Claimant’s summary dismissal was unlawful and unprocedural?
 - b. Whether the Claimant was discriminated against?
 - c. Whether the Claimant is entitled to the reliefs sought?
 - d. Who should bear the costs of this cause?
32. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the question of whether the Claimant was a former employee of the Respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
- a. Whether the termination of employment of the claimant by the respondent was lawful and fair.
 - b. Whether the claimant was entitled to the reliefs sought.

Written Submissions

Issue 1. Whether the termination of employment of the claimant by the respondent was lawful and fair Claimant’s submissions

33. On the validity of the reasons for the termination of the employment, the Claimant submits that there was no reason for his dismissal, as the only reason available was the one put before the panel, before which he appeared before, was heard and a decision for cost recovery made on 17th December 2021.
34. The Claimant submits that as per the Respondent’s’ defence (para. 23) the claimant allegedly after the disciplinary action continued to engage in ‘gross acts of negligence and malpractice and subsequently lost the trust and faith of the fellow co-workers’.



35. The Claimant submits that there was no statement of the further issues of the negligence issued to him or appearing in the dismissal letter and there was no wrong on his part that the Respondent adduced as required under section 45(2) of the *Employment Act* which requires the Employer to prove validity of reasons. He submits that there was no record of further instances of negligence and thus the reason for his termination was not specific or clear. To buttress this point, he relied on the decisions in *Gachubi v Malster International* (Cause E406 of 2020)(202)KEELRC 3822(KLR)(1 August 2022); *Justus Mutabi Ibaji v Kenya Airways Limited* (2018)eKLR; *Walter Ogal Anure v Teachers Service Commission*.
36. The Claimant submits that his dismissal was orchestrated by senior officials of the Respondent whom he had disagreed with before. He submits that that he had reported all malpractices in his station to his immediate boss, the Assistant operations manager and DW confirmed that the claimant was answerable to him and that investigations did not find him culpable.
37. The Claimant submitted that DW had confirmed that warning letters expired within 12 months and the alleged warning letters which the Claimant had not received of 6th March 2019(R-Exh-4), 5th March 2018(R-Exh-6) and 7th December 2017(R-Exh-4) had all expired pursuant to the HR Policy (Pg. 21 of C-Exhb-13).
38. The claimant submits that he was never issued with the final warning letter dated 18th August 2021(R-Exh-4) and as required by the Human Resource Policy(“HR Policy”)(C-Exhb- 13), all communications with the Respondent ought to be signed against. He submitted that since the last warning letter which was the basis for his termination had not been served upon him, a position confirmed by DW, the same offended the HR Policy. The Claimant submitted that the Respondent had no proof that the claimant had signed for the final warning, and if the claimant had refused to sign the same the same was an offence in the HR Policy punishable by subjection to disciplinary proceedings of (Pg. 23 of C-Exhb-13), which the claimant submits never occurred.
39. The claimant submitted that before any action of termination is undertaken, a final warning letter must be issued. He submits that, the said warning of 18th August 2021 was sneaked into his file and thus defective and the whole process a sham devoid of merit.
40. The Claimant submitted that DW confirmed that the hearing having been conducted on 9th December 2021, the decision of the hearing was to be communicated on 17th December 2021. That indeed on 17th December 2021, the cost recovery happened and he signed the recovery form(R-Exh-14) and the dismissal letter came in later on 21st December 2021.
41. The claimant submitted that he signed the deduction form for cost recovery though he did not agree with the committee’s finding and while on his duly accorded leave he was summoned and issued with the summary dismissal letter. He submits that DW alleged the deduction was a surcharge as per the HR Policy, but the claimant submits that the same was one of the penalties available for gross misconduct. (para-C, Pg.22 of (C -Exhb- 13).
42. The Claimant states that two decisions were meted against him, one on 17th December 2021 and the other on 21st December 2021(CX-Exh-1).
43. The Claimant submits that DW confirmed that through the wording of the letter of dismissal ‘considering that you intentionally misconducted yourself, the management considers actions proposed as too lenient and has decided to summarily dismiss you from employment’ two decisions had been made against the claimant with the decision of 21st December 2021 , having been submitted 12 days after the required seven days’ period in the HR Policy.



44. The Claimant submits that he ought to have been invited to a new hearing for the further gross acts of negligence as alleged in the defence at paragraph 23 and if otherwise, it would mean he was punished twice for the same offence which is procedurally unfair.
45. The claimant submits that the Respondent by failing to adhere to its HR policy which guaranteed a fair hearing and procedural justification, it offended Article 41 and 47 of the Constitution of Kenya. To buttress this, point the relied on the decision in Emmanuel Mambo Oduory v One Arc Fund(2020)eKLR.
46. The Claimant submitted that he was discriminated upon as he alone was dismissed. He submits that he was discriminated upon as the Hearing committee had recommended that action be taken against the Assistant Operations manager, Foreman and supervisors. No action was taken against the Foreman and supervisors. He submitted that DW argued that the Assistant Operations manager, had been terminated but produced no document to rebut the claimant's position.
47. The Claimant submits that DW confirmed that his basic salary was Kshs. 95,000 and the taxable sum of Kshs. 109,250 against the respondent contention that his basic salary was Kshs. 76,000. The Claimant's submissions submit that with the claimant having worked for more than 5 years he was entitled to two months' salary in lieu of notice if he had not been summarily dismissed.

Respondent's submissions

48. The Respondent submits that the claimant had on previous occasions been warned (R-Exhb-2, R-Exhb-3, R-Exhb-4, , R-Exhb-5, R-Exhb-6, R-Exhb-7, R-Exhb-8, R-Exhb-9 and R-Exhb-16) in contrast to his allegation that he had not received any prior warning from the respondent. The respondent submitted that due to the Claimant's action they had lost a client-the Kenya High School. (R-Exhb-10).
49. The Claimant submits that under section 44 of the Employment Act an employee can be dismissed summarily with less notice than he is entitled to under statute or contract if his conduct breaches the terms of contract and in particular "where 'a).an employee without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work" and "c) an employee wilfully neglects to perform any work which it was his duty to perform , 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."
50. The respondent Submits that the Claimant having been transferred to Bungoma, his new station was flagged for malpractice by the regional manager and an audit was conducted on 20th November 2021, which showed a short fall of Kshs. 95,015/- in polybags and bread. The Respondent states that this showed a case of theft of company property.
51. The Claimant submits that as relating to Section 43 of the Employment Act which requires an employer to prove that there existed reasonable grounds at the time of terminating an employee, that the Employer believed existed. The Respondent submits that the Claimant willful gross misconduct and violation of company rules by concealing shortfalls was an aim of defrauding the company and exposing it to grave losses related to his conduct and capacity and hence the reasons of his termination were valid and fair for termination under Section 45 of the Employment Act.



52. In relation to procedural fairness under Section 41 of the *Employment Act*. The Respondent submits that under the *Halsbury Laws of England Judicial Review* (Volume 61 (2020) 5th Edition) Para.639, the position not to be condemned unheard is provided thus:
- ‘The rule that no person is to be condemned unless the person has been given prior notice of the allegations against him and a fair opportunity to be heard is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.’
53. The Respondent submits that the Claimant was issued with the show cause letter (R-Exhb-11) and the charges in the show cause letter were explained to the claimant in the presence of his fellow employee and he was given opportunity to attend the hearing with two of his witnesses, a position he confirmed during hearing. The claimant responded to the show cause letter (R-Exhb-12) and disciplinary proceedings hearing occurred on 9th December 2021 as opposed to 8th December 2021 indicated in the show cause letter.
54. The Respondent submits that the claimant appeared before the disciplinary committee and it was confirmed that he had failed to report the malpractice in his station after his juniors informed him (CHBs and the Foremen) and the decision of the hearing was that he be surcharged as per Page 26 of the HR Policy and summarily dismissed.
55. The Respondent submitted that the claimant did not prove the issue of sabotage and none of his witnesses proved the same. The Respondent submitted that on the issue of warning notices, the Respondent printed three notices with two issued to the employee to sign and return and no notice could be in the employee file having not been issued, he submitted that employees could sometime not return their signed notice , but the employees had access to their files and knew of any notices against them. The respondent submits that only one decision was issued against the Claimant being the surcharge and his summary dismissal(R-Exhb-13).
56. The Respondent submits that the summary dismissal was issued later than 7 days because the proceedings having been conducted in Bungoma, it took longer to transmit documents to headquarters in Nairobi for preparation of dismissal letter by the overall manager. The Respondent submits that the dismissal letter did not introduce new grounds but the same was based on the grounds on the show cause letter. The respondent therefore submits it complied with section 41 of the *Employment Act*, Article 50(1) and 47(1) and (2) of the *Constitution* and the claimant's claim that he was not heard was untenable. The Respondent relied on the decisions in *Anthony Mkala Chitavi Vs Malindi Water & Sewerage Co. Ltd* , Industrial Court Cause No. 66 of 2012 and *Evans Kamadi Misango vs Barclays Bank of Kenya Limited* (2015)eKLR).
57. The Respondent submits that the Claimant was not discriminated upon as the Assistant Operations Manager, the immediate supervisor of the claimant was summarily dismissed. That the Claimant did not adduce evidence under section 108 of the *Evidence Act* and only alleged that said Supervisor had only been suspended. The Respondent submits it is not enough to allege a particular fact without proving it and thus it was not sufficient to only plead discrimination without tendering proof. To assert this point the respondent relied on decision in *Samson Gwer & 5 others vs Kenya Medical research Institute & 3 others*(2020) eKLR .
58. The Respondent submits that the Claimant having been fairly terminated, he was not entitled to compensation. It submits that the Claimant was not entitled to gratuity as the same was not provided in



his contract and the pension scheme contributions had been remitted to him. Therefore the Claimant cannot benefit double and to buttress this assertion it relied on the Court Appeal decision in *Pathfinder international Kenya Limited Vs Stephen Ndegwa Mwangi* (2019) eKLR; where the court stated that Gratuity is a payment by an employer in appreciation for service available in a contract or as per a CBA and it is not available in the *Employment Act*.

59. The respondent submits that the Claimant's salary was Kshs. 95,000(R-Exhb-33,34 & 35) and that he had taken all his leave days (R-Exhb-18 – 32). The Respondent further urged that under its pension scheme, the claimant had received his remittances to the pension (R-Exhb- 36, 37 & 38).
60. The Respondent submits that the Claimant was not entitled to a claim of house allowance as the same is time barred as having discovered he was not paid a house allowance from 2018, he did not claim and in any event the Claimant was housed by the Respondent. That the claimant was not entitled to notice pay as he was summarily dismissed and all is other due and benefits had been settled (R-Exhb-17, 39). That for the claim for unpaid leave, the Claimant failed to state the days he was entitled to leave and the Respondent states he had taken all his days (R-Exh 18-32).
61. The Respondent submits that the costs follow the event as enumerated in *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another* (2016) eKLR, where the successful party gets the costs.

Decision

The relevant law

62. Section 43 of the *Employment Act*, 2007 provides that:
 - “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
63. Section 45 (2) of the *Act* provides that:
 - (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason -
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”
 64. The applicable test on whether or not the termination of employment was fair or not, in my opinion is that of a reasonable employer as enunciated by Lord Denning in British *Leland UK LTD v Swift* (1981) IRLR 91 where the reasonableness test was defined to wit:- ‘ the correct test is: ‘ was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him , then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair..”



Decision On Substantive Fairness

65. The Show cause Letter (R-Exhb-11) stated that after the Audit of 26th November 2021, the claimant had been flagged for gross negligence for having failed to curb the shortfall amounting to Kshs. 95,015/- arising from bread and polybag theft. The show cause letter indicated that loss was due to the suspected theft of 2,233.25 Loaves, loss of polybags cumulatively 3790 pieces with the 400g white polybags of (pf x 45) having a 2348 piece variation. It further outlined that loadings for each day were not invoiced or supported by STNs. The Show cause letter also indicated that the claimant failed to ensure compliance with company procedures and allowed underweight loaves of bread to be sold.
66. The Claimant responded to the show cause letter (R-Exhb-12) stating that there was sabotage in the production line and that after the audit, the alleged shortfall of the polybags was no longer there as the stock take during handover showed that there was an excess of 3600 polybags which showed that the same had been hidden before the audit and returned after the audit to sabotage the claimant's employment.
67. The Respondent's Disciplinary Committee finding(R-Exh-55) pointed that the Claimant had been negligent; had failed to record loaves of bread loaded; poor recording of yield by indicating a yield that had not been met and bread damages having not been recorded properly.
68. The same committee acknowledged that there was a possibility of sabotage from the supervision team through the production staff who were unhappy that a certain foreman who was transferred to the branch and yet they wanted a promotion and they were unhappy with the branch Manager.
69. During cross-examination DW testified that there was no proof of any sabotage produced by the claimant, yet its own disciplinary committee had acknowledged that there was possibility of sabotage in the claimant's work station.
70. The show cause letter indicated that the Committee would prepare and submit its recommendations for the management's advise on the decision made. The recommendations by the committee(R-Exh-55) were made on the same date, recommending that stern action be accorded to the CHB, Foreman , manager and the Operations Manager for negligence in their conduct.
71. By virtue of clause (i) under Procedure for Handling Gross Misconduct of the HR Policy(pg.- 23 of C-Exhb-13) the decision of the panel was to be communicated to the employee within 7 days from the date of the hearing. The Respondent's produced the Disciplinary Action Requisition Request(R-Exhb-13) which indicated the decision of the disciplinary panel as being "termination and recovery of Kshs. 47,507 being half of the loss incurred.
72. The Respondent's witness told the court decision of the Panel was to be communicated to the employee by the management. The Disciplinary Committee duly send the Disciplinary requisition request setting out its finding and the same was acknowledged by the claimant's Operations Manager on 9th December 2021 and the OP. Director/Reg.OP Manager on 14th December 2021. It was evident to the court that Claimant was not aware of the content of the disciplinary Committee's findings which were said to have been forwarded to the Management as at time he signed the salary deduction form.
73. As per its own HR Policy, on the seventh day when the decision of the panel was to be communicated to the Claimant, the Respondent made the Claimant sign the Deduction Form, which as per its policy was a decision on the seventh day after the disciplinary hearing of 9th December 2021. Nothing prevented the Respondent on the same day it had communicated the partial decision of the Panel to notify the claimant of his dismissal.



74. The Respondent had found that the Claimant had negligently failed to prevent the loss of bread and acted to conceal its occurrence without informing his superiors. The disciplinary committee had also noted the possibility of sabotage in the working of the claimant but that did not prevent the Claimant from reporting the incidences of sabotage and malpractice to the respondent and he did not provide proof that he had indeed reported the malpractices.
75. However, through its conduct the Respondent asked the Claimant to sign the Deduction form on the date when a decision was to be passed. The HR Policy which is a document of the Respondent provided that after investigations of a gross misconduct; a recovery of cost was one of the actions available in an instance of gross misconduct.
76. The allegation by the Respondent that the decision of the panel had recommended both termination and a surcharge(R-Exh-13) at the same time could not be verified by the claimant at the time of his signing the deduction form. The only decision made for the gross misconduct as at the time when the decision ought to have been issued was the recovery of the amount from the Claimant. DW argued that Recovery of costs and Surcharge were different actions arguing that the surcharge was only payable through terminal dues.
77. A Surcharge in the HR Policy (Pg.26) provided that the same was payable if an employee among others was found to have caused loss of company property over which the employee has personal charge. The Respondent's argued that the Claimant had failed to stop the loss of the company's stock of bread and polybags, which had led to a loss of Kshs. 95,015. The panel recommended that the same amount be recovered from the Claimant and the Assistant Operations Manager and the same was done.
78. The Respondent argued that recovery of costs had not happened but the same was a surcharge. The *Black's law dictionary*, 10th Edition, Byran A. Garner defines surcharge as "(of a Court) to impose a fine on a fiduciary for breach of duty" The claimant having being in a position of control had not exercised the necessary diligence required of a manager and was fined to that extend by recovery of Kshs. 47,507.
79. The provisions relating to surcharge under the HR Policy state that the surcharge would be recovered from the employee either in the employee's salary in suitable installments or from terminal dues. The Deduction form indicated that the deduction was payment for bread recovery payable in one installment from the December Salary and not from terminal dues. The *Black's Law Dictionary*(supra) defines "Recovery" as "The obtaining or restoration of something lost or taken away". The Bread could not be restored in its physical form but the same could only be restored through recovery of the cost of the bread, either part of the full costs or half and in the instant case the same had been part of the cost.
80. The dismissal notice was issued on 21st December 2021, after the deduction had been effected. As to why both decisions had not been communicated to the Claimant on the same day, considering that the Respondent states that the Panel had recommended both termination and surcharge, was not justified. The court took notice of the defense statement (para. 23) that the claimant allegedly after the disciplinary action continued to engage in 'gross acts of negligence and malpractice and subsequently lost the trust and faith of the fellow co-workers'. No evidence of the said infractions was notified to the claimant or produced in court.
81. The court was of the opinion considering the claimant had only been at Bungoma for 2 months and due to the allegations under paragraph 23 of the defence (supra) the subsequent act of dismissal was unfounded and unfair. The decision for dismissal was made after another action had been taken against the Claimant within the allowed timelines required by the Respondent's HR Policy. A reasonable employer could have rendered its decision either concurrently dismissing an employee and surcharging



