Mwangi v Industrial and Commercial Development Corporation (Employment and Labour Relations Cause 2098 of 2016) [2023] KEELRC 2738 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2738 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 2098 OF 2016

K OCHARO, J

OCTOBER 17, 2023

BETWEEN

PETER KAMAU MWANGI .... CLAIMANT

AND

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION .... RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated the 7th of October 2016, the Claimant instituted a Claim against the Respondent seeking the following reliefs;

   a. A declaration that the Claimant suffered unfair and wrongful termination of his employment by the Respondent.

   b. A declaration that the Respondent intentionally breached the provisions of section 41 of the *Employment Act* 2007, Articles 41, 47, 50, and 236 of *the Constitution*, 2010 in terminating the Claimant's employment.

   c. An order of reinstatement of the Claimant to his employment and position without any loss of benefits and or seniority and continuity of service.

   d. In the alternative to paragraph [iii] above and without prejudice to the foregoing, the payment to the Claimant of actual pecuniary loss suffered since his date of termination including payment for salary/wages as would have been earned, housing allowance and together with all accrued allowances.

   e. A permanent injunction restraining the Respondent whether by itself, servants, agents, officers, directors, representatives or any of them or howsoever from converting the interest

rate from the present rate of 3% to the commercial rate of interest on the credit facilities granted by the Respondent to the Claimant under the terms of staff loans scheme.

f. A permanent injunction restraining the Respondent whether by itself, servants, agents, officers, directors, representatives or any of them or howsoever from levying penalties on the outstanding loan balance granted by the Respondent to the Claimant from the date such penalties started to accrue on the aforestated outstanding loan balance.

g. An order of permanent injunction restraining the Respondent herein and or their agents or servants from alienating, selling, transferring or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with the Claimant's property known as L.R No. 12948/20 Nairobi Area within Nairobi County.

h. An order directing the Claimant to continue paying the same rate of monthly instalment inclusive of the rate of interest at 3% on credit facilities.

i. Maximum compensation for the loss of employment.

j. General damages.

k. Aggravated and exemplary damages.

l. Any other relief this court may deem fit to grant.

m. Cost of the suit with interest.

2. The Memorandum of the Claim was filed together with the Claimant's witness statement and documents that he intended to place reliance on as evidence in support of his case.

3. Upon being served with the summons to enter appearance, the Respondent entered appearance on the 17th December 2016 and filed its response to the Claimant's statement on the 17th July 2017.In the Memorandum of Reply, the Respondent denied the Claimant's cause of action, and his entitlement to the reliefs sought.

4. Subsequent to the close of the pleadings the matter became destined for hearing inter-partes on merit. The Claimant's case was heard on the 28th October 2022 while the Respondent's case was on the 26th July 2022.

5. At the hearing of the parties' respective cases, the Witness Statements that they had filed were adopted as part of their evidence in chief and the documents they had admitted as their documentary evidence.

6. This Court gave direction as to the filling of the submissions. The parties herein complied and thus this judgment is with the benefit of the parties' submissions.

The Claimant's case

7. At all the material times, the Claimant was employed by the Respondent as an ICT Manager. He came into employment on the 27th of January 2006. Confirmation into employment was subject to a successful completion of a probationary period of 6 months. He successfully did. On the 19th day of December 2006, his employment was confirmed on permanent and pensionable terms.

8. The Claimant asserted that, however, his confirmation into employment was preceded by hitches that were unexplainable. The appointed date for the lapse of his probationary period was 31st August 2006. However, without any explained reason, the Respondent didn't issue him with any confirmation letter

or any communication in regard thereto, immediately after this date. This prompted him to write to the Respondent on the 26th of October 2006 to inquire about the position of the confirmation.

9. He contended that during the probationary period, he didn't receive any adverse report or communication on his performance. Though the confirmation letter was essentially for the sole purpose of communicating the Respondent's decision to confirm him into employment, it had a content which would later be used against him unnecessarily and unjustifiably. The letter was couched to appear as though it was a performance warning letter. This was done by the then Executive Director, Peter Kimurwa who had a personal vendetta against him.

10. The unjustified comment could later become the basis for other unnecessary and unjustified phrases in several subsequent correspondences like" long outstanding unsatisfactory job performance issue". For instance, the termination letter read in part, 'This decision has been taken due to unsatisfactory job performance which has been a long outstanding issue that can be traced back to 2006 when you joined the corporation."

11. The Claimant avers that between the years 2006 and 2009, the Respondent did not have a performance Management tool in place. The Corporation introduced the performance tool on a mock basis in the last quarter of the financial year 2008/2009. The Respondent's Board was emphatic that the outcomes of the mock performance appraisals were not to be used for reward or sanction on staff as the three-month trial period was too short to measure the performance.

12. For the Claimant's case, most of the targets set involved the procurement process. However, due to the bureaucratic nature of the Procurement legal regime that existed at the time, it was not practical to implement the project which the Respondent had embarked on for that period. Notwithstanding this and the fact that the process was out of his control, his performance was rated as fair.

13. The Claimant asserted that notwithstanding the Board's direction that the appraisal mentioned above wasn't supposed to be used as a means of reward or sanction, the same was cited in the disciplinary proceedings to his detriment.

14. It is the Claimant's case that in the three financial years after the introduction of the performance management system 2009/2010/, 2010/2011, 2011/2012 he was rated 'Very Good', Good' and Good' respectively. In 2012/2013, 2013/2014, and 2014/2015 he was rated 'Poor', Good' and fair respectively and from the foregoing nine years, it is only two periods of appraisal the Claimant was rated 'poor' and 'fair' based on the Corporation's performance Management system, yet the various correspondences which have been issued to the Claimant depict a picture of an employee whose performance had been largely poor since joining the Corporation. Furthermore, it is worth noting that all the performance related correspondences were issued during the regime of Peter Kimurwa. The Claimant had worked under two other Executive Directors before Peter Kimurwa but none raised any issue with his performance.

15. The Claimant avers that the Chief Executive Officer, Mr. Peter Kimurwa joined the Corporation in August 2010, a time when the Respondent had major challenges with the core banking system, Rubikon from Neptune Software group. The Respondent had implemented the system in December 2009. Though the system had gone live in December 2009, critical deliverables relating to the generation of accurate financials and management of customer loans were yet to be resolved. Despite many correspondences with the vendors which he had also copied to the Acting Executive Director before Peter Kimurwa took office, the rate of resolving the issues was quite slow. He brought the challenges to the attention of the Mr' Kimurwa.

16. The Claimant stated that the relationship between him and Mr Kimurwa started going sought when they disagreed over part payment of funds to Neptune for the system. Despite the abovementioned challenges, Neptune had raised an invoice of 30% of the project cost which as per the project's payment terms was only due two months after the system's 'productive use'. Further, although one of the subsystems in the software suite was in production, some other subsystems were yet to be delivered and even. The part that was in production had a fair share of challenges which needed to be addressed.

17. On the 20th December 2010, a meeting was held between the representatives of Neptune [the vendor], and the Respondents to discuss the way forward on the challenges and payments. The Claimant and the Executive Director were representing the Respondent. The Executive Director proposed that the vendor be paid part of the invoice to unlock the stalemate. Knowing the vendor very well, regarding their non-committal nature, considering his position as the link person between the vendor and the Inspection Committee, and the stipulations of the Procurement and the Disposal Act 2005, the Claimant made a proposal that was not in support of the Executive Director's proposal. This didn't sit down well with the Director. The Director gave him a dress down in the presence of the Vendor's representatives and proceeded to commit to the payment. The Commitment was even against the advice of the Respondent's Legal Department.

18. The Claimant avers that on 18th January 2011, he was away from the office and when he reported back on 19th January 2011, the CEO summoned him and one of his officers to his office. The CEO gave him a terse instruction, to hand over all the activities regarding the project to the officer. He promised that he was going to sack him. He was only waiting for the Board's concurrence. The CEO felt that the Claimant was frustrating the payment of Neptune an accusation that caught him by surprise considering that was not sitting on the Inspection and Acceptance Committee of Procurement. An email was sent out on the same day to the management team informing them of the new changes. The officer was to be in charge of the project and was to report to the Executive Director directly.

19. The Claimant contends that the abovementioned incidents had a direct bearing on the year 2010/2011 mid-year one-on-one performance review discussion that was held on 3rd February 2011 and the subsequent letter that was issued to the Claimant on 4th February 2011 by the CEO. However, courtesy of his focus on performance and the targets, at the close of the year his performance for the year 2010/2011, was rated "Good". As a consequence, he was rewarded as per sections 4.0 and 4.1.1 of the incentive and sanction performance management policy.

20. The Claimant further contends that in the financial year 2011/2012, he met the performance targets which had been set, and agreed on at the beginning of the year. The period's performance report observed his overall annual performance was rated as 'Good' and as per the policy, he was rewarded with a salary increment.

21. The Claimant avers that in the early part of the year 2012, he initiated an Audit Process to review the Rubikon Implementation project. The audit is a Standard process in IT projects. With mal fides Mr Peter Kimurwa hijacked the process before the final report could be completed. He wanted to seize the opportunity and blame any shortcomings that the audit would reveal, to diminish his otherwise good performance that he had attained, to attract a poor performance rating.

22. Testament of the ill will on his part, Mr Peter Kimurwa organized a Board meeting where the draft report was to be presented behind the Claimant's back. However, as fate would have it, the Audit Committee of the Board felt that it was proper to discuss an ICT report in the absence of the Manager in charge. Consequently, he was invited to the meeting shortly before it could start.

23. Later, he was issued with a letter dated 11th September 2013, on an alleged underperformance. The Claimant responded to the letter pointing out that the accusation was unfair because in all the previous years, he had met the set targets. It is clear that in the financial year 2012/2013, the Executive Director was determined to use the performance management tool to force him out of office. What followed was an issue of an underperformance letter dated 19th October 2015 and later 26th October 2015.

24. It is the Claimant's case that during the financial year 2012/2013, Mr Peter Kimurwa seemed to have been fully determined to use the performance Management tool to force the Claimant out of the office. The appraisal process was very brief. He assigned the Claimant arbitrary marks of 50% which according to the performance policy is rated 'poor'. He was quite hostile during the appraisal session and he refused to accept the supporting evidence the Claimant had for delivery of the set targets. Targets which the Claimant had completed and reported during the half-year review were rated Zero, whereas the Officers whom the Claimant had assigned the deliverables got full marks. This prompted the Claimant to withdraw from the appraisal process with the hope that he would get justice through the moderation process. He requested for a review of some deliverables which the Executive Director had refused to recognize and which the Claimant had supporting documents for. Director had the final word on the Appraisal for Managers and the Claimant was never granted a chance to present his case. The Claimant was rated "poor."

25. He further asserted that for the year 2014/2015, he was unfairly appraised and rated "fair". Marks were assigned to deliverables with a predetermined aim of rating him "fair". This, even though for some deliverables he had supporting evidence that would enable him to score 15%. The Executive Director arbitrarily assigned him 5% to ensure that he didn't get overall marks to place him within the "reward" band.

26. The Claimant contends that between March 2015 and the end of the financial year 2015, the Management used to meet every two weeks to track the progress each department was making in achieving the annual targets. The Claimant had reported the completion of several targets, and there was no dispute on the same during that time. However, during the appraisal session, the marks were assigned arbitrarily. He was rated "Fair."

27. Fair grading requires the employee to put under a six-month Performance Improvement Plan [P.I.P] and this was communicated to the Claimant by the Acting Executive Director, however, he was surprised to receive a letter dated 19th October 2015 requiring him to show cause why his employment should not be terminated.

28. He stated that he responded to the letter giving a detailed defence drawing attention to the acting Executive Director that the letter was not consistent with the performance Management Policy and the fact that he had requested a review of the year 2014/2015 appraisal. The Claimant had copied the same to the Chair of Staff Committee of the Board, but the acting CEO advised that there was no need to bring the matter to the attention of the Board for the CEO was intending to handle it within his office. Despite the assurance, the Claimant received a reply dated 15th February 2016 inviting him to appear before the staff Committee on the 17th February 2016. To this letter, he responded through his dated 23rd February 2016.

29. The notice given to him was too short and when he appeared before the Committee, he asked for more time to study the said letter dated 15th February 2015 because it had introduced specific serious charges such as "gross misconduct as stipulated in the ICDC Staff Code of rules and regulations section 13.4 [11] [c] and the *Employment Act* section 44 [4] [c]. He was later called in and though the Committee

indicated that the letter was immaterial the committee granted his request for more time up to 29th February 2016.

30. The Claimant asserts that he prepared his defence based on the letter dated 15th February 2016 but at the disciplinary hearing the charges which were read to him that were set out in the show cause letter dated 19th October 2015.

31. Through its letter dated 8th March 2016, the Respondent communicated its decision to terminate his contract of employment.

32. He further stated that in the termination letter, he was granted an opportunity to appeal the decision of the Board to the Chairman according to the Staff Code rules and regulations. The Claimant asserted that in terms of the revised code [2014], and the procedure therein, the Committee was meant to make a decision on his presentation and communicate the decision to him in seven days. If not satisfied with the decision of the Committee, he was supposed to appeal to the Board.

33. The Claimant contends that he appealed to the Chairman of the Board, Francis Kimemia, on 21st March 2016 as per the advice in the termination letter. On 5th July 2016, he received a response from the Respondent stating that the decision of the Board was final and, on the 6th July 2016, the process of filling his position commenced. An advertisement was placed in the Daily Nation Newspaper.

34. It is his position that at the time of his termination, he was earning a monthly gross salary of Ksh. 379, 475.70 plus benefits. As a permanent employee, he was also entitled to a performance reward incentive. As a consequence, he suffered general damages for the lost wages, reasonable notice, bonuses, and vacation pay. Club membership and the monthly spend entitlement, ability to participate in the severance benefits and group medical benefits, aggravated damages resulting from the emotional distress associated with having his employment terminated unlawfully and unexpectedly.

35. The Claimant contended that he had a legitimate expectation that he would not be terminated and that should his employment be terminated, the same was to be done per the *Employment Act* 2007.

36. The Claimant contends that it was his legitimate expectation that he would continue to serve the Respondent as an employee in his position until the statutorily recognized retirement age of 60 years. The expectation flowed from the promise given by the Respondent that he would work up to the retirement age of 60 years, a promise which was contained in the contract of employment, Further, it was upon this that he took credit facilities.

37. He alleged that by reason of the premises, he was deprived of the benefits he would have otherwise earned and suffered loss and damages including; losing Ksh. 30,733,820.80 being salary that he was to earn for the remainder of the years before his retirement at the age of 60 years, lost allowances amounting to Ksh.12, 853, 602 he was meant to earn for the remainder of the years before retirement at 60 years, lost enjoyment of credit facilities at the staff rate of 3% on reducing Balance, is threatened by the Respondent withdrawing staff rate of 3% on credit facilities and recalling the loan at market rate, has lost pension payable by the Respondent, has lost telephone, travel, entertainment, medical and house allowance.

38. It is the Claimant's case that the Respondent's conduct, including the manner of termination, was high-handed, outrageous, reckless and wanton, entirely without care, deliberate, wilful and actuated by malice and bad faith.

39. When cross-examined, he told the court that his confirmation was subject to a six-month probation period. At the lapse of this period, he was not confirmed immediately. The confirmation came

four months thereafter. In the confirmation letter, the Board raised some concerns regarding his department.

40. The Performance Appraisal for the period April 1st 2009 to 30th June 2009 was mock since the Respondent did not have a Performance Appraisal System. He was appraised at 52% which was fair. He could not tell how the rating and grades were done due to the age of the matter.

41. The letter dated 4th February 2011 refers to a mid-year appraisal flowing from a Performance Improvement Programme. He was not put under the programme though the letter noted weakness that had been noted on his performance.

42. Referred to the latter dated 5th April 2012, the Claimant testified that it was captioned "unsatisfactory work performance and loss of ICDC assets due to negligence ". The incident the letter spoke to happened in 2011. He replied and explained the loss of the laptops. They were kept in his office. They were not under his custody or possession as everybody had access to his office. He suggested that the matter be taken up by the Insurer. In reaction, the Executive Director wrote him a letter dated 21st May 2011, telling him that he had to bear liability, further, his performance was still unsatisfactory.

43. It was his testimony that in the Performance appraisal report for 2012 to 2013, he was appraised as a poor worker. Following the appraisal, the Executive Director issued him with a final warning letter dated 26th September 2013.

44. The Claimant testified further that quite unjustifiably, the Director wrote him a letter dated 27th January, 2015 accusing him of initiating unbudgeted procurement. He was not in charge of procurement, he could not initiate procurement, and the procurement function was not under his department.

45. The letter dated 23rd March 2015 was a warning letter which was a warning letter and was about performance. Someone had complained that he had challenges using emails. Furthermore, he was given a performance appraisal report. The rating was fair and the said letter was signed by the Acting Executive Director.

46. It was his further testimony that he was invited to a disciplinary hearing on the 23rd of February 2016. He made representations on the accusations levelled against him. Upon the hearing, he was issued with a termination letter. He appealed to the Chairman of the Board. The Acting Executive Director wrote him after four months informing him that the chairman had declined his Appeal.

47. At the time he was employed, Engineer Munene was the Executive Director. His confirmation was under a different Executive Director, Isaac Mogaka. Between 2011 and sometime in 2015 Mr. Peter Kimurwa was the Executive Director. Lastly, the show cause letter was issued by Mr Kennedy Wanderi who succeeded Mr. Peter Kimurwa.

48. When re-examined, he told the Court that the probation was to run for six months and when the confirmation was delayed, he wrote to the Executive Director bringing it to his attention that the probation period had lapsed and that he was due for confirmation.

49. The probationary period was to lapse on the 31st of August 2006. The confirmation came after three and a half months. The confirmation letter raised issues that he needed to address including the Micro-Banker system. The system had several challenges even at the time he was joining the Respondent. There was resistance to its implementation by members of staff. They were holding that it was being forced on them.

50. From 2006 until the time he was terminated, he had never appeared before the Disciplinary Committee over the various performance-related matters that were raised over time.

51. When he appeared before the disciplinary committee, he was allowed to be accompanied by a colleague.

52. Regarding the allegation that he initiated an unbudgeted procurement, the Claimant explained that all he did was receive a requisition from the user department for onward transmission to the procurement Department to confirm that the requisitioned goods or services were budgeted for and proceed with the procurement process.

53. Lastly, upon termination, the loan was to revert to the commercial interest rate if one had not served for 10 years.

The Respondent's case

54. The Respondent's case was presented by Diana Faith Nene, the Respondent's Human Resource and Administration Manager. The Respondent confirmed that the Claimant was employed by the Respondent with effect 1st March 2006 as an IT Manager and remained in its employ as such until 8th March 2016, when his contract of employment was terminated on grounds of unsatisfactory performance. It is further contended that whereas the Claimant was confirmed by the Respondent in his appointment as an IT Manager, the said confirmation was subject to fulfilment of certain conditions which were specified in the Respondent's letter dated 19th December 2006.

55. It is the Respondent's case that the Claimant's performance was unsatisfactory and on 23rd October 2009, the Claimant received a letter informing him that his overall assessment had been rated "fair" which was far from being satisfactory. Further on the 4th February 2011, the Claimant received an internal Memo informing him that his performance during the period July-December 2010 was unacceptably poor.

56. It is further contended that on the 5th of April 2012, the Claimant received an internal memo informing him of his continued poor and unsatisfactory performance. Furthermore, on the 30th of May 2012, he received an internal memo informing him of his failure to table an action plan despite being asked severally to do so.

57. The Respondent avers that on the 11th September 2013, the Claimant also received a letter informing him that his performance had been rated "poor". Subsequently, on the 26th of September 2013, he received an internal memo of final warning for his unsatisfactory performance.

58. It is the Respondent's case that on the 27th of January 2015, the Claimant received an internal memo informing him of the four instances of procurement initiated by him which did not have the budgetary provision as required by the Public Procurement and Disposal Act 2005. Furthermore, on 3rd March 2015, the Claimant received an internal memo warning him of his failure to deliver on two critical issues of the system integrity and facilitating effective work communications between staff and third parties.

59. The Respondent contends that on the 3rd of September 2015, the Claimant received a letter informing him that his overall assessment had been rated "fair". With this on the 19th of October 2015, the Claimant was issued with a show cause why disciplinary action could not be taken against him for his below-standard performance.

60. It is the Respondent's case that the delay in confirming the Claimant was because of doubt in the quality of his performance. Through various correspondences, the Respondent kept reminding the

Claimant that he had maintained an unsatisfactory pattern of work albeit having been confirmed. Severally, the Claimant indicated that he was to improve but this he did not do.

61. The Respondent avers that the Claimant was never promoted at all. The Respondent had a general grading structure which affected all members of staff and the same cannot be deemed to be a promotion.

62. A Show Cause letter dated 19th October 2015 was sent to the Claimant. It elicited his response through a letter dated 23 October 2015. Thereafter the Claimant was invited to appear before the staff and General Purposes Committee of the Board. In response to the invitation, he wrote to the Respondent the letter dated 23rd February 2016.

63. The Respondent states that when the Claimant received its internal memo inviting him to the disciplinary meeting, he wrote back and requested more time to enable him to adequately prepare for his defence. The Respondent acceded to the request through a memo dated 22 February 2016. The date for the hearing was adjusted.

64. The Respondent further contended that it gave the Claimant a fair hearing as required by the law. The allegations that were raised against him were genuinely raised and they required answers from.

65. It is averred that the Credit facilities granted to the Claimant were guided by the Code of Staff Rules and Regulation. They only applied to the Claimant for the period he remained in the service of the Respondent. At the time he ceased being an employee of the Respondent, enjoyment of the benefits thereunder terminated.

66. Lastly it is averred that the Claimant appealed to the Board against the decision to terminate his contract but the appeal was subsequently rejected.

67. When cross-examined, she testified that before his termination, he had disciplinary issues. He was not taken through a disciplinary hearing, though he had several formal warnings. One such warning letter was that of 5th April 2012 which required him to show cause why disciplinary action would not be taken against him for the loss that the Company had suffered.

68. It was her testimony that the Claimant was put on probation from the date of appointment for 6 months and completed his 6 months as required. The probation was not extended. He was not confirmed immediately. The probation ended in September, however, his confirmation came in about three months later. The delay was occasioned by the fact that the Respondent is run by a Board which has a calendar for its activities.

69. She testified that before the show cause letter dated 19th October 2015, there had been many show cause letters issued to the Claimant on the subject of his poor performance. One such letter was the internal memo dated 21st May 2012. The Claimant was allowed to respond to the letters.

70. RW1 told the Court the Respondent had in place a Performance Improvement Programme [P.I.P]. The Claimant was taken through the programme. In the year 2011, he was placed on a six-month Performance Improvement Programme. This was through a letter from the Executive Director. The letter pointed out the areas that required him to improve.

71. The Respondent facilitated the training of the Claimant. At one point it sent him to South Africa for training. Pressed further, she admitted that she had no documentary proof for this.

72. It was her testimony that the letters written by the CEO were written by him as the Claimant's Supervisor.

73. On re-exam, she clarified by stating that there is nowhere it was provided that the warnings were to be by the Board. The Board only comes in at the dismissal of an employee.

74. The supervisor writes the warning letters. The Executive Director signed the warning letters in issue.

75. The disciplinary action is not limited to termination or dismissal. This includes warnings either verbal or written.

76. She told the Court that the Claimant's delay in confirmation was due to the calendar of the Board.

The Claimant's submissions

77. The Claimant filed his written submissions on the 17th of October 2022 distilling four issues for determination thus;

    i. Whether there existed a valid reason [s] to terminate the Claimant's employment.

    ii. Whether the Respondent met the threshold for termination on account of poor performance.

    iii. Whether the Respondent failed to follow due procedure in terminating the Claimant's employment thereby rendering the termination unfair and unlawful.

    iv. Whether the Claimant is entitled to the remedies sought.

78. On the first issue, Counsel for the Claimant submitted that the law only recognises termination of a contract of service with cause. This is what the provisions of section 43 of the *Employment Act*, 2007 contemplate. At the time of termination of the contract, the employer must have reasons that he genuinely believes to exist. To buttress these submissions, Counsel cited the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR.

79. The termination letter encapsulated the reason for the termination of the Claimant's employment. An unsatisfactory performance by the Claimant which allegedly dated back to the year 2006. The evidence on record does not support this assertion by the Respondent. In the financial years 2009/2010, 2010/2011, 2011/2012, the Claimant was rated "Very Good" ", Good" and 'Good", respectively. In the financial years 2012/2013, 2013/2014, and 2014/2015, the Claimant was rated "poor" "Good" and "Fair", respectively. The 2012/2013 rating was stage-managed by the Respondent's Executive Director, who decided to conduct the appraisal regarding the period in a very shallow manner and refused to consider the Claimant's supporting documents. The supervisor just awarded an arbitrary rating of 50% to ensure that he fell within the realm of the score," poor."

80. The Claimant cannot be labelled a poor performer since he was only rated poor and fair in only two instances, and this flowed from an arbitrary scoring by the Executive Director.

81. It is clear therefore that the termination wasn't prompted by a hunt by the Executive Director.

82. To buttress these submissions, the Claimant's Counsel placed reliance on the case of Liberator Njau Njioka v Magadi Soda Company Limited [2011] eKLR.

83. On whether the Respondent met the threshold for termination on account of poor performance, it was submitted that in a dispute regarding termination on account of poor performance, the law places a high burden on the employer to prove that before deciding to terminate an employee, mechanisms were put in place to measure the performance of such an employee and where the employee was found to be performing poorly, he/she was placed on a performance improvement plan. To bolster these

submissions, reliance was placed on the case of Jane Samba Mukala vs Ol Tukai Lodge Limited [2013] eKLR where it was held:

> "This is important to note as 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 outlines 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 to 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.
>
> Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses."

84. It was further submitted that the Respondent did not demonstrate that besides identifying the alleged areas that the Claimant needed improvement on, it directed any effort towards assisting the Claimant improve for instance through training and other activities.

85. The Court was urged to note that to solidify its allegations of poor performance, the Respondent referred to the performance for the years 2006-2009 when they didn't have any performance appraisal mechanism in place. Further, they relied on the performance for the period 1st April 2009 to June 2009[three months] when it was clear that the performance appraisal for this period was on a mock basis and was not supposed to be used either for reward or sanction on employees.

86. It was further submitted that the Respondent's Human Resource Policy and Procedure Manual provided that where an employee was rated fair after a performance appraisal, he was supposed to be placed on a performance improvement plan for six months. After the appraisal for the year 2014/2015 he was not put on a Performance Improvement Plan, he was just issued with a show cause letter and subsequently terminated. Without justification, the Respondent breached its Instrument.

87. Counsel summed it up by submitting that the threshold wasn't met. The termination on account of poor performance was unfair. The Claimant is entitled to all the reliefs he has sought.

The Respondent's submissions

88. The Respondent filed written submissions on the 1st March 2023 with three issues for determination thus;

    i. Whether there were sufficient reasons to justify the termination of the Claimant's services.

    ii. Whether the Respondent followed due process in terminating the Claimant's services.

    iii. Whether the relief sought should be granted.

89. For the first issue, it was submitted that there was no contest between the parties that the Claimant like any other member of staff was subject to annual performance appraisals. Performance by a member of staff was expected to be consistent and a rating of "very good" to "excellent" was desirable as per the Respondent's policy. Following the erratic performance by the Claimant cautionary and or warning letters were issued against him and subsequently subjected to a disciplinary process.

90. The Respondent's Counsel urged this Court to note that on the 5th of April 2012, the Claimant was issued a memo notifying him of an unsatisfactory work performance, and loss of ICDC assets due to negligence. In the letter, he was accused of poor performance and the loss of ten laptops. He was required to show cause why disciplinary action should not be taken against him. The Claimant responded to the letter admitting that the laptops were stored in his office and that they were pilfered away. This was a clear neglect of duty that would justifiably attract the sanction of summary dismissal under the provisions of section 44[4][c] of the *Employment Act*.

91. It was contended that looking at the trend exhibited by the documents presented by both parties, it wouldn't be difficult to discern that the Respondent was justified to hold that the Claimant's performance was poor and terminate his employment on that account.

92. It was further argued that the Claimant's assertion that the termination of his employment was the result of a witch hunt by Mr. Kimurwa cannot be justified. Correspondences concerning his unsatisfactory performance were not only written by Kimurwa alone but also by the other Executive Directors under whom he had an opportunity to serve.

93. On the second issue, it was submitted that the procedure adopted by the Respondent in terminating the Claimant was fair. He was issued with a notice to show cause to which he responded. He was allowed to defend himself during the disciplinary hearing. Further, he appealed against the decision to terminate his employment but the appeal was unsuccessful. To support its submissions that procedural fairness was present in the termination, it placed reliance on the case of Jane Samba Mukala vs Ol Tukai Lodge Limited [2013] eKLR where it was held:

> "This is important to note as 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 outlines 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 to 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.
>
> Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses."

94. Reliance was also placed on section 41 of the *Employment Act* 2007 which provides:

> "(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 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), make."

95. By reason of the foregoing premises the Respondent argues that as the Claimant's employment was rightfully terminated, he is not entitled to a grant of any of the reliefs he has sought.

96. The Respondent asserted that the relief of reinstatement reliance cannot be available to the Claimant by operation of the law, Section 12 of the Employment and Labour Relation Court Act 2011. The provision inhibits any order of reinstatement in situations where three years have lapsed after the date of termination. Reliance was also placed on the case of Sotik Highlands Tea Estates Limited vs Kenya Plantation & Agricultural Workers Union [2017] eKLR in fortification of the submissions.

97. Contending that the Claimant has not demonstrated that he qualifies to be granted the relief of aggravated damages and exemplary damages the Respondent placed reliance on the case of Geoffrey Githiriri Kamau vs Attorney General [2015] eKLR where it was held:

> "Aggravated damages are awarded in actions where damages are at large. That is to say where damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copyright, among others.
>
> Such damages are part of, or included in the sum awarded as general damages and are therefore at large. As such, they need not be specifically pleaded or included in the prayer for reliefs. See Rookes v Bernard (1964) 1A ER 367. However, where the plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matter. The matters that the court should take into account in awarding such damages include the defendant's motives, conduct and manner of committing the tort. The court has to consider whether or not the defendant acted with malevolence or spite or behaved in a high handed, malicious, insulting or aggressive manner."

98. Similarly, on case of Godfrey Julius Ndumba Mbogori & Another vs Nairobi City County [2018] eKLR the court held:

> "Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes V Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of

the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute."

99. Lastly it was submitted that general damages are not awardable in wrongful termination cases. Reliance was placed on the case of Kenya Broadcasting Corporation vs Geoffrey Wakio [2019] eKLR in fortification of the submissions

100. It is the Respondent's submission that the Claimant's case ought to be dismissed in its entirety with costs to the Respondent.

Analysis and determination.

101. From the pleadings, the evidence on record as well as the rival submissions, by the parties, the following issues present themselves for determination thus:

    i. Whether the Claimant's termination was procedurally and substantively fair.

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

    iii. Who should shoulder the costs of the suit?

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

102. In this matter, the Court has been called upon to interrogate and render itself on the presence of fairness or otherwise in the termination of the Claimant's employment. To answer the question of whether there was fairness or not in the discharge of an employee from employment either by termination or summary dismissal, the Court gets enjoined to consider two aspects, substantive justification and procedural fairness. The two form the total unit of fairness. The absence of any of or both them shall render the termination unfair. Imperative to state that the two aspects are statutory.

103. In the case of Walter Anuro Ogal vs Teachers Service Commission (2013) eKLR the Court held on this, that;

> "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."

104. Having said as I have hereinabove, I now turn to consider the first aspect, procedural fairness. Section 41 of the *Employment Act* 2007 provides the structure for procedural fairness in the Kenyan situation. It provides:

> "(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 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), make."

105. Procedural fairness as contemplated by the provisions of Section 41, embodies three components; The notification component, any employer contemplating terminating an employee's employment must inform the employee of the intention and the reasons stirring the intention; the hearing component, the employer must allow the employee affected a reasonable opportunity to make a representation both on the grounds and the intention; the consideration component, the employer must consider the representations before making a final decision.

106. In Obara, Lydia Moraa vs Tusker Mattresses Limited 2016 eKLR this Court held:

> " 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 the 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."

107. There is no doubt that the Claimant herein was at all material an employee of the Respondent. He was in the service of the Respondent for almost a decade as the IT Manager until 8th March 2016 when his services were terminated on account of unsatisfactory job performance.

108. There is no dispute that by an internal Memo dated 19th October 2015, the Claimant was issued with a show cause letter, instructing him to explain why disciplinary action should not be taken against him on the grounds of poor performance. He was required to furnish a response to the Executive Director by the close of business, Wednesday 21st October 2015. Indeed, the Claimant responded to the said show cause letter on the 23rd of October 2015 explaining his position.

109. It is also patently clear that on 15th February 2016, the Claimant was invited to a disciplinary meeting before the Staff and General Purposes Committee of the Board on 17th February 2016 at 9:30 a.m., to show cause why his employment would not be terminated. The Claimant was also informed of his right to be accompanied by a colleague of his own choice to the said hearing. It is also evident that the Claimant requested more time to prepare and formulate his response which was accepted by the Respondent through an internal memo dated 22nd February 2016. The hearing was re-slated for the 23rd of February 2016. In the letter, the Executive Director asked the Claimant to deliver a written defence before the hearing date to the Chairman of the Committee. This he did.

110. The Claimant's employment was subsequently terminated on the 8th of March 2016. The Claimant was reminded of his right to appeal under the Corporation's Code of Rules and Regulations. On 21st March 2016 he exercised his right of Appeal to the Chairman of the Board of Directors. The appeal was declined.

111. I have carefully considered the documents that I have referred to hereinabove, and the sequence of events brought forth, and come to an inevitable conclusion that; the Claimant was notified of the Respondent's intention to terminate his employment and the grounds that were spurring the same; he was accorded an opportunity to defend himself on the grounds. Consequently, I find that the process leading to the termination conformed to the edicts section 41 of the *Employment Act*.

112. Sections 43, 45, and 47[5] of the *Employment Act* speak to substantive fairness. When one talks of substantive fairness, he is talking of the merits or demerits of the decision within the context provided

by law. Section 43 of the Act places a duty on the employer to prove the reasons for the termination of an employee's employment whenever there is a dispute as the one herein. Section 45 of the Act imposes a further burden on the employer to prove that the reasons were fair and valid.

113. In the case of Naima Khamis vs Oxford University Press E.A Limited (2017) eKLR the Court observed:

> "On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination."

114. There cannot be any doubt that the Respondent fronted the Claimant's poor or unsatisfactory performance as the reason for the termination of his employment. This was expressed on the termination letter. The same read in part:

> "RE: Termination Of Employment
>
> I wish to inform you that the Corporation has decided to terminate your services with immediate effect. Consequently, the Corporation shall pay you one month's salary in lieu of notice.
>
> This decision has been taken due to unsatisfactory job performance which has been a long outstanding issue that can be tracked back to 2006 when you joined the Corporation and which has been brought to your attention through various correspondences including those dated 4th February 2011, 21st May 2012, 26th September 2013 and 3rd March 2015..............."

115. This Court has to decide whether the material placed forth establishes that the reason was valid, fair, just and equitable as contemplated in the provisions of the law cited hereinabove. I state this without losing sight of the fact a separation in employment is supposed to be characterised by candidness, forthrightness, trust, confidence, and good faith. Neither the employer nor the employee should abuse the authority available to them in the employment relationship to oppress the other.

116. Undoubtedly, the thinking that at the confirmation of the Claimant into employment, the Board noted his unsatisfactory performance integrally formed part of the reason why his employment was terminated. One keenly looking at the letter, and considering the purpose for the probationary period[s] will find no difficulty in concluding that this position taken by the Respondent with due respect is wholly erroneous.

117. The Respondent's witness asserted that the Claimant's confirmation into employment was conditional, another wholly erroneous assertion. The letter doesn't expressly provide so or give content to enable an inference to that effect. I am unable to fathom what informed the assertion.

118. The probation period is meant to allow the employer to evaluate the employee's suitability for the new job before confirming the appointment. The law [section 42 of the *Employment Act*] and no doubt sound Human Resource Management practice contemplates three options available to the employer at the end of a new employee's probationary period, thus; confirm the employee into employment; or terminate his employment on account of unsatisfactory performance; or extend the probationary period with the consent of the employee. If the performance was wanting in one way or the other to warrant an extension, the areas of weakness must be expressly stated and the employee's effort to improve on those areas called upon.

119. The confirmation letter does not at all attribute those "outstanding issues" cited in the confirmation letter to any poor performance on the part of the Claimant.

120. This maintained and the consistent assertion that the Claimant's poor performance would be traced back to 2006, in my view, is unreasonable and without basis, by reason of the foregoing premises. Since the Respondent decided to make it part of the reason for the discharge of the Claimant from employment, the validity and fairness of the reason for termination are gravely diminished.

121. In order to find an employee is guilty of poor performance and contemplate dismissal as an appropriate sanction for such conduct, onus is on the employer to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected performance standards is serious; that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Additionally, the employer should be able to demonstrate that the failure to meet the standards of performance required is due to the employee's inability to do so and not factors that are outside the employee's control.

122. In the case of the case of Jane Samba Mukala vs Oltukai Lodge Limited (2010) eKLR 225 the court observed:

> " 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 outlines 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."

123. Similarly, in the case of National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR where it was held:

> " The reason advanced by the Bank for terminating the respondent's employment was poor performance.
>
> "a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the 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.
>
> b. It is imperative on the part of the employer to show what measures were in place to enable them to 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 put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
>
> c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation

on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

124. There is no dispute that the Respondent had put in place the Performance Management System for appraisal of its employees' performance for incentives/rewards and sanctions. The respondent's Incentives and Sanction Policy Frame Work, in clause 4.0 provides;

> " The corporation has in place a performance management tool which it will use to set targets for employees at the beginning of the financial year and carry out evaluation of the same at the end of each financial year. The results of the evaluation will be used to make decisions on incentives/rewards and sanctions."

125. The Respondent's witness asserted that the standard of performance that was accepted by the Respondent one that could be rated "Very Good"' or "Excellent" after the appraisal. The witness didn't point out to the Court any provision of the policy framework to support this assertion. When one considers the stipulations of the policy framework and more particularly clause 4.1.3, which provides for sanctions could emerge that the witness was wrong or he deliberately was attempting to mislead the court. Further, if the witness's evidence is taken to be reflective of the Respondent's perception, [and I have no reason to see it otherwise] in deciding to terminate the Claimant's employment, then the same was on a wrong premise. This reflects the invalidity and unfairness of the reason for termination.

126. The Respondent alleged that the Claimant exhibited a constant trend of under-performance. The Claimant furiously contested this assertion. The Claimant argued that his performance had a positive trajectory with him being rated good, good and very good and in two appraisals that rated "poor" and "Fair ". I have had a look at the performance appraisal for the period 1st April to 30th June 2009 the Claimant's overall performance was rated 'Fair'. According to the policy, such a rating could attract an employee to be placed under a performance improvement plan. However, the Court has not lost sight of the fact that the Claimant asserted convincingly so, that the rating was born out of a mock appraisal and the same couldn't count for reward or sanction. This evidence was not at all challenged by the Respondent. In any event, the policy provides for appraisal end of each financial year. The Respondent was wrong to use this appraisal and score as a basis inter alia for the decision to terminate.

127. It was the case that by a letter dated 4th February 2011, the Claimant was placed on a Performance Improvement Programme. I have carefully read the letter posits that the poor performance led to the Performance Improvement Plan for the Period July to December 2010. One could wonder how the poor performance during this period was noted yet the Policy framework only allowed appraisals at the end of each financial year. I can only agree with the Claimant that he was was not appraised for this period and placed on any PIP.

128. In the Performance Appraisal Report for the period 1st July 2009 to 30th June 2010, the Claimant's overall performance was rated 'very good' with a salary increment to Ksh. 158, 268. Similarly, in the Performance Appraisal report for the period 1st July 2010 to 30th June 2011, the Claimant was rated 'Good' with a salary increment of Ksh. 175, 677.48. In the Performance Appraisal report from 1st July 2011 to 30th June 2012, the Claimant was rated 'Good' with a salary increment of Ksh. 182, 704.60. In the Appraisal report for the period 1st July 2012 to 30th June 2013, the Claimant was rated "Poor" with a total score of 50%. It is also clear on the record that in the Performance Appraisal Report for

the period 1st July 2013 to 30th June 2014, the Claimant was rated "Good" with a salary increment of Ksh. 223,082.31 and lastly in the Performance Appraisal report from 1st July 2014 to 30th June 2015 the Claimant was rated "Fair" with a total score of 57%.

129. By reason of the premises, I have no difficulty in concluding that there was only one instance when the Claimant was rated below 'Good'. Performance appraisal for the period 1st July 2012 to 30th June 2013 when the Claimant's performance was rated Poor with a total score of 50%. The question that pops up then is, how did the Respondent handle the result? Clause 4.1.3 [ii] of the Respondent's Incentive and Sanction Policy Framework, stipulated:

> " Those who are rated poor [50% and below] will immediately receive a warning letter and be placed on a performance improvement program for six months. [Mitigating factors will be considered before the first warning letter is issued] Failure to improve after six months calls for a final warning letter. If there is no improvement by the time of the next review, the employee's services will be terminated."

130. No evidence was tendered by the Claimant was ever placed under a performance Improvement Program after this. This is Contrary to the stipulations cited above.

131. A final warning letter could only be issued to the Claimant if he failed to improve during the performance improvement plan. The Respondent's Executive Director purported to issue a final warning letter to set the tone for the termination of the Claimant's employment. This was unfair and in breach of its duty of trust and confidentiality. Important to note that during the next appraisal for the period 1st July 2014 to 30th July 2014, the Claimant's performance was rated 'Good'.

132. The Appraisal for 1st July 2014 to 30th June 2015 rated the Claimant's performance as "Fair" and the Respondent does not dispute this. Having performed satisfactorily in the preceding financial year, the Respondent could only dismiss him on account of poor performance on the outcome of this period's appraisal but after duly engaging the motions provided under clause 4.1.3 of the policy framework. It provided;

> " (i) Those who are rated FAIR [64-51] will be placed on a performance improvement program of six months. If one does not improve within the six months, one shall receive a warning letter. If there is no improvement recorded during the next review, a final warning letter shall be issued. Failure to improve after this will call for termination of services."

133. The Respondent didn't issue any warning letter and put the Claimant on a performance improvement program as dictated by its Policy framework. It just proceeded to call for the termination of his employment skipping two key processes provided by the policy framework. This deprived the Claimant of the opportunity to redeem himself from the claws of a potential termination. In my view, this was unjust and inequitable.

134. Having stated as I have, I find that after the appraisal of the financial year 2014- 2015, there wasn't a situational ripeness to attract the Respondent's action, calling for the termination of the Claimant's employment.

135. As stated hereinabove, the duty falls upon the employer to demonstrate that the alleged poor performance on the part of the employee wasn't as a result of factors outside his control. I note that in the correspondences by the Claimant, he attributed the performance for those periods that he is said to have performed not to the satisfaction of the Respondent, to factors that this court perceives to be

systemic, organizational structure, and relational with 3rd parties, like that between Neptune Limited and the Respondent.

136. For instance, the Claimant contended that his performance was affected by low staff establishments in user departments and hence lack of full participation from user departments in the implementation of automation initiatives and the non-functional tender system due to a prolonged lack of procurement Officers to drive procurement process. The Respondent didn't place any evidence before me to show that the factors were not the prompters of the unsatisfactory performance.

137. Further, the Court notes that RW1 during Cross-examination asserted that indeed the Claimant was sponsored and allowed for various trainings including in South Africa. However, pressed for proof, she acceded she had none. By dint of section 107 of the *Evidence Act* Cap 80, it is trite that "whoever alleges must prove". A document, certificate or certificate of participation could have sufficed to prove that indeed the Claimant was given the much needed support to improve on his weak areas other than being left to wade through the mud of underperformance as alleged solely.

138. By reason of the foregoing premises, I reach an inescapable conclusion that the Claimant's termination was substantively unjustified and unlawful.

Whether the Claimant is entitled to the reliefs sought

i. Reinstatement

139. The Claimant urged this Court to order his reinstatement into employment with the Respondent without loss of benefits, seniority and continued service. 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. An order for reinstatement is not automatic and the same is allowed only in very exceptional circumstances depending on the facts and circumstances of each case.

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

> " 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 took action against him will be minimal. (Emphasis supplied).
>
> 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".

141. I have considered the material placed before this court and I am impelled to hold that in the circumstances of this matter, the remedy cannot be availed to the Claimant. A period of almost seven years has lapsed since the Claimant's discharge from employment. The stipulations of Section 12 [3] [vii] tie my hands to.

A permanent injunction restraining the conversion of the interest rate of 3% to commercial rate interest on credit facilities was granted.

142. The Claimant urged this Court to issue a permanent injunction against the Respondent restraining it from converting the interest rate from the special staff interest rate of 3% of financial accommodations granted to its employees to a commercial rate on credit facilities granted that were granted Respondent to the Applicant under the terms of the staff loans scheme.

143. No dispute that the Claimant was granted financial accommodation in the form of a loan of Ksh. 10, 600,000 [Ten million six hundred Thousand shillings only] on or about the 15th of September 2009. He offered his parcel of land comprised in title No.LR. 12948/230 as security for its repayment. The loan term was set as 20 years.

144. Clause 7:3 [e] of the Respondent's Code of Staff Rules and Regulation revised in June 2015, it provides:

> " The rate of interest applicable to the Housing Loan Scheme shall be 3% [revisable], provided that should the borrower leave services of the Corporation honourably after serving for ten [10] years or more, or retire, the interest chargeable will be 8% p.a. or such other interest as the Corporation may at its sole discretion determine from time to time.
>
> However, if a borrower leaves the services of the Corporation on disciplinary grounds, despite serving over ten [10] years the rate of interest shall automatically revert to the current market rates and the borrower shall in such event repay the full amount outstanding within three months of the date of leaving the services of the Corporation.
>
> If however, an officer leaves the service for reasons other than disciplinary such an officer shall not be required to repay the loan within three months provided he or she previously fulfilled all other requirements of the scheme but the rate of interest shall revert to current market rates."

145. Through an email dated 11th March 2015, the Board communicated the following resolutions pertaining the staff matters as far as loan facilities were concerned the same reads in part:

> " From: staff@icdc.co.ke
>
> To: Peter K. Mwangi.
>
> Dear All,
>
> I wish to inform you that the Board during its meeting held on 9th March 2015 made the following resolutions relating to staff matters:
>
> They approved the reduction of the interest rates charged for the staff car and house loans from 5% to 3% as per the Salaries and Remuneration Commission [SRC] Circular, however, the terms and conditions of repayment when one leaves the Corporation will remain the same......"

146. Clause 3 [b] [b] of the loan agreement further provided that:

> " If the employer voluntarily leaves the services of the corporation or retires after having served for Ten [10] years or more the interest rate payable shall be eight [8%] per annum [Revisable] at the absolute discretion of the Corporation or such other interest as the Corporation at its own discretion may decide from time to time."

147. Having found that the Claimant's employment was terminated unfairly and the fact that he had served the Respondent for Ten [10] years and six months, I am persuaded that justice calls me to grant the remedy of injunction sought. To fail to grant the remedy will be tantamount to allowing the Respondent to draw a benefit from its wrong[s]. I am not ready to. It will be unfair and an affront on equity.

ii. A permanent injunction restraining the Respondent from levying penalties on the outstanding loan balance from the date such penalties started to accrue on the outstanding loan.

148. The Claimant asserted that due to the sudden and unfair termination of his employment payment loan became a challenge. I see him as saying that penalties that were visited on his account due to not making repayment instalments as and when they fell due were a result of the Respondent's unfair action. Having said that the Respondent cannot be allowed to benefit from a wrong committed by itself, I am convinced that this relief should also be availed to the Claimant.

An order of Permanent injunction restraining the Respondent from selling by auction the Claimant's property known as LR. No. 12948/230 Nairobi Area.

149. There is no doubt that the property LR. 12948/230 situated in Nairobi City measuring 0.0976 hectares was used to secure repayment of the loan facility advanced to the Claimant by the Respondent. By parity of the foregoing reasoning, I grant the injunction sought under this head.

iii. An order directing the Claimant to continue paying the same rate of monthly instalment inclusive of the rate of 3% on credit facilities.

150. Having noted that the Claimant was unfairly terminated and taking into consideration the provision of clause 7:3 [e] of the Respondent's Code, Rules and Regulations which provides "if however, an officer leaves the service for reasons other than disciplinary such an officer shall not be required to repay the loan within three months provided he or she previously fulfilled all other requirements of the scheme."

151. By reasons of the foregoing, it is hereby ordered that the Claimant continue repaying the facility at the interest rate of 3% p.a and in the contractual monthly instalments.

iv. Maximum compensation for the loss of employment.

152. The Claimant sought to be awarded maximum compensation for the unfair termination. This Court is a live of the fact that 12 months 'gross wages or salary is the maximum awardable compensation provided under section 49 [1] [c] of the *Employment Act* 2007. Granting of the relief is discretionary. Whether maximum compensation depends on the circumstances of the case.

153. I have considered the period the Claimant was engaged by the Respondent as an IT Manager and the fact that his termination was procedurally fair but substantively unfair, the fact that without any justifiable reason the Respondent failed to adhere to it policy framework and terminated the Claimant's employment, and that the Respondent acted without equity, and I am inclined to award the Claimant the compensatory relief at the extent of eight [8] months gross salary. Kshs. 3,035, 805.60

v. General damages

154. The Claimant argued that he had a legitimate expectation that under the contract of employment, the Respondent had bound itself that if the contract was to be terminated, then the same would be per the *Employment Act* 2007. Having awarded the Claimant, the compensatory relief under Section 49[1][c] of the Act, to make an award under this head on the reasoning fronted by him, shall equate to making a double award and consequently enriching him unjustifiably.

155. The Claimant contended that it was the legitimate expectation that he would continue to serve the Respondent as an employee in his position until the statutorily recognized retirement age of 60 years. Further, the expectation flows from the promise given by the Respondent that he would work up to the retirement age of 60 years. That upon the promise he took credit facilities which promise. The Respondent has reneged upon the promise to his detriment.

156. By reason of the above-mentioned breach, he was deprived of the benefits he would have otherwise earned and suffered loss and damage which including; losing Ksh. 30,733,820.80 being salary that he were to earn for the remainder of the years before his retirement at the age of 60 years, lost allowances amounting to Ksh.12, 853, 602 he was meant to earn for the remainder of the years before retirement at 60 years, lost enjoyment of credit facilities at the staff rate of 3% on reducing Balance, is threatened by the Respondent withdrawing staff rate of 3% on credit facilities and recalling the loan at market rate, has lost pension payable by the Respondent, has lost telephone, travel, entertainment, medical and house allowance.

157. In my view, the Claimant's claim under this head and the argument advanced in fortification of the same ignores the principle that a contract of employment is not necessarily for life or up to the age of retirement and that though it may be for indefinite period, does not mean life employment. I decline to make any award here.

vi. Aggravated and exemplary damages.

158. On the award of punitive/aggravated/exemplary damages, in Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001, the Court citing Obongo & Another vs. Municipal Council of Kisumu [1971] EA 91 and Rookes v Bernard & Others [1964] AC 1129 held that:

> "In Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. The third scenario is, of course, where such damages are authorised by statute."

159. The Claimant didn't put forth any material from which it can be discerned that these conditions existed in the circumstances of the instant matter. The Claimant's claim under this head is hereby rejected.

vii. Whether the Claimant's constitutional rights under Article 28, 41, 43, 47 and 50 were infringed by the Respondent

160. It is a trite principle that a party seeking reliefs upon premise of alleged violation of *the Constitution*, constitutional rights and fundamental freedoms, he or she must plead with high degree of precision, show constitutional provision in question or violated and how they have been violated. See- Anerita Karimi Njeru vs Attorney General (1979) eKLR.

161. Similarly, in the case of Julius Meme vs Republic (2004) eKLR the Court stated:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed".

162. The Claimant has not cogently demonstrated how his termination by the Respondent violated his constitutional right [s]. I not able to find that any was violated therefore.

Who should bear the cost of the claim?

163. Costs follow the event. The Respondent shall bear the costs of this suit.

164. In the upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

I. A declaration that the Claimant's termination was procedural fair but substantively unjustified and unfair.

II. A Permanent injunction is hereby issued against the Respondent whether by themselves, agents or servants, officers restraining them from converting the interest rate on the credit facilities that were advanced to him from the special staff rate of 3% to commercial rate.

III. A Permanent restraining order is hereby issued against the Respondent, their agents, servants or whosoever from alienating, selling, transferring or attempting to sell by way of auction or dealing with the Claimant's property known as LR. No. 12948/230 Nairobi Area within Nairobi County, on account of any default in the loan repayment from the date of the termination of his employment to the date of this judgment.

IV. The Claimant shall continue repaying the loan at the said rate and the contractual monthly instalments.

V. Compensation pursuant to section 49 [1] [c] of the *Employment Act*, 2007 for unfair termination......................Ksh. 3,035,805.60.

VI. Cost of the suit.

VII. Interest on the sum awarded at court rates from the date of this judgement till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF OCTOBER, 2023.

____

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Otieno holding brief for Obura for Respondent

Ms. Atieno holding brief for Mr. Olewe for Claimant

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