



**Kasina & another v Kenya Hospital Association t/a The Nairobi Hospital & another
(Cause 2140 of 2014) [2023] KEELRC 2899 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2899 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2140 OF 2014
NZIOKI WA MAKAU, J
NOVEMBER 15, 2023**

BETWEEN

SOLOMON MWIYEI KASINA 1ST CLAIMANT

SOLOMON MWIYEI KASINA 2ND CLAIMANT

AND

**KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI
HOSPITAL 1ST RESPONDENT**

T/A THE NAIROBI HOSPITAL 2ND RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent claiming unfair, unlawful and unprocedural termination and or summary dismissal. The Claimant averred that through a letter of employment dated 16th August 2012, he joined the Respondent Hospital as a Financial Controller. That he used to report to the Respondent's Finance Director who in turn reported to the Chief Executive Officer (CEO) and that there was clear segregation of duties/responsibilities at different equal or senior office so as to avoid collusion among staff. That his duties were specific i.e. processing financial information, reconciliation, maintaining external/internal financial relationships, budgeting and reporting, and finance staff supervision and deployment reporting. He asserted that he served the Respondent in the said capacity with diligence and dedication from 1st October 2012 until he was unfairly and unlawfully terminated vide a letter dated 14th October 2014. The Claimant averred that sometimes in April 2014, he discovered discrepancies in transactions in the Respondent's cash collection account amounting to over Kshs. 124 Million. That together with the Respondent's Chief Accountant, Mr. John Ngunju, their investigations revealed that the discrepancies came from manipulation of data through the Information Technology (IT) Department headed by the IT Manager who reported to the Finance Director. That they then immediately notified the CEO in writing and with documentary evidence, actually pointed out the staff involved in the fraud. That they also recommended to the CEO



ways of securing the data. That however instead of being rewarded, he was suspended through a letter dated 15th May 2014 and accused by the Respondent's HR Manager, on behalf of the CEO, as being culpable for the loss "by commission or omission". That as a result of the suspension, he subsequently left his place of employment and waited for the promised investigations. He further averred that he recorded a statement with the police on 27th July 2014 in the presence of his advocate for purposes of him giving evidence in court in the fraud case and that he had never been treated as a suspect. That the Chief Accountant, who acted as the Financial Controller at the time of the Claimant's suspension also recorded a statement with the Police but was inexplicably summarily dismissed on 14th August 2014. According to the Claimant, he had no way of ascertaining and verifying the day to day cash collections as the same was the sole responsibility of the Finance Director who was his boss. In this regard, he relied on copies of daily cash collection book/summary signed/approved by the Finance Director with the approval of the Respondent's CEO. Further, that the Respondent had similarly lost money through the same account in 2010 and 2011 and despite it being advised to put audit trail logs in the system to prevent any data manipulation, it ignored the recommendations. He relied on the relevant 2010 and 2011 audited accounts signed by the Board of Trustees and Management and the letter from external auditors to Chief Executives in support of the claims.