them at the same time or surcharging them only. The action by the Respondent to issue punishment in piecemeal was against its operational requirements.

82. Contrary to the assertion by the Respondent that the delay to issue the notice of dismissal did not prejudice the Claimant the same is untrue as the Claimant legitimately expected that the surcharge/recovery of costs (a rose by any other number smells as a rose) as per the HR Policy had settled his disciplinary proceedings on the seventh day. The Respondent in the summary dismissal (R-Exhb-15) indicated that “the management considers action proposed as too lenient and has decided to summarily dismiss you...”; this expression by the respondent indicated that an earlier different decision had already been issued. Further this statement that the ‘management considers the action proposed as too lenient’ created doubt on the mind of the court as to whether indeed the disciplinary committee had made two recommendations being termination and surcharge. The doubt is founded on the ground that the proceedings were recorded by the respondent and not availed to the claimant before the decisions at the very least at point of the recovery of the alleged lost monies. The Court holds that the Respondent’s dismissal decision was an afterthought arrived at after further considerations had been considered to add to the punishment of surcharging and as admitted under paragraph 23 of the defence.
83. It is my opinion that at the disciplinary hearing there existed justifiable reasons that could have led to the claimant’s disciplinary action. The respondent chose the path to recover costs or surcharge as it prefers. Later outside its policy timelines it imposed another severe sanction of dismissal without justification. The allegation under paragraph 23 of the defence were not helpful to the respondent’s case but amounted to admission of lack of reason for the dismissal. The dismissal process was unfair. It is my opinion that the non-compliance with the procedures of the employer under the manual and issuance of two decisions at different times amounted to unfairness.

Decision On Procedural Fairness

84. Section 41 of the [Employment Act](#) which provides as follows:-
- “41(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
85. The HR Policy (pg.20-22) “warning Procedure” required that where an oral warning was issued to an employee ; a note that the oral warning had been given be placed in the employee’s file. As for written warning, which was for serious offences, it was required that where termination was not the immediate action, that the employee be notified by their supervisor in writing; the warning to specify the nature of offence and possible consequence for failure to remedy offence; details of the complainant for poor performance instances; the background of the offence and the written warning be placed in the file after the employee mandatorily acknowledged it in writing.
86. The Written warnings’ effect was to lapse in 12 months although the same were to be retained in the employees’ file. If an employee who had received, the first and second warning and not changed their conduct, and was issued with the third warning which was the final warning and they committed an



- offence within 12 months of issue of the said last warning , then they would be subjected to disciplinary hearing and thereafter summary dismissal.
87. The Claimant argued that DW had confirmed that the warning letters expired within 12 months. The Claimant alleged that the warning letters of 6th March 2019(R-Exh-4), 5th March 2018(R-Exh-6) and 7th December 2017(R-Exh-4) had all expired pursuant to the HR Policy (Pg. 21 of C-Exhb-13). The Claimant submitted that he was never issued with the final warning letter dated 18th August 2021(R-Exhb-4) and as required by the Human Resource Policy(“HR Policy”)(C-Exhb- 13), all communications with the Respondent ought to be signed against.
 88. The claimant submitted that since the last warning letter which was the basis for his termination had not been served upon him, a position confirmed by DW, who stated that even though the warning had not been issued to the employee the same was available in the file for the employee to peruse.
 89. The Claimant argues that failure to give him the said notice of 18th August 2021 offended the HR Policy, and no action on summary dismissal could be undertaken unless he had received the said warning which had been issued within 12 months. He submitted that the same had been sneaked into his file. During hearing the Claimant confirmed that he had responded to previous notices through the letters of 25th February 2018 and 28th November 2017 even though he stated that he no disciplinary action had been taken against him.
 90. On the issue of the warnings, the position as per the HR Policy was that the notices must be signed by an employee, contain their name and be filed in their files. The letters dated 5th March 2018(R-Exh-6); 7th December 2017(R-Exh-4) and 18th August 2021(R-Exh-10) were never signed by the Claimant as per the HR Policy. R-Exhb-6 and R-Exhb-4 had already expired after 12 months provided in the HR Policy and within nine months as provided in Clause 5(c) of the CBA(R-Exhb-38) and had no bearing in the claimant’s disciplinary proceedings.
 91. The Notice- R-Exh-10 which had been issued on 18th August 2021 was not signed by the Claimant and he had no recollection that the same had been filed in his file as he was not notified to accept it before it was placed in the file. The Notice did not indicate whether the same had been issued orally either. This however, did not mean that the claimant could not be summarily dismissed. On Page 25 of the HR Policy, in the case of summary dismissal, the HR policy gave the Respondent the power to summarily dismiss an employee in the case of gross wilful misconduct without issuing either the first, second or final warning. Therefore, irrespective of the Warning of 18th August 2021 having not been signed by the Claimant, or he having not been notified about it, a decision to summarily dismiss an employee could be made in the absence of any such notices.
 92. What the court now must consider is whether the decision to summarily dismiss was procedurally arrived at. It was not disputed that the Claimant attended the disciplinary hearing and was accompanied by his chosen representative. The disciplinary procedures of the respondent were set out under the HR Policy and where a set procedure is set for handling disputes in an organisation, the same must be followed.
 93. Under the HR Policy (pg. 22) the “procedure for handling gross misconduct” required that where there was a report of any incident amounting to gross misconduct, investigations be undertaken and subsequently a show cause letter be issued to the employee to respond. The Employee was to be given at least 3 days’ notice before the hearing before the disciplinary committee; where the employee was allowed to be accompanied by another employee. The decision of the panel in the term of the Policy ‘should be communicated to the employee within 7 days from the date of the hearing’.



94. The claimant testified that he was served with the show cause letter on 1st December 2021 and responded on 4th December 2021, within the four days that the show cause letter required him to. The Hearing as per the Show cause letter was to be held on 8th December 2021, but DW testified that the same was held on 9th December 2021 which did not prejudice the Claimant. The Claimant confirmed that he attended the disciplinary hearing and was accompanied by his witnesses.
95. The issue raised by the Claimant related to the time when the decision of the panel was made. The Claimant argued that the decision was to be made within seven days as per the HR policy. That I agree. The Respondent on its part through DW argued that the decision had been made twelve days after the Hearing of 9th December 2021; owing to the delay taken in forwarding documents to its headquarters to the Overall manager to make a decision on the summary dismissal.
96. The HR Policy uses the word “should” when stating that “Decision of the panel should be communicated to the employee within 7 days from the date of the hearing.” The word “should” is defined in the *Black’s Law Dictionary*(supra) under the definition of the word “shall” as ‘this is the mandatory sense that drafters typically intend and that courts typically uphold’ 2. “should (as often interpreted by courts).”. The use of the word ‘should’ denotes that it was mandatory for the Respondent to give its decision after the hearing of 9th December 2021 within seven days i.e. 17th December 2021.
97. DW confirmed that the decision of dismissal made on 21st December 2021 was against the policy provisions and his argument that logistics caused delays of transmitting communication from Bungoma to Nairobi, works in the favour of the Claimant. The contra preferentum rule applicable in one sided contracts like employment contracts and employment manuals as defined in the *Black’s Law Dictionary*(supra) provides that interpretation of documents be construed unfavorably to the drafter. In the instant case, the Respondent having failed to issue the decision within the timelines in its own HR Policy, could not escape the consequence of non-compliance with the timelines set out therein.
98. The court further under substantive fairness found that the procedure leading to dismissal was unfair for failure to communicate the decision of termination at time of surcharge and that the subsequent decision of dismissal was afterthought and unjustified.
99. The court holds that there was no procedural fairness in the dismissal of the claimant from service.

Issue 2). Whether the claimant was entitled to the reliefs sought.

100. The court having determined the dismissal was unfair, the next issue to determine was whether the claimant was entitled to the other reliefs sought.
101. The Claimant sought various reliefs that the court proceeds to consider under the various items. The claimant pleaded that the Respondent be compelled to pay to the claimant sum of Kshs. 2,880,152.50 as particularized at paragraphs 9,41,43,44 and 45 above.

i. Paragraph 9- underpayment of house allowance (1/3 x 95,000)-14,000 x 12 per month for 5 years Kshs. 1,030,20.00

102. During hearing the Claimant alleged that he noticed that he had been underpaid his house allowance since 2018.
103. The Respondent argued that the Claimant claim for housing allowance is time barred and the claimant never raised the same. The Respondent argued that the Claimant was been housed by the respondent hence not entitled to this claim.



104. The claimant's contract of employment (C-Exhb-2) provided at Paragraph 6 that the Claimant's gross emolument for the position of a Charge Hand Baker was inclusive of house allowance. The said salary of Kshs. 29,704 covered the period of 1st October 2016 to 31st April 2017 when the claimant was granted a six percent(6%) salary increment to earn Kshs. 31,497, which covered the period of 1st May 2017 to 31st June 2018. He was granted a further five percent (5%) increment to earn Kshs. 32,598 for the period of 1st May 2018 to 31st October 2018. (R-Exhb-46)
105. The claimant was promoted to a new position of Bakery Manager II(R-Exhb-28)effective 1st November 2018; where he was paid a basic salary of Kshs. 70,000 and a 15% house allowance of Kshs. 10,500/= until 31st June 2021(C-Exhb- 7-8) when he was promoted to a Bakery Manager III (R-Exhb-45) from 1st July 2021 earning a basic salary of Kshs. 95,000 and a 15% house allowance of Kshs. 14,250/=(C-Exhb-6) until 23rd December 2021 at termination. The Respondent produced the November payslip of the claimant at page 43 of its documents which reads Kshs. 95000 as basic pay and Kshs, 14,250 as housing allowance total salary stated as Kshs. 109,250/-. The court holds that the last gross salary of the claimant was Kshs. 109,250/-.
106. From this analysis, there was no instance of an underpayment as the contract as a Charge Hand Baker was a consolidated salary from 2016 to October 2018. On promotion the claimant was paid the housing allowance at 15%. In Kenya House allowance is based on a minimum of 15% of the basic salary, under the General Wages Order. The respondent complied. The claim for underpaid house allowance fails.

ii. Paragraph 41 - the Claimant claimed that his immediate boss was suspended for only two weeks while was treated differently;

107. The Claimant did not show proof that his immediate boss had only been suspended. The Claimant submitted that since the records as to whether his immediate boss had been suspended were in the custody of the Respondent that the Respondent ought to have produced it.
108. When pleading discrimination, the claimant ought to have verified that indeed that only suspension had been meted on his former immediate boss. DW during hearing stated that, the Claimant's immediate boss had been dismissed and to require the Respondent to produce its employees records which did not relate to the Claimant would amount to a fishing expedition.
109. The Court's opinion is that the nature of punishment for each employee depends with their contractual obligations and the same punishment cannot be expected to be imposed across board.
110. The court holds that the claim for discrimination was not proven and fails.

iii. Paragraph 43 - He stated that the decision to dismiss him having been made 6 days after recovery of costs, subjected him to double suffering;

111. The employer is bound by its human resources procedures and practices. The court found that the deduction was done within the 7 days as per the manual and that was one of the sanctions under the manual. The deduction was done on the salary and not terminal dues. The court agreed with the claimant that he had legitimate expectation that this was the only sanction having not been informed otherwise. The agreed that the decisions led to double suffering of the claimant.



iv. Paragraph 44- the investigations did not locate any wrong doing on his part and thus he was dismissed without a valid reason and thus unfairly summarily dismissed.

112. The court already held that the dismissal was unfair for non compliance with the respondent's human resources manual and further having been effected days after another sanction of recovery of costs from the claimant's salary. The court found the claimant did not appeal the recovery of the costs thus cannot raise issue of having not been on any wrong at this stage.

v. Paragraph 45- refund of the Kshs. 47,507. 50 deducted as a surcharge

113. The Claimant was found by the disciplinary committee to have had failed to undertake his duties as a managing Director as required and a loss of Kshs. 95, 015/- emanating from a shortfall in bread and polybags had happened under the Claimant management; the surcharge of half the amount of Kshs. 47,507.50 was well in line with the Respondent's right to recover costs emanating from the loss its property under the Claimant's management. The claimant did not appeal against that decision. The court finds he is not entitled to the refund as the claim is an afterthought.

vi. Paragraph 47- 12 months maximum compensation = (Kshs. 109,250 x 12= Kshs. 1,311,000/=..

114. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. (See *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR) where the court held: "In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others."

115. From the hearing and as held herein, the Claimant was the Managing director of the respondent's Bungoma station, and in this position he was in a position to communicate to his superiors the existence of malpractices as he had noted regarding the theft or issuance of bread by supervisors.

116. The Claimant did not adduce any evidence that he had informed his superiors nor had he taken any step to curb the vice. The Claimant testified that he is a businessman and the import of this assertion is that he is self-employed and earning from his business and had not alleged that he has tried to seek alternative employment and failed. The claimant had been found to have been negligent in his duties and surcharged and did not appeal against the surcharge for the alleged loss. The court taking into account the foregoing finds an award of six months' gross salary as per last pay slip (C-exhb 6) was sufficient compensation for the unfair dismissal thus :-Kshs.109,250 x 6= Kshs. 655,500/-

vii. Paragraph 48. - 5 Year Gratuity = 273,125.00 (1/2 x 109,250 x5)

117. The Claimant during hearing confirmed that there was no provision for Gratuity in his contract or in the CBA. The Decision in *Pathfinder international Kenya Limited Vs Stephen Ndegwa Mwangi*(2019) eKLR quoted by the Respondent; the court rightly held that Gratuity is a payment by an employer in appreciation for service available in a contract or as per a CBA and that it is not available in the *Employment Act*. The claim for gratuity is unjustified and is disallowed.



viii. Paragraph 49. 2 months in lieu of Notice as per clause c of pg. 22 of HR policy- Kshs. 218,500(109, 250 x 2)

118. Having found that the procedure leading to the Claimant's dismissal was unfair, as per Clause 3(i) and (ii) of CBA (R-Exhb-38) an employee who had worked for five years but for less than ten years was entitled to two months' salary in lieu of notice as the time of his dismissal, the Claimant had worked for 5 years 2 months from 1st October 2016 to 21st December 2021.
119. During hearing, the Claimant confirmed that his gross salary was Kshs. 109,250 being Ksh.95000 as basic salary plus 15% house allowance(c-exb 6). The notice pay of 2 months was confirmed by the respondent. Having found the dismissal was unfair notice pay for two months is awarded:- Kshs. 109,250x 2 (months) total award of notice pay Kshs. 218,500/-

x. Costs of this claim and interest thereon (b) above at present court rates from the date of filing suit until payment in full.

120. The Respondent argued that no demand or Intention to sue was served. The Claimant in the reply to defence asserted that a demand was issued and replied to by the Respondent. He submitted (C-Exh-14) as the demand letter. The respondent did not object to the same. Costs follow the event hence in favour of the claimant.
121. Costs of the case are awarded to the Claimant.
122. Interest is awarded at court rate from date of judgment until payment in full.

Issue of Unpaid Leave

123. During hearing, the Claimant argued that he had 26 untaken leave days, the Respondent argued that the Claimant had taken all his leave days for the year 2021. This claim was not pleaded in the memorandum of claim. Parties are bound by their pleadings. The claim for unpaid leave having not been pleaded in the memorandum of claim fails.

Conclusion and disposition

124. The court holds the dismissal of the claimant from employment by the Respondent was unfair. The court enters judgment for the Claimant against the Respondent as follows:-
- a. Notice pay for two months in lieu awarded for Kshs. 218,500/- .
 - b. Compensation for unfair dismissal equivalent of 6 months gross salary total awarded for Kshs. 655,500/- .
(awards a and b total Kshs 874,000/- payable subject to statutory deduction of PAYE only)
 - c. The respondent to pay costs of the suit to the claimant.
 - d. Interest awarded at court rates on the award amount and costs from date of judgment until payment in full.
125. Stay of 30 days.
126. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 31ST DAY OF OCTOBER 2023.



JEMIMAH KELI

JUDGE

In The Presence Of:-

Court Assistant: - Brenda Wesonga

For Claimant:- Ajulu

For Respondent:- Otieno Monica

