



Mwandikwa v Kenya Civil Aviation Authority & another (Employment and Labour Relations Cause 813 of 2015) [2023] KEELRC 2970 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2970 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 813 OF 2015**

**K OCHARO, J
OCTOBER 31, 2023**

BETWEEN

ANTHONY MUTIA MWANDIKWA CLAIMANT

AND

KENYA CIVIL AVIATION AUTHORITY 1ST RESPONDENT

**JOSEPH KIPTOO CHEBUNGEI ACTING GENERAL DIRECTOR, KENYA
CIVIL AVIATION AUTHORITY 2ND RESPONDENT**

JUDGMENT

Introduction

1. Through a letter dated 25th April 2005, the Respondent offered to employ the Claimant as its Chief Public Relations Officer. The Claimant accepted the offer on the 27th April 2005. After a decade of service, the employment relationship between him and the Respondent encountered headwinds. His contract of service was terminated on the 16th April 2015. Holding the termination as unlawful, unfair, and one that affronted constitutional rights, he sued the Respondent herein through a Memorandum of Claim dated the 14th May 2015, against the Respondents seeking the following reliefs;
 - a. A declaration that the purported termination flies in the face of the *Constitution* of Kenya 2010, particularly Article 41 and 47 thereof and that the Claimant is entitled to redress.
 - b. An order directing the Respondents to unconditionally reinstate the Claimant to his employment and former position with the 1st Respondent without loss of benefits and seniority and any conditionality.
 - c. In the alternative and without prejudice to the foregoing the 1st Respondent be ordered to fully compensate the Claimant for the unfair, unlawful and the wrongful termination of employment services of the Claimant with all the attendant benefits.



- d. General damages.
 - e. Costs of the Claim and interest on (c) and (d) above.
 - f. Any other or further claim that the court may deem fit to grant
2. The Statement of the Claim was filed contemporaneously with the Claimant's witness statement dated 12th November 2021 and a list of documents dated the 14th May 2015 under which the documents that the Claimant intended to place reliance as his documentary evidence, were filed.
 3. Upon being served with the summons to enter appearance, the Respondents entered appearance and filed their Statement of response on the 30th July 2015. In it the Respondents denied the Claimant's case and his entitlement to the reliefs sought.
 4. At the close of the pleadings, the matter got destined for hearing inter-partes on merit. The Claimant's case was heard on the 28th March 2022 and 17th May 2022 while the Respondent's case was heard on the 12th July 2022.
 5. At the hearing of the parties' respective cases, the parties urged this Court to adopt their witness statements and their documents as their evidence and the Court so adopted.
 6. At the full hearing of the parties' respective cases, this court directed the filing of the written submissions. The direction was obliged, this judgment is thus with the benefit of consideration of the submissions filed.

The Claimant's case

7. It was the Claimant's case that he joined the employment of the 1st Respondent [Kenya Civil Aviation Authority] as Chief Public Relations Officer in May 2005. This followed an offer of employment by the Respondent, an offer which was embodied in the letter dated 25th April 2005. He accepted the offer. He was subsequently confirmed into employment under a letter dated 16th February, 2006. At all material times he earned a salary of Kshs. 430,384.
8. The Claimant contended at joining the Respondent he became the defacto Head of the Department. During this period as the Head of the Department, he achieved a host of milestone; the department grew from two officers to four; he developed the KCAA's Travel Policy; he contributed towards a successful hosting of Africa and Indian Ocean Planning & Implementation Regional Group [APRIG 15] Conference in Nairobi; and he the KCAA's Concept Paper for the Construction 'Aviation House KCAA'S current head office.
9. In December 2007, he was appointed the Acting Manager, Corporate Communication & Personal Assistant to the Director. He was later appointed to this position after a competitive recruitment process and confirmed. He undertook diligently and was able to achieve a lot.
10. The Claimant averred that after about 8 months as the Manager Corporate Communications, Mr Joseph Kiptoo Chebungei was recruited as the Manager Finance in August 2008 and that during his tenure, the Claimant and the said Joseph Kiptoo had some of differing opinions on various issues. Largely the differences stemmed from his lack of understanding of how the Aviation Industry and Department operated. Mr Joseph Kiptoo after a short while resigned and later returned to the 1st Respondent as the Director Corporate services in January 2012 becoming his immediate supervisor in the new structure.