2. The Claimant further averred that when he met the HR Manager on 5th August 2014, she intimated she was under instruction to exit all senior staff in the Finance, IT and Internal Audit departments of the Respondent, either by resignation, termination or dismissal and at that point offered him three (3) months' notice pay for his resignation. That true to her words, the Heads of the said departments had since left the Respondent's employment. That in the same meeting, the HR Manager asked him to cooperate and be used as a witness against the Finance Director and that she would in turn organise for the CEO to personally give him Kshs. 2 Million, because the Hospital was adamant to take a Senior Staff to Court for the fraud. He stated that he refused to be used against the Finance Director as he had no evidence associating the said director with the fraud and that he declined the resignation offer through a letter dated 11th August 2014. It was the Claimant's case that prior to termination of his employment, the Respondent's officers engaged in several malicious and unprocedural acts against him. Firstly, he disclosed a fraud but was thereafter held culpable of the same before any thorough investigation had been conducted and without any explanation being given to him. That instead, the Respondent forced him to resign without going for the real culprits and then planned and initiated a flawed disciplinary process against him for the fraud. To this effect, the Respondent's HR Manager, Ms. Christina Were, wrote a letter dated 26th August 2014 asking him to show cause why disciplinary action should not be taken against him and setting up a disciplinary meeting for 1st September 2014, even before it had considered his explanation. That through his lawyer, he responded in a letter dated 27th August 2014 requiring the said disciplinary meeting to be cancelled as it was unprocedural and prejudged. That he also set out therein the reasons why he should not be held liable for the loss, including that the IT department and Cash Collection was not in his docket of supervision and that the action that would have prevented occurrence of fraud was communicated four (4) years earlier but was ignored. Furthermore, the audit firm that conducted the forensic audit had not implicated him in the fraud. Further, that the Respondent replied to his letter vide their advocates' letter dated 26th September 2014 insisting that the disciplinary action against the Claimant would be instituted afresh and promising to follow due process. That the Respondent subsequently wrote to him on 9th October 2014 on a 'without prejudice' basis and invited him to a disciplinary hearing on 13th October 2014. That his advocates sought to have the said hearing postponed for three days for reasons set out therein but the Respondent ignored the communication and proceeded to terminate his employment for failing to respond to the disciplinary meeting. That the termination letter was dropped by his house and received by the house girl and that he had never been allowed to collect his personal belongings from his former



office. It was the Claimant's stance that prior to the termination, the Respondent had maliciously kept him in indefinite suspension for 153 days against fair HR practices.

3. The Claimant thus prayed for judgment against the Respondent for damages for unfair termination (monthly salary and pension), annual 13th salary paid every year, general and exemplary damages, medical costs for 12 months, letter of service, costs, interest on the foregoing, and any other relief the Court may deem fit as set out in his Memorandum of Claim dated 1st December 2014.

Respondent's Case

4. In response, the Respondent filed a Memorandum in Reply and Counter Claim. It averred that the Claimant's letter of appointment provided among others that he was to abide by the administrative instructions in force and those issued from time to time and was not to disclose any of the Respondent's secrets or confidential matters without consent. The Respondent averred that on 10th May 2013, the HR Manager found an unauthorised person supposedly helping one of the officers under the Claimant's immediate supervision, to clean the outstanding issues of stock. That the Claimant failed to bring to attention the presence of the unauthorised person and the vice would have continued unabated had the HR Manager not found him. That the said person, Mr. Kenneth Kamau, wrote a letter indicating he had been using the said employee's password to assess the Respondent's financial status from 2007. The Respondent averred that the report from the HR Manager noted that such incidents had been the norm in the finance department and recommended a review of systems access, which the Claimant ought to have taken as per his job description.
5. It was the Respondent's further averment that on 27th November 2013, the Claimant's immediate supervisor who was the Finance Director, wrote an internal memo to the CEO on the fraud involving TNH Cheque No. 138262 drawn in March 2013 and noted that the fraud was within the department. From the said assessment, the Respondent reasonably suspected that fraud was being perpetuated by its employees in the Finance Department either by omission or commission. It averred that its CEO responded to the Memo on 5th December 2013 wondering why disciplinary action had not been against the Accounts Assistant, who under the Respondent's Disciplinary Policy, ought to have had a recommendation for disciplinary action from the Claimant. That the CEO also questioned how the unauthorised person accessed the file management system yet the Claimant's job description was to 'establish and maintain effective internal control systems and procedures'. In essence, the Respondent's position was that the fraud had been perpetuated due to the Claimant's negligence to perform his duties.
6. The Respondent averred that when it thereafter carried out internal investigations to determine the culpability of the persons involved, the same shockingly revealed that a total of over KShs. 135 Million had been lost. That it consequently suspended the Claimant with half pay as per its disciplinary policy so as to enable it conclude its investigations. Whereas it denied that the Show Cause Letter issued to the Claimant stated that he was involved in the fraud, it acknowledged that it cancelled the planned hearing set on 1st September 2014 after the Claimant disputed the same. It however averred that it thereafter sought advice from its advocates who responded to the Claimant to the effect that disciplinary process cannot be interfered with and that a new date be set for the disciplinary hearing. That it was instructive to note that the Claimant's response in his letter of 29th September 2014 was that he wanted a settlement without going through the internal disciplinary process. It was the Respondent's averment that it wrote to the Claimant on 8th October 2014 inviting him for a disciplinary hearing and informed him of his right to have another employee present during the hearing. That since the said letter had erroneously referred to the date of the hearing as 13th September 2014, it wrote another letter dated 9th October 2014 to correct the inadvertent mistake. The Respondent further averred that its HR



Manager constituted a disciplinary committee in line with its disciplinary policy and unequivocally set out the agenda. That the said committee held a hearing on 13th October 2014 and waited for the Claimant but who did not show up to make his presentation. The Respondent asserted that it therefore terminated the Claimant's services for gross misconduct and set out in the Termination Letter the final dues to be paid to him. That it also sent to the Claimant Cheque Nos. 161164 and 161165 for KShs. 1,513,024.20 after making all the statutory deductions and further sought his advice whether he wished to transfer his portion to a new employer's retirement scheme or an individual retirement scheme. It noted that the Claimant had tried to adjourn the hearing to 16th October 2014 because his advocate would have been unavailable and in court on the said 13th October 2014 but his letter was received two days after the disciplinary meeting and after he had been dismissed.

7. The Respondent avers that it followed the due process of law, its Disciplinary Policy and the Principles of Natural Justice in terminating the Claimant's employment. That the Claimant was afforded an opportunity to respond to queries over his role in the alleged fraud but failed to vindicate himself. That the Claimant was suspended on 15th May 2014 to 26th August 2014 when he was invited for the disciplinary hearing, which is a period of 3 months and that the period between 27th August 2014 to 14th October 2014 was due to the Claimant's act of seeking to be represented by counsel in an internal disciplinary process that does not require such participation. Further, the Respondent contended that the Claimant exhibiting confidential copies of cash collection summaries and confidential letters from auditors goes against his letter of employment and the Declaration and Confidentiality Form that he signed. It refuted the claim that it was the Claimant who discovered the discrepancies in its transactions, asserting that it had commissioned an upgrade of its ICT CARE 2000 system through which the fraud was subsequently established. It further denied the Claimant's averments on what transpired between him and the HR Manager in a meeting. The Respondent also produced a copy of a warning letter to demonstrate that the Claimant was warned about his lateness during his employment with it. The Respondent averred that the Claimant had not concisely pleaded and proved his claim for special damages. That the Claimant's prayer for 13th salary was untenable as the same was bonus salary given to employees at the end of 12 months after assessment of the year's financial performance profits by the Respondent, yet his services were terminated before end of year. As regards medical cost, the Respondent noted that it cannot bear the said burden if the same was not claimed at the time of employment. It asserted that as it had proved its case against the claim for unfair termination, the Claimant was not entitled to any compensation.
8. The Respondent's Counter Claim was grounded on Articles 22, 27 and 40 of the Constitution of Kenya and therein the Respondent prayed for:
 - a. A declaration that the Section 41 of the Employment Act contravenes Articles 27 and 40 of the Constitution to the extent that an employer is penalized with damages for purportedly failing to accord a hearing to the employee who has been dismissed for gross misconduct in accordance with Section 44 of the Employment Act.
 - b. A declaration that any lawful damages under Section 49(1)(c) as read with Section 41 of the Employment Act should be limited to the contractual period of notice provided in the contract of employment or the Employment Act or time taken for carrying out the disciplinary hearing.
 - c. A declaration that damages awarded under Section 49(1)(c) of the Employment Act is strictly confined to instances where a finding is made that the dismissal was unjustified and does not extend to unfair dismissal under Section 49(3) of the Employment Act which only permits reinstatement or re-engagement.



- d. A declaration that damages under Section 49(1)(c) as read with Section 41 of the Employment Act ought not to be awarded to a Claimant who was afforded a fair administrative action under Article 47 of the Constitution.

Claimant's Submissions

9. It was the Claimant's submission that the law on termination of contracts of employment on account of incompetence and/or poor performance, gross misconduct and physical incapacity is fairly settled. That under sections 41, 43 and 45 of the Employment Act 2007, the employer must, before terminating the employee's contract of employment, establish a valid reason for the decision and also follow due process in terminating the contract. That sections 43 and 45 of the Act place the burden of proving the validity of the decision to terminate a contract of employment on the employer. According to the Claimant, the Respondent did not have any valid reasons to terminate his employment and did not follow the requisite procedure as detailed in the chronology of events leading to termination of his employment set out in his pleadings. In addition, he was not given an opportunity to complete the investigations as he was suspended and remained on suspension until termination of his employment on 14th October 2014. He further submitted that he properly communicated his inability to attend the disciplinary hearing on 13th October 2014 and the failure to attend should therefore not have been used as a reason to terminate his employment. That the Respondent should have either accepted or declined his request for adjournment of the disciplinary hearing.
10. Further, that although the Respondent stated that its investigation unearthed a loss of Kshs. 135 Million under the Claimant's watch, there was no report in this regard produced in court. That it was therefore doubtful that there was any investigation other than the one he and the Chief Accountant carried out. Moreover, that it had not been demonstrated how he was involved in the alleged losses since no evidence of the transactions leading to the alleged losses or his involvement in data manipulation was produced in court. He reiterated that even before the Respondent employed him, its auditors had recommended the actions to be taken to prevent losses but nothing was done. That RW1 admitted so on cross-examination, that no action had been taken on the auditor's recommendation contained in the Report to Management for the year ended 31st December 2011. The Claimant further explained that the Respondent had a long standing practice of recruiting extra personnel to help in stock-taking, as confirmed in a confidential discussion paper signed by Ms. Christina Were dated 14th May 2013, wherein one Duncan Githiga stated he had been coming to stock-take at the Hospital since 2007. Regarding the allegation that he failed to prevent an attempted fraud involving Cheque No. 138262, the Claimant submitted that it was not in dispute that he was the one who stopped payment of the cheque once the Commercial Bank of Africa alerted him of its existence as the issue was escalated to the banking fraud unit. According to him, he carried out his mandate in preventing fraud against the respondent. the claimant further submitted that the show cause letter was referenced "show cause & disciplinary hearing", which was clearly contrary to the set disciplinary mechanism and that the wording of the letter demonstrated a pre-determined outcome of the notice to show cause. That the Respondent had already concluded that no proper cause would be shown and had therefore set in motion the process of a disciplinary hearing. Furthermore, the Respondent's conduct including hastily handing over at his house cheques for his final dues a day after the date of the disciplinary hearing confirmed his assertion that a decision had been made to terminate his employment by all means, and which called for award of exemplary damages.
11. It was the Claimant's submission that the law on summary dismissal is provided under section 44 of the Employment Act to be when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or



contractual term, when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. He argued that the Respondent contravened his rights to fair labour practice and to fair administrative action under Articles 41 and 47 of the Constitution of Kenya respectively. He reiterated that the Respondent combined the show cause process and the disciplinary hearing in complete disregard of its own disciplinary mechanism and in violation of principles of natural justice and he urged the Court to so find. He relied on the case of Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR in which the Court asserted that where procedure is flawed, the termination was unfair. The Claimant thus urged the Court to find that the termination of his employment was unprocedural and therefore unfair. The Claimant submitted that whereas it is settled law that the damages payable for wrongful dismissal or unlawful termination of employment is payment of salary for the contracted notice period, section 49(1)(c) of the employment act however provides for payment of the equivalent of a number of months' wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. that this court has on many occasions stated that the remedy under section 49(1)(c) is discretionary and based on the circumstances of each individual case and the factors set out in section 49(4) of the act. he pointed out george onyango akuti v g4s security services kenya ltd and nairobi elrc petition no. 117 of 2018 - munir sheikh ahmed v national bank of kenya [2020] eklr. it was the claimant's submission that given the manner in which his employment was terminated, particularly the Respondent's failure to follow its own disciplinary mechanism, considering he was suspended for a long period, and further taking into account his position as a Financial Controller, the Court should award him 12 months' salary compensation, which is reasonable.

12. With regard to the prayer for award of exemplary damages, the Claimant submitted that Kshs. 5 Million would be fair considering the manner in which he was treated, the violation of his rights under Articles 41 and 47 of the Constitution, his suspension for an indefinite period, and being treated as culpable for losses incurred by the respondent without being given an opportunity to present his case. on this submission he relied on the case of mokava v kithure kindiki t/a kithure kindiki & associates [2021] keelrc 1(klr) where the petitioner was awarded the sum of kshs. 1.5 million exemplary damages for the violation of her statutory and constitutional rights. It was the Claimant's submission that in the instant case, the sum of Kshs. 5,000,000/- under this head is reasonable. The Claimant further submitted that he was entitled to the claim for his 13th salary and to benefit from the medical scheme, which sums this Court should award. In conclusion, he prayed that the Court awards him the reliefs set out in the Statement of Claim.

Respondent's Submissions

13. The Respondent submitted that the standard of proof in employment matters, to confirm that the reasons were valid, is on a balance of probabilities and not beyond reasonable doubt as per the Court of Appeal's decision in the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR. That this is in line with section 43 of the Employment Act which provides that the reasons for termination should be "matters that the employer genuinely believed to exist at the time of termination". Further, that the Court of Appeal in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR maintained this position and held that in adjudicating on the reasonableness of the employer's decision, the court is not entitled to substitute its own decision for that of the employer, particularly where the employer has exercised its discretion properly and in the best interest of the company.
14. It was the Respondent's submission that the Claimant was found to have performed acts and/or omissions of gross misconduct by failing to ensure 'adequate checks and balances to prevent fraud within his workplace', contrary to what was required in his job description. That the Claimant's



Termination Letter and Show Cause Letter and Invitation to disciplinary hearing were clear that the disciplinary issue related to his negligence and omission in breach of his duty of establishing and maintaining effective controls, which led to loss of funds. That section 44(4)(c) of the Employment Act provides that it amounts to gross misconduct if an employee wilfully neglects to perform any work that was his/her duty to perform, or if he/she carelessly and improperly performs any work, which from its nature was his/her duty under the contract of employment to perform carefully and properly. The Respondent cited the case of Bahari Parents Academy v LBZ (Minor suing through his father and next friend) BNZ [2020] eKLR where the Court defined negligence of duty to mean:

“Negligence is a conduct, not state of mind - conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.

With regard to employment and labour relations, negligence then connotes on a balance of probabilities that there is evidence that the claimant as an employee failed to enforce stock routines and that he failed to enforce standard operating procedures which facts he was well aware of. further that he was well of the standards and levels of his required performance but deliberately failed to take proper care in performing the same to the required standard/degree/level.” (Emphasis by Respondent)