11. The Claimant further contended that during his tenure as the immediate supervisor, Mr Joseph did not hide the fact that he did not like him. He even declared that there were some Managers in his Directorate who he planned to fire and the Claimant was one of them. To ensure the Claimant failed and to sabotage him, he would often hide information from him and delay approval of his requests.
12. It was the Claimant's case that the harassment from Mr Kiptoo moved a notch higher when in 2014 he was appointed the Acting Director General. His appointment as the Acting Director General emboldened him, with him constantly bullying the Claimant so that he could resign. This caused the Claimant a lot of stress and his health deteriorated greatly. Furthermore, sometime in September 2014, the 2nd Respondent called him and asked to resign or he would be forced to leave employment.
13. The Claimant averred that on the 6th October 2014 he was given a memorandum dated 26th September 2014 by the Acting Director General in which he was informed that he was to appear before the Board of Directors Finance & Human Capital Committee [FHCC] on the 16th October 2014 to show cause why appropriate disciplinary action should not be taken against him for the unsatisfactory performance, noted errors, commissions and negligence.
14. It was the Claimant's position that the accusations listed in the letter were based on the memos that the Claimant had received since joining the 1st Respondent as the Chief Public Relations Officer in 2005 when Mr. Joseph Kiptoo was not in the KCAA's service. The most recent of accusation was encompassed in the memo dated 27th May 2013. Mr. Kiptoo was reviving the issue therein over a year since he had replied to it. The said memos had been dealt with and concluded and that is why he was confirmed to the position.
15. The Claimant averred that when he appeared before the Finance & Human Capital Committee, he stated the successes of the department under his leadership and also articulated the challenges such as the lack of staff and resources that the department was facing. He explained his good performance and fortified the explanation with his Performance Appraisals and the appreciation letters KCAA received due to his work. The Performance Appraisals reflected his scores as 62% in 2011-2012, 63.76% in 2012-2013 and 72% in 2013- 2014. Furthermore, he also detailed how his department had been listed as a top performer by both internal and external customers in the Customer Satisfaction Survey in 2014 and 2015. All this was ignored as the Committee had already made up its mind and was just going through the motions.
16. The Claimant stated that after the Finance & Human Committee meeting, he received a memo dated 20th November 2014 from Mr Joseph Kiptoo in which it was stated that his unsatisfactory performance had been sufficiently demonstrated and that the Board had resolved that he be given three months to demonstrate improvement.
17. It was the Claimant's further contention that the three months given did not seem to be a Performance Improvement Plan [P.I.P] contemplated in the HR Manual or as per the HR best practice. No meeting was ever held to draw up any P.I.P targets nor were any of his concerns of lack of staff and facilitation taken into consideration. Furthermore, the Human Resources department was not involved in giving a professional opinion.
18. The Claimant averred that on the afternoon of 25th March 2015, he was requested by Mr. Joseph Kiptoo to urgently furnish him within two hours with a report of the Corporate Communications Department's activities from December 2014 to February 2015 for his presentation to the Board, the following day, despite submitting the said activities as requested, he was surprised that the KCAA Board was going to deliberate on routine Board matters against the State Corporate Act which required that all board matters be undertaken at a State Corporation Head Office.



19. It was the Claimant's case that on the 26th March 2015, he met one Mr. Chebungei Kiptoo at the Sopa Lodge in Naivasha who handed him an envelope with a memo dated 24th March 2015 which informed him that the Finance & Human Capital Committee had reviewed his three months report and found the activities therein were more of routine tasks that did not meet the strategic expectation to turn around the Corporate Communications function and therefore his performance was unsatisfactory. The letter was handed to him at the hotel's carpark. He this to be unprofessional and an act which was against the laid down procedure for delivery of such letters.
20. The Claimant averred that he replied to the said memo with a detailed explanation dated 2nd April 2015 of what the Corporate Communication department [CCD] role and duties were and why the routine activities were part of what a PR/Corporate Communications department does. Further, those activities were the foundation and the pillars that the department was using to achieve the Authority's Corporate Goal No. 7 was outlined in the KCAA Strategic Plan and thus the activities were strategic themselves.
21. The Claimant averred that despite various memos to the Respondent on the lack of adequate staff and the need to recruit, the Respondents were never interested in completing the recruitment process for the Corporate Communications Department and no reasons whatsoever were given. Unlike corporate department, other departments in the 1st Respondent's Authority such as the Audit department, the Finance Department, Air-worthiness and the Flight operation had adequate staff and whenever there were vacant positions, the position were quickly filled.
22. The Claimant further averred that his performance for 2012-2013 and 2013-2014 had continued to improve from 63% to 72%, an improvement of 14% and therefore under-performance would logically not be a valid reason for his termination. Furthermore, the failure to improve on work performance was a minor offence which does not warrant dismissal.
23. It was the Claimant's position that it was a best practice requirement in Performance Management that when an officer is found to be underperforming, the officer's supervisor is expected to hold discussions with the officer to clearly outline the areas of underperformance, state the reasons and the challenges for the under-performance, agree on the mitigation including resources and the facilitation required to achieve the said goals and set a reasonable time for further review, but this was never done by the Respondents.
24. The Claimant contended that the letter dated 26th September 2014, was deficient in content contrary to the the requirements under the 1st Respondent's Human Resource Manual as the alleged disciplinary case was not reported in the approved format for a charge sheet to be drawn, which should clearly indicate the exact time, nature of the offence including its repercussions on work and on the 1st Respondent's operation.
25. The Claimant contended that the alleged meeting that passed the resolution to dismiss the him was held in Naivasha which was contrary to the requirement under the State Corporation Act which provides that the State Corporation meeting to be held at the Corporation's premises/ facilities.
26. It was the Claimant's case that sometimes in April 2015, he received a letter dated 16th April 2015 from Mr. Kiptoo giving him a notice of termination of his employment.
27. The Claimant further stated that later on Mr. Chebungei Kiptoo was not confirmed as the Director General and Captain Gilbert Kibe was appointed to the post. When Captain Kibe joined KCAA he undertook his own investigations into the matter and after holding discussion with the Claimant, he directed the Legal Department to settle the matter and reinstate him to his position, however, on



- finding out the Director General's directive, Mr. Chebungei influenced the Board and the Director General was forced to dismiss him.
28. Lastly, it was the Claimant's position that his termination was unfair, malicious and illegal, a breach of contract and implied obligations, thus he is entitled to damages.
 29. When cross-examined, it was his testimony that the 2nd Respondent was his Supervisor, he had no employer-employee relationship with the 2nd Respondent herein.
 30. He testified that one of the reasons for his termination by the Respondent was that his performance was unsatisfactory, however, from the comments on the appraisal document, he could discern that it was satisfactory. He admitted that on the document his supervisor did comment that he needed a lot of supervision to produce the results.
 31. On the 2012-2013 appraisal, the supervisor's comment was that the performance was a fair. Further, indicating that there was room for improvement. He alleged that while the performance appraisal for 2014- 2015 was incomplete, the Supervisor gave him 44 of 60. The total score was 71.8%. He gave himself 78.4%.
 32. It was his testimony that following the appraisal, he was invited for a hearing on the performance whereby he attended. At the hearing, he was told that his performance was not satisfactory, they gave him three months. However, he did not understand clearly what the three months were all about. He proceeded to the Human Resource Manager for clarification, the HR Manager informed him that he could not be of help as he was not in the Committee's proceedings.
 33. The Claimant further testified that he similarly reached out to his supervisor and asked him about the same. He was told that it was the Board's decision and he had to abide by it. The Claimant told the court that he tried to explain to him that if an employee had unsatisfactory performance, the matter was supposed to go to the Performance Management Committee and if they were of the view that the same was unsatisfactory, the employee was put under the Performance Improvement Plan [P.I.P] in per the HR Manual, section N, but he couldn't take it.
 34. After three months he was asked to prepare and submit a report to the Board. He was only given two hours to do this. He considered this time a very short time for the task.
 35. It was his testimony that at the time he was being terminated, there was no appeal Board constituted. Ordinarily, he was to appeal to the Standing Committee which had not been constituted. He did not appeal. He filed an appeal to the Public Service Commission which wrote to the Standing Committee. The Committee wrote expressing that since he was in court already, they would not be seized of the matter.
 36. It was testified that the successor to Mr Kiptoo, Mr. Kibet did his own investigation and concluded that he was not guilty. He subsequently ordered the Legal Department to work on his reinstatement. Unfortunately, he got communication by him recently, the same was copied to the Public Service Commission.
 37. On re-exam, he clarified by stating that performance Management is considered as a pivotal thing in the Human Resource Management, reason why the HR Manual has dedicated a part for it.
 38. It was 11th March 2011, when he submitted the report and not 25th March 2015 as he had mentioned earlier.
 39. He did not appeal to the Board because there was no Appeals Board that had been constituted to hear his Appeal.



The Respondent's case

40. The Respondents' case was presented by Joseph Kiptoo Chebungei, the 1st Respondent's Director, and Corporate Services.
41. The Respondent contended that the Claimant was once its employee as a Manager Corporate Communication, and as an employee, he was subject to the provisions of the 1st Respondent's Human Resource Manual.
42. It was averred that on the 6th of October 2014, the Claimant was issued with a Notice to Show Cause letter dated 26th September 2014. In the letter, he was informed of specific accusations that the Authority had against him. He was required to appear before the Board of Directors, Disciplinary Committee and the Finance and the Capital Committee on the 16th of October 2014 to show Cause why appropriate disciplinary action should not be taken against him for the unsatisfactory work, wilful neglect to perform duties, noted errors, commissions and negligence.
43. It was the Respondent's case that the Notice to show cause culminated from various internal memos that were sent to him during his tenure as the Manager Corporate Communication, all of which raised concerns over the Claimant's wilful neglect to perform work, unsatisfactory performance, and failure to account for the Authority's funds, all which amounted to gross misconduct.
44. The Respondent contended that the Claimant was on various occasions issued with internal memos requiring him to provide departmental reports to show progress or improvements achieved in his department. Additionally, the memos were also meant to give him a chance to redeem himself by improving his work performance. An appraisal on his performance was done during his tenure to assess whether he had achieved a strategic turnaround of his department to enable attainment of its functional objectives.
45. The Respondent further stated that the last report submitted by the Claimant to the Board, showed and confirmed that he had only been involved in routine activities which he ought to have attended to during the early stages of his career as the Manager Corporate Communication, a clear demonstration that he had failed to properly discharge his duties during his tenure. As such he had not laid the expected foundation for his department to build on to achieve the strategic expectations and corporate goals of the 1st Respondent. Furthermore, the allegation by the Claimant that the reasons for his non- performance as expected occasioned by inadequate staff was not true as there were four staff members in the Corporate Communication Department against the staff establishment of three and thus Department was overstaffed.
46. The witness further contended that it was the responsibility of the Claimant to follow up with the Human Resource Department if he had any challenges regarding adequacy of staff in his Department. The fact that he didn't, exemplifies his indolence and neglect in performance of his duties.
47. It was stated that as a result of Claimant's underperformance and neglect of his duties that the 1st Respondent duly served him with Internal Memorandum that fully disclosed the offences committed, the specific dates he had committed those and the consequences thereto. The information therein was sufficient to enable the Claimant fully respond to the allegations meted against him and the failure by the 1st Respondent to label the internal Memorandum as the Charge Sheet did not occasion the Claimant any prejudice.



48. The Respondent contended that it is worth noting that the disciplinary mechanism to be followed when dealing with Head Department, Directors and the Managers as provided in the KCAA Manual was duly followed and adhered to and any allegation contrary thereto is unfounded.
49. It was further averred that the Claimant appeared before the Finance and Human Capital Committee of the KCAA Board of Directors on the 16th October 2014 with his former Supervisor who was a person of his choice and that this was a clear indication that due process and procedure was followed in the disciplinary proceedings in accordance with the Employment Act and the Respondent's Human Resource Manual. The termination of employment was therefore in accordance with the law and the HR Manual. Furthermore, if the Claimant was dissatisfied with the decision of the Committee, the KCAA Manual provided the Appeal Mechanism which he did not exhaust.
50. When Cross-examined, he testified that he joined the Kenya Airports Authority in April 2012 and prior to this he was not the Claimant's Supervisor. Clause 2:3 of the HR Manual provides for the disciplinary process while Clause 2:3:1 provide for an Officer to be called to account for his or her conduct and lastly Clause 2:3:2 provided that they were to consider the explanations by the Officer.
51. The Claimant had been served precautions before he was given the show cause letter. There were previous written warnings to the Claimant. The warning letters have not been placed before the Court.
52. According to clause 2:3:2 where the nature of breach is considered to be serious to be handled by the Supervisor, a report should be made to the Director General through the Head of Directorate in this case he was the Head of the Directorate.
53. It was his testimony that though in his Statement paragraph 3 he had stated that there were many allegations against the Claimant, the Show Cause letter was basically on negligence. The Notice to Show Cause raises various issues running from the year 2005. On the various years, the Claimant gave responses to the allegations at the various issues that were raised. He had no documents to show that after the responses, the respondent gave him chances to improve on identified areas of weakness.
54. Part II A.4 of the Respondent's Human Resources Manual elaborately provides for appraisal procedure and performance contracts. The supervisor of an employee is obligated to assist and support the employee achieve the performance targets. This obligation is exemplified by paragraph 2.4.4 of the performance contract tendered in evidence by the Claimant.
55. RW1 further told the court that according to the performance appraisals filed by the Claimant for the different years, in all of them, there is an indication that he had improved in his performance. Further, the Respondent's HR Manual, did not failure to improve in performance a ground for dismissal.
56. It was his testimony, that at the time the Claimant was joining the Respondent's employment, his Department had only one member of staff. He was therefore the second. Additional employees came in, in 2015, around the same time he was existing. As per the approved organizational structure, the targeted number of employees for the Department had not been filled. However, in the negotiated contract the Claimant had agreed that he would handle the work notwithstanding the understaffing.
57. That according to the HR Manual, he was supposed to be given a charge sheet. In their case, the internal memos act as the charge sheet.
58. RW1 testified further that the Claimant was called to appear before the Disciplinary committee on the 16th October 2014. He did not have the minutes for this meeting. The Claimant appeared accompanied by someone. Out of this proceeding, he was given three months to improve and give a report.



59. It was his testimony that the next disciplinary committee sat on the 26th March 2015. He could not remember how he was called to the meeting. What happened on this day was that the Human Resource Committee presented a report to the full Board that was then sitting. So, on this day there were no disciplinary proceedings, the meeting was not in any way a disciplinary meeting.
60. On the 26th March 2015, based on the report of the HR Committee, the Board decided that the Claimant/Officer be terminated from service. The termination letter flowed from here.
61. It was his testimony that in the letter of termination, an officer is given the right of appeal. When appeals, an ad hoc committee is constituted. In this case, the Committee was not constituted because he did not appeal.
62. On re-exam, he clarified by stating that the issue of the Claimant's performance was not something new, it was a problem that had started much earlier since 2012.
63. The Claimant was given time to improve, and this did not meet the set threshold.
64. Clause H D. 2.3.1 contemplates written and verbal warnings on an officer's conduct. The Claimant responded to the notice to show cause letter. He never at any time sought any clarification on the allegations therein. Subsequent to the show cause letter, he was heard.
65. It was further stated that at his level, he would only be heard by the Board. Further, for Officers at managerial level, the Board could only come in, in the disciplinary only to receive and consider a report from the HR Committee.

The Claimant's submissions

66. The Claimant filed his written submission on the 21st October 2022 outlining two issues for determination thus:
 - i. Whether the Claimant was unfairly terminated as per section 45 of the [Employment Act](#) 2007.
 - ii. Whether the Claimant is entitled to the reliefs sought.
67. ON the first issue it was submitted that the memorandum dated the 26th September, 2014 was not in compliance with the Human Resource Manual for the Staff Regulations and Administration specifically clause 2.3.1 which was to guide the Claimant's Supervisor in the disciplinary process.
68. It is the Claimant's submission that even though the 1st Respondent issued the Claimant with warning letters, he ignored the Responses by the Claimant.
69. The Claimant submits that the notice to show cause letter did not adhere to the requirements under the Respondent's Human Resource Manual as alleged disciplinary case was not reported in the approved format for a charge sheet as per clause H5. It is submitted that the Respondent contravened the laid down disciplinary procedure under the said Human Resource Manual and thus the termination amounted to unfair and unlawful termination.
70. It is submitted that the Respondent failed to provide the Court with the minutes of this meeting held on the 16th October 2014, and therefore it could be alleged that the meeting was properly constituted.
71. The Claimant submitted that despite the Respondents issuing the Claimant with the memo dated 20th November 2014, they failed to issue the Claimant with the Performance Improvement Plan as outlined in the HR Manual or as per the HR best practise.



72. The Claimant further submitted that no meeting was held to draw up the Performance Improvement Plan [P.I.P] nor were any of the Claimant's concerns of lack of staff and facilitation taken into consideration. It is the Claimant's submission that for the Respondents to expect the Claimant to improve his performance, they required to give a performance Improvement Plan to set his performance targets.
73. It is submitted that the Respondent failed to prove to the court that there was another meeting in which a deliberation passed and a finding made that the three months report did not meet the strategic expectations, furthermore, the said strategic expectations had not been laid out for the Claimant and therefore it was unrealistic and unfair to expect the Claimant to have met the expectations.
74. The Claimant submitted that no invitation had been issued to the Claimant for this disciplinary meeting on the 26th March 2015. Furthermore, from the Respondent's documentation the meeting held on the 26th March 2015 was not a disciplinary meeting rather a routine Board meeting where it was decided that the Claimant be terminated from employment.
75. The Claimant submitted that his performance for 2012-2013 and 2013-2014 had continued to improve from 63% to 72%, an improvement of 14% and therefore under-performance would logically not be a valid reason for his termination.
76. It was submitted that it is a best practice requirement in performance Management that when an officer is found to be underperforming, the officer's supervisor is expected to hold discussions with the officer to clearly outline the areas of underperformance, state the reasons and the challenges for the under-performance, agree on the mitigation including resources and the facilitation required to achieve the said goals and set a reasonable time for further review, but this was never done by the Respondent.
77. The Claimant further submitted that although the 1st Respondent's Human Resource Manual section HD 5.0 thereof, provided for an Appeal mechanism to the Appeals Committee, this Committee had not been formed by the Board as contemplated under the foresaid Manual. The Claimant couldn't appeal to a non-existent.
78. It is lastly submitted that the Claimant's termination was done without due observance of the Respondents Human Resource Manual and the provisions of the *Employment Act* 2007. The same was unfair and unlawful.
79. On the last issue, the Claimant submitted that his termination was unlawful and thus entitled to the reliefs sought. Reliance was placed on the principle of 'restitutio in integrum' which means that the injured party has to be restored as nearly as possible to a position he or she would have been had the injury not occurred. Reliance was further placed on the case of *Mawenzi Investments Ltd v Top Finance Co. Ltd & Another* [2013] eKLR, in fortification of his submission.

The Respondents' submissions

80. The Respondents filed their submissions on the 31st January 2023 ventilating three issues for determination thus;
 - I. Whether the Claimant's termination by the Respondent was unlawful/ unfair.
 - II. Whether the 2nd Respondent should be struck out from the Claim.
 - III. What reliefs if any is the Claimant entitled to.
 - IV. Who should bear the cost of the Claim?



81. For the first issue it was submitted that it is trite law that for a termination to be fair, the employer must have valid reasons for the termination and the process must be fair and valid. Reliance was placed on the case of Walter Anuro v Teachers Service Commission [2013] eKLR where it was held:
- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
82. Similarly reliance was placed on the case of Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR where it was held:
- “What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”
83. The Respondents submitted that it had demonstrated on a balance of probability that it had valid legal reasons for terminating the Claimant’s employment.
84. It is submitted that vide a show cause letter dated 26th September 2014, the Claimant was requested to show cause why his services should not be terminated on account of unsatisfactory performance of work. The notice to show cause culminated from numerous memos that were sent to the Claimant during his employment, which all raised the concerns of wilful neglect to perform work, improperly performing work resulting in unsatisfactory performance, failure to account for authority funds and poor work performance which all amounted to gross misconduct.
85. The Respondents submitted that a fair procedure was adopted before terminating the Claimant’s services. To buttress this reliance was placed on the provision of section 41 of the Employment Act 2007. It further submitted that the Claimant was issued with a show cause letter inviting him for a hearing whereupon he appeared before the hearing Committee and after the hearing, he was given three months to improve his performance. After the three months, he filed his report on the activities undertaken for consideration by the Board of Directors. Subsequently, on the 27th March 2015, the Board of Directors considered the report and recommended the termination of his employment. This culminated to the termination letter dated the 16th April 2015. Furthermore, the Claimant could have appealed pursuant to Clause 5.0 in the event of dissatisfaction with the outcome of the disciplinary hearing which Appeal was not pursued by the Claimant.
86. For the second issue, it was submitted that the Claimant during cross-examination admitted that he was employed by the 1st Respondent and that his claim in principle was against the 1st Respondent. Reliance was placed on section 12 of the Employment & Labour Relations Act which provides that the jurisdiction of this court to be exercised in disputes between the employer and the employees.
87. Similarly, reliance was placed on section 25 [1] of the Civil Aviation Act No. 21 of 2013 which provides:
- “No action or thing done by a member of the Board or by any officer, employee or agent of the Authority shall, if the action or thing is done in good faith for executing the functions, powers or duties of the Authority under this Act, render the member, officer, employee or agent or any person acting on their direction personally liable to any action, claim or demand whatsoever.”
88. Lastly the Respondent submitted that the 2nd Respondent cannot be held personally liable for actions done in good faith. Holding of a contrary view, shall affront the provisions of the Civil Aviation Act. On account of this provision the 2nd Respondent’s name should be struck out of these proceedings.



89. For the last issue, the Respondents' counsel submitted that the Claimant was paid all his dues following the termination of his services.
90. For the relief of reinstatement, the Respondents submitted that the same is a measure of last resort and the Court ought to grant this remedy sparingly. Orders of specific performance of an employment contract may force two unwilling parties into an unsavoury contractual relationship. Reliance was placed on the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR in fortification of its submission.
91. The Respondents further relied on the provision of section 12 [3] of the Industrial Court Act that limited the order of reinstatement of an employee within three years of dismissal.
92. For the relief of damages, the Respondents submitted that the Claimant was paid all his dues and thus the Claim for damages does not hold. In the event the court find that the Claimant was unfairly terminated then three [3] months compensation would be sufficient. The Respondent further urged this court to dismiss the Claimant's claim in entirety for being frivolous.

Analysis and determination

93. From the pleadings, the evidence on record as well as the submissions by the parties herein, the following issues emerge for determination thus:
 - i. Whether the 2nd Respondent was properly enjoined in this suit.
 - ii. Whether the Claimant's termination by the Respondents was procedurally and substantively fair.
 - iii. Whether the Claimant is entitled to any of the reliefs sought.
 - iv. Who should bear the costs of the claim?

Whether the Claimant's termination was procedurally and substantively unfair.

94. The *Employment Act* 2007 sets out two aspects that must be considered by the Court whenever called upon to interrogate fairness of an employee's dismissal from employment or termination of an employee's employment. The aspects being procedural fairness and the substantive justification.
95. However, it should be stated here that in considering the two aspects, the Court is not enjoined only to look at the stipulations of the forestated Act. It should consider the relevant provisions of the *Constitution* of Kenya, 2010, the international labour standards which are part of our law by dint of Article 2[5] of the *Constitution*, and the stipulations of the Human Resource policy and procedure Manual of an employer, which in my view became part of the terms of the employment contract.
96. The Section 41 of the *Employment Act* provides the structure for the procedural fairness. It provides;

“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 this 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)”

97. Procedural fairness entails three components based on the provisions of section 41 of the *Employment Act*. First the information or the notification component. The employer has to inform the employee against whom he or she intends to act, of the intention to and the grounds prompting the intention. The second is the hearing component, the employer has to accord the employee an opportunity to make representations on the grounds. Conjoined with this is the employee’s right of accompaniment. The employer shall allow the employee to be accompanied with a colleague or a union representative [if he or she is a member of a union], during the hearing. Lastly, the employer has to consider the representations by the employee or accompanying person before deciding on the accusation[s].
98. The provision is couched in a mandatory manner; any form of non-adherence to it, legally renders the termination or the summary dismissal unfair pursuant to the provisions of section 45 of the *Act*.
99. In the case of *Obara, Lydia Moraa v Tusker Mattresses Limited* 2016 eKLR the court stated:
- “In sum, in considering whether the procedure was fair, the test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to, rebut the allegations of misconduct, or offer a representation on any ground[s] that the employer has indicated to be basis for his intention to terminate the employment, and bring to the attention of the employer any relevant information before a final decision is taken.”
100. The Claimant contended that the notice to show cause letter did not adhere to the requirements under the Respondent’s Human Resource Manual as alleged disciplinary case was not reported in the approved format for a charge sheet as per clause H5. It was further contended that the Respondent contravened the laid down disciplinary procedure under the said Human Resource Manual and thus the termination was unfair.
101. Clause H5 of the manual provides the disciplinary principles applicable within the Respondent organization, thus;
- “In the process of administering disciplinary measures the Authority shall be guided by but not limited to the disciplinary principles listed below which are further enumerated in the Disciplinary Handbook.
- a. All disciplinary cases shall be reported in the approved format for a charge sheet.
 - b. The charge sheet shall indicate:
 1. Particulars of the officer [Name, Designation, grade and the station]
 2. The exact nature of the offence.
 3. Date and time the offence was committed.
 4. Repercussion of the offence on the work and the KCAA Operation.”
102. I have carefully considered the postulations of the Respondent’s Human Resource Manual for staff Regulations and Administration 2011, and the Disciplinary and Grievance, and it must be stated that their details on; the disciplinary procedure; the purpose for the procedure; the categorization



- of offences; and the sanctions, are succinctly and impressively set out. In my view, deliberately, to ensure; compliance with the tenets of natural justice; the Constitutional dictates for fair hearing and fair admirative action; and attainment of the procedural and substantive fairness contemplated under the provisions of the *Employment Act*. A reasonable employer-the owner of the manual will not have any reasonable justification not to adhere to such a manual both for its good and that of its employees.
103. Cross-examined, RW1 indeed admitted that according to the manual, the Claimant was supposed to be given a charge sheet but it was not given. However, according to him, the internal memos act as the charge sheet. With great respect this line of thought is surprising and not persuasive. If the Respondent wanted to have the contents of the memos metamorphosise into a charge sheet the contents could have been consolidated to give that single document, the charge sheet. Further, the intention of the Respondent when it issued the various memos, wasn't for the same to become in some future date, a charge sheet. The Respondent was obliged to give a reasonable explanation for the departure from the stipulations of the manual, and therefore its contractual obligations, it didn't. I am not at all persuaded with the Respondent's position and or assertions that the internal memo sent to the Claimant supplemented the laid down requirement of the disciplinary cases being reported in the form of the charge sheet.
 104. One Could be tempted to argue that the show cause letter set in for the charge sheet contemplated in the manual, in my view, such thought will be erroneous. I have carefully considered the notice to show cause letter, it does not attain the sufficiency in detail as contemplated in the manual. Sufficiency in detail that would give an employee a clear view of the charges intended against him or her.
 105. The Respondent to the position that on the 16th October 2014, a disciplinary hearing was conducted against the Claimant whereby all the canons of procedural fairness were adhered to. The Claimant denied having been given a hearing, and that there was adherence by the Respondent to the edicts of procedural fairness. Time and again, this Court has held that the law [section 41 and 45 of the *Employment Act*] places a legal burden on the employer to prove procedural fairness. The Court notes that the minutes for the alleged disciplinary hearing meeting were not placed forth by the Respondent. The Court is therefore not able to ascertain whether indeed there was procedural fairness or not. Equally, I am not able to interrogate how the decision to direct to improve was arrived at, and scope of the improvement that was desired. I come to an inescapable conclusion that the Respondent didn't discharge the burden.
 106. The Respondent's witness testified that in a meeting held on the 26th March 2015, it was decided that the Claimant's employment be terminated as he had failed to improve. This was after the three months that he had been given to. I have agonized over this assertion by the Respondent and conclude that it portrays the Respondent as an uncandid employer. I have carefully looked at the memorandum dated 24th March,2015, with the subject, " board retreat [Wednesday ,25th March ,2015 to Saturday ,28th March,2015]- Lake Naivasha Sopa Resort" and programme for the retreat and gain an impression that the consideration of the Claimant's performance was not an agenda or made an agenda for any of the days of the retreat. Further, it there was indeed the meeting with such a vital agenda and determination, reasonably, minutes for the same could be presented. The respondent had none.
 107. This Court has not lost sight of the fact that in his witness statement turned evidence in chief and the response to the Claimant's memorandum of claim, the witness and the Respondent contended that on this day, the Board considered a report that had been prepared by the Claimant on his performance within the three months and concluded that he had not improved. However, in his evidence under cross-examination RW1 testified that on this day the Human Resource Committee presented a report to the full Board that was then sitting and that the decision to terminate his employment flowed from the report. The alleged report by the Committee was placed before me by the Respondent. The alleged



report by the Claimant was tendered in evidence by the Respondent. I have carefully considered the report and more specifically the introductory part, which stated;

“ Please refer to our conversation today at 4.30pm on the above subject.

As required below please find a report on the activities of the Corporate Communications Department from December 2014 to February 2015.....”

And conclude that the report had nothing to do with the performance of the Claimant within the three months.

108. If indeed there was any report on the Claimant’s performance within the three months, the same could only be a basis for termination of his employment on after the Respondent’s compliance with the stipulations of section 41 of the *Employment Act* on procedural fairness, and Clause 3.2 of the Disciplinary and Grievance Handbook, which clearly contemplates representations by the employee. In fact, the Respondent’s witness conceded that the meeting of 26th March wasn’t a disciplinary hearing. He was not able to remember whether the Claimant was invited to the meeting.
109. I have reached an inescapable conclusion that the Claimant’s termination was procedurally unfair contrary to the *Employment Act* 2007, as well as the Respondent’s HR Manual on record.
110. Whether an employee has been given previous warnings in the past or not, when an employer is contemplating terminating his or her services, the employer must expressly and unambiguously inform the employee of the contemplated action and the reasons attracting the contemplation. Presence or otherwise of warnings prior to the termination is a factor considerable when interrogating substantive fairness, the appropriateness of sanction imposed on an employee and or award of a compensatory relief under section 49[1][c] of the Act.
111. Regarding substantive justification, the law has laid down a framework for the same in section 45(2) of the *Employment Act*. The section provides that;
- “ 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.”
112. Section 43 of the *Act* places a duty on the employer to prove the reasons for the termination of an employee’s employment in a dispute as herein. Section 45 of the Act imposes a further burden on the employer, to prove that the reason[s] for the termination was fair and valid. Where the employer fails to discharge the first burden, no doubt, it isn’t possible for him or her to discharge the second one under section 45.
113. Principally, the Claimant’s employment was terminated on account of an alleged poor performance. This is clearly discernible from the termination dated 16th April 2015, which read in part:

”RE: NOTICE OF TERMINATION FROM SERVICE.



You will recall that on the 16th October 2014, you appeared before the Board on Account of unsatisfactory performance and failure on your part to fulfil the expectations as the Head of Corporate Communications department and during which you made a commitment to improve in your departmental performance. It is noted that the Board considered your mitigation and accordingly granted you a further review period of three 3 months, whereby you were expected thereafter to submit a report on your performance over the period within the defined turnaround strategy for the department.

The three months period lapsed and as required, you submitted a report to the Board within the stated guidelines. However, the Board went through your report and noted a very insignificant improvement in your performance and therefore questioned the need for your continued retention in service as the Head of Corporate Communication department in the Authority.

As per my brief to you in regard to your performance report to the Board, I indicated the concern of the Board on your continued retention in service on the account of non-performance. Accordingly, you are served with a one month notice of termination from the services of the Authority. The Notice takes effect from 17th April, 2015 and your last day in service will be 16th May 2015.”

114. In the case of *Jane Samba Mukala v OL Tukai Lodge Limited* (2013) eKLR where it was held:

“Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5 (8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore, it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.”

115. Owing to the inequality of bargaining power which is inherent and must be inherent in the employment relationship, termination of an employee’s employment will be an easy ground to be misused. It is to insulate employees from consequences of any such abuse, that courts do not and cannot allow the employer to just say that one was discharged on account of poor performance. The employer bears a heavy burden to demonstrate a couple of things, as was neatly articulated in the *Jane Samba case* [supra] and, *Jane Wairimu & Associates* (2012) eKLR. where the court held:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time.”



116. Section N of the Respondent's above stated Manual provided for the Staff Performance Management in detail. Section N9 emphatically provides:

“ Adverse Performance Appraisal Reports.

If an employee's performance is found unsatisfactory during the appraisal and development review, the employee will be advised of the shortfalls in the work performance and be counselled by the Supervisor with the assistance of the Human Capital Department if necessary. Any further adverse performance may lead to the employee being placed on Performance and skills improvement Programme.”

117. The Respondent contended that due to the Claimant's unsatisfactory performance, he was given three months to improve. Keenly, looking at the provisions of the manual on staff performance management, I find no difficulty in concluding that the stated decision by of the Board was only possible after a performance appraisal based on performance contract contemplated under Clause N6, using One of the tools of evaluation set out under N8. No doubt, the decision didn't from the process elaborated. This in my view, eroded the validity and fairness of the purported reason for the termination.

118. The Claimant contended, and I agree that he was not placed under any Performance Improvement Programme, a natural thing that would have followed if indeed his performance had been found unsatisfactory. The Respondent's witness confirmed this. The Court notes that the memorandum dated 24th November,2014, expressed that the Claimant was to be appraised in February 2015 after the end of the three months period to determine whether or not his performance had improved. Any further action in my view could only be taken after the appraisal. There is no indication and prove that the appraisal was done. In absence of the same, there cannot be any reason to declare that the Respondent had a fair and valid reason to terminate the Claimant's employment. The Respondent failed to discharge the legal burden under section 45[2] of the *Employment Act*.

119. The Respondent posited that the unsatisfactory performance the basis for the termination, was an accumulation of incidents and or misconducts that were the subject matter of the various memos that were issued to him at various times. The Claimant urged that at the various times he responded to the memos. After the responses, no action was taken against him. The fact that those memos some which dated back to the 2005 were responded to was not challenged or rebutted by the Respondent. Consequently, I find that the authors of the same were satisfied with the explanations, reason why they didn't take any further action after the responses. As a result, the incidents and or alleged misconducts cannot be resurrected to be basis for a disciplinary action a number of years after. To allow will amount to sanctioning inequity, unfairness and unreasonableness. A violation of the employee's right to fair administrative action, under Article 47 of the *Constitution*, shall occur.

120. It has not escaped my sight that section H5[g] of the manual provides, “All acts of misconduct by officers shall be dealt with and finalized within a period of not more than three [3] years”. More reason why this Court holds that revival of misconducts allegedly committed some years back to be basis for disciplinary action is impermissible.

121. The upshot, I conclude that the Claimant's termination was both procedurally and substantively unfair and unlawful.



Whether the 2nd Respondent was properly enjoined in this suit.

122. Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) provides that:

“The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

123. I have carefully considered the statement of claim and I note that there is no cause of action disclosed against the 2nd Respondent. I do not think he is a necessary party the suit. The main dispute appears to be between the Claimant and the 1st Respondent which was his employer. The bone of contention between the Claimant and the 2nd Respondent is not evident. I hesitate not to strike out the 2nd Respondent’s name from these proceedings, as a consequence.

Whether the Claimant is entitled to the reliefs sought or any of the reliefs.

i.Reinstatement

124. The Claimant urged this Court to issue an order directing the 1st Respondent to unconditionally reinstate him to his employment services and former position without loss of benefits, seniority and conditionality.

125. In the case of [Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 others](#) [2014] eKLR, Maraga J (as he then was) stated:

“As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the [Employment Act](#) and Section 12 (3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who acted against him will be minimal.

Under the Kenyan [Employment Act](#), the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the [Employment Act](#). Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor”



126. Section 12 (3) (vii) of the *Employment and Labour Relations Court Act* bars the court from granting that relief where three years have lapsed from the date of dismissal. It is only on this reason that I decline to grant the relief of reinstatement, as it is now more than seven years after the termination of the Claimant's employment. Otherwise, this is a matter where an order of reinstatement was well deserved.

iii. 12 months compensation for the unfair termination.

127. The Claimant also sought for compensation for wrongful termination, being 12 months' gross salary. This Court is a live of the fact that 12 months gross wages or salary is the maximum awardable compensation provided for under section 49 (1) (c) of the *Employment Act* 2007. Granting the relief is discretionary. Whether maximum compensation is awardable or a portion thereof or no compensation depends on the circumstances of each case.

128. Having noted as I have hereinabove, that; the Claimant's termination on the ground of unsatisfactory performance was both procedurally and substantively unfair; and considered the length of time that he served the Respondent, that the remedy of reinstatement was deserved but for the legal bar forested, and that the Claimant didn't contribute to the termination, I am convinced that the Claimant is entitled to compensation under the provisions of section 49[1][c], to an extent of 8 (Eight) months' gross salary. Ksh. 3,443,072.00/=.

iii General damages.

129. I have considered the Respondent's action, undeniably, they were capricious, without good faith, in breach of the implied duty of trust and confidence, and largely arbitrary. I am persuaded that the Claimant's right to fair labour practice was breached, and for this, he is awarded KShs. 200,000 as general damages.

Who should bear the cost of the suit?

130. The cost of the suit to be borne by the 1st Respondent.

131. The upshot, judgment is hereby entered for the Claimant against the 1st Respondent in the following terms:

- I. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- II. Compensation pursuant to section 49 [1] [c] of the *Employment Act* 2007 to an extent of eight [8] months' salary.....Kshs. 3,443, 072.00.
- III. General damages for breach of the Claimant's right to fair labour practice KShs. 200,000/-.
- IV. Interest at court rates on the awarded sum, from the dated of this judgment till full payment.
- V. Cost of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2023.

.....

OCHARO KEBIRA

JUDGE



Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

Ocharo Kebira

Judge