15. According to the Respondent, the act of negligence by the Claimant was a breach of the terms and conditions of his employment contract and that this Court ought to find that his employment was therefore terminated for valid and fair reasons in line with sections 43 and 45 of the Employment Act. The Respondent further submitted that its explanations and evidence in the Memorandum in Reply remained uncontroverted as the Claimant did not reply to the same and that purporting to controvert the same at trial and/or through submissions should not be countenanced by the Court. It noted that the issue of the loss of Kshs. 135 Million being doubtful because the Respondent had not produced a report in court had been first raised by the Claimant in submissions. It argued that such introduction of new issues after close of the defence case and more so at the submissions stage was irregular and would highly prejudice the Respondent who no opportunity for rebuttal through evidence. The Respondent relied on the Court’s decision in the case of Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another [2022] eKLR wherein the Court observed there was no sufficient material placed before the Court controverting the respondents’ account because the claimant had not challenged by way of a reply to the response to the claim, and or by bringing on board a further witness statement. In the end, the Respondent urged this Court to disregard in total the Claimant’s submissions on alleged previous losses.
16. As to whether the termination of the Claimant’s employment was procedurally fair, the Respondent submitted that it followed due process in taking disciplinary action against the Claimant as per the provisions of section 41 of the Employment Act. To this effect, it carried out internal investigations and gave the Claimant a chance to exonerate himself through a show cause and invitation to disciplinary hearings twice, but the Claimant failed to show up for the hearing and had his contract subsequently terminated for gross misconduct. It argued that had the Claimant not been guilty as he alleged, nothing would have stopped him from submitting himself to the Respondent’s internal disciplinary processes before involving his advocates. The Respondent relied on the decision of the Court in the case of Mathew Lucy Cherusa v Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre [2013] eKLR, that an employee who squanders the internal grievance handling mechanisms provided for by the employer cannot claim to have been unfairly treated. That this position was affirmed Mbaru J. in the case of Peter Njuguna Chege v Timsales Limited [2020] eKLR.



17. The Respondent further submitted that despite the Claimant's deliberate refusal and/or failure to observe the Respondent's internal disciplinary processes, it considered the investigations and the Claimant's advocates' reply to the show cause letter of 27th August 2014, found the same not satisfactory and which informed its decision to terminate his employment. It also denied that it maliciously kept the Claimant in suspension for 153 days, arguing that the three-months period was reasonable given the nature of the issues that needed to be investigated and the subsequent correspondence had between it and the Claimant's advocates. It was the Respondent's submission that more importantly, section 41 of the Employment Act is clear that the persons accompanying employees to disciplinary hearings are fellow employees or union representatives and that the section does not extend the same to advocates. That the issue of advocates accompanying their clients to disciplinary proceedings was addressed by Rika J. in the case of *Dennis Nyagaka Ratemo v Kenya Film Commission & another* [2014] eKLR that, "Disciplinary proceedings are viewed as internal and labour relations exercises, which must be shielded from the incendiary effects of Lawyers. The less the lawyers are involved, the more likely it is presumed, that the employment dispute will be resolved without escalating into a full-blown legal dispute." The Respondent further submitted that the alleged unavailability of the Claimant's Counsel to attend the disciplinary hearing as scheduled did not mean the Claimant was excused from attending the hearing. On the failure to attend disciplinary hearing, the Respondent relied on the cases of *Gideon Akwera v Board of Governors Church on the Rock Academy* [2015] eKLR; *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd* [2014] eKLR; and *Shadrack Muthiani Kin'goo v Apex Steel Limited* [2018] eKLR. The Respondent submitted that the wording of section 49 of the Employment Act is that for any of the remedies sought in that section to be granted, the employee should first seek to obtain the opinion of the Court as to whether the alleged dismissal or termination of employment was unlawful or not. That without forming this opinion, the Court cannot have the basis of granting any of the remedies sought as there will be no foundational basis for the award. It argued that since the Claimant had not urged the Court to make a determination or form an opinion as to whether his dismissal was unlawful or otherwise, this Court should not make the said determination and therefore not proceed to award or determine any other remedial prayer sought in the Statement of Claim. Without prejudice to the foregoing, the Respondent submitted that it had demonstrated that the Claimant's dismissal was substantively justified and procedurally fair and that the Court should not be invited to substitute the Respondent's reasons for termination with its reasons and/or audit the reasons for termination as held in the case of *Kenya Revenue Authority v Reuwel Waitaha Gitahi & 2 others* (supra). That there was thus no basis for the claim for damages and compensation for unfair termination. Further, that by virtue of section 46 of the Retirement Benefits Act, 1997, this Court does not have the jurisdiction to award the claim for pension benefits/dues as such disputes are regulated by the Retirement Benefits Act, No. 3 of 1997, which Act provides for a dispute resolution mechanism.
18. It was further submitted by the Respondent that since the Claimant had not given the basis for the award of annual 13th salary, the said claim should fail. It argued that the Claimant had not tendered any evidence linking the alleged bonus award to any policy by the Respondent and that the claim was also not part of the terms and conditions of the Claimant's employment. In urging this Court not to award the said prayer, the Respondent relied on the decision of the Court in the case of *Anytime Limited v Fredrick Mutobera Omuraya* [2022] eKLR that the Court must interrogate each prayer in a statement of claim and evaluate the same vis-à-vis the law and the facts of the case before it.
19. The Respondent submitted that, exemplary damages, if at all awardable, can only apply in the most egregious of cases. That the Court of Appeal affirmed in the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR that exemplary damages are essentially different from ordinary damages and that the object of exemplary damages is to punish and deter. That the prayer for damages cannot also



be granted for want of particularity and supporting evidence as confirmed in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR in which the Court of Appeal asserted that a claim for exemplary damages must not only be specifically pleaded but must also be proved with a degree of certainty and particularity. It was the Respondent's stance that since the Claimant did not particularize nor plead the damages he sought to be awarded, the claim for general and exemplary damages should therefore fail. It also relied on the decision of the Court in the case of *Okumu Aziz Ramadhan v China Roads and Bridge Corporation (Kenya)* [2021] eKLR wherein Gakeri J. held that the claimant led no evidence to demonstrate that the respondent committed any tortious act or omission to warrant the award of exemplary damages.

20. Regarding the prayer for medical costs, the Respondent submitted that the Claimant simply claimed for medical costs for 12 months without particulars of the period in question. That medical benefits are for employees and since the Claimant ceased being an employee, there was no basis to claim medical benefits post termination. Further, that the said claim is also not a prayer/claim tenable by virtue of the provisions of section 49 of the Employment Act as well as the Claimant's employment contract of employment. It also noted that the letter of service was available upon application and request. The Respondent further submitted that the Claimant had classically exhibited the access and absence of effective control measured by producing confidential and sensitive information, for which he had not sought any permission to access post-termination of his employment.
21. The Claimant was terminated from his position by the Respondent for his unearthing of a fraudulent scheme where the Respondent had lost some sums of money. The Respondent punished the person who had discovered the hole into which some 43 million had been lost in 2010 and written off as irreconcilable cash/debtors balances. A sum of Kshs. 24 million was similarly written off in 2011. The Claimant was employed in August 2012 and was suspended for the losses hereabove outlined. He therefore was unfairly targeted for dismissal despite there being no reasonable basis to do so. The Claimant was not heard despite the Respondent asserting it gave him an opportunity to be heard. The Claimant was given a letter dated 8th October 2014 (Wednesday) to respond to the allegation by 10th October 2014 (Friday) and hearing on 13th October 2014 (Monday). The Claimant was to was not given sufficient time to respond to the allegations made against him. In the letter, there was no indication that the Claimant was supplied with details of the outcome of the investigation. The letter of suspension on 15th May 2014 was vague as it merely stated that 'reference is made to investigations into the fraudulent transactions of over Kshs. 135 million that have taken place over the last year.' There was nothing else given to the Claimant in as far as accusations go.
22. The dismissal of the Claimant for failing to attend the disciplinary hearing and not availing a defence was insufficient basis for termination given the short time lines the Respondent had given making it impossible for the Claimant to mount any defence. The show cause was a mere formality as the Respondent had already made a determination that there would be a disciplinary hearing. A show cause is the opportunity to demonstrate whether there is any basis for the process to proceed or end at that stage. It was apparent the Respondent had already determined that no matter the explanation the Claimant was to give he was to go for a disciplinary hearing. The termination that ensued was therefore a foregone conclusion and ergo ipso facto unfair and unlawful.
23. The Claimant sought maximum compensation for the unfair termination. The termination was egregious as the Claimant was facing a decision that had been made and therefore having a predetermined disciplinary panel, his hearing cannot be said to have been fair at all. As such he would be entitled to the maximum compensation of 12 months. The Claimant sought bonuses which he would not be entitled to as these were only available to serving employees. He also would not be entitled to the medical costs at Kshs. 500,000/- for the 12 months claimed. The Claimant is entitled to a letter



of service commonly referred to as a certificate of service. The Court also awards the Claimant costs of the suit.

24. The Respondent had raised a counter claim to the effect that the Court do issue a declaration that the section 41 of the Employment Act contravenes Articles 27 and 40 of the Constitution to the extent that an employer is penalized with damages for purportedly failing to accord a hearing to the employee who has been dismissed for gross misconduct in accordance with section 44 of the Employment Act. This cannot be granted as section 41 of the Employment Act accords with Articles 27 and 41 of the Constitution. The employee has a right to be heard much as the employer has a right to explanations under the section. The Claimant and Respondent have equal protection and benefit of the law and where a party contravenes section 41 of the Employment Act, the punishment by way of compensation (damages) payable under section 49 of the Employment Act are within permissible restraints of rights under the Constitution. Even where an employee has been deemed guilty of infarctions against the employer, failure to follow the law in termination of the employee would result in payment of compensation to the wronged employee. That is not unconstitutional.
25. The Respondent also sought a declaration that any lawful damages under section 49(1)(c) as read with section 41 of the Employment Act should be limited to the contractual period of notice provided in the contract of employment or the Employment Act or time taken for carrying out the disciplinary hearing. This cannot be granted as the law provides for payment of up to 12 months salary as compensation and this at times is not even sufficient for the egregious infarctions committed by some employers against employees. Termination in some instances leads to termination of a career and making the employer pay only 12 months for destroying the livelihood and future of its former employee is at times a mere slap on the wrist and if Article 27 were to be realised in that instance, the employee should be allowed to recover more than the 12 months where it is shown the dismissal was loaded with malice and falsehoods as sometimes is the case in matters before the Court.
26. The Respondent sought a declaration that damages awarded under section 49(1)(c) of the Employment Act is strictly confined to instances where a finding is made that the dismissal was unjustified and does not extend to unfair dismissal under section 49(3) of the Employment Act which only permits reinstatement or re-engagement. The remit of section 49 seems lost on the Respondent who conflates unjustifiable dismissal and the issue of reinstatement or re-engagement. Where an employer is culpable and the Court finds there can be reinstatement or re-engagement, it does not bar the Court from awarding compensation. Section 49 of the Employment Act should be read with an open mind.
27. Finally, the Respondent sought a declaration that damages under section 49(1)(c) as read with section 41 of the Employment Act ought not to be awarded to a Claimant who was afforded a fair administrative action under Article 47 of the Constitution. Once again, the Respondent misses the point that fair administrative action must be viewed not in ticking boxes but in actual fair administrative action. Where the law provides that a party should be heard, the party is not heard, the dismissal is faulted for not according with the law, the compensation under section 49(1)(c) as read with section 41 of the Employment Act should be granted as of right since failure to grant an employee the rights that crystalize under section 41 opens the employer to sanctions under section 49 of the Employment Act. As the Court has not found the counterclaim by the Respondent to be merited, the same is dismissed albeit with no order as to costs.
28. In the final analysis, I enter judgment for the Claimant against the Respondent for:-
 - a. A declaration that the termination of the Claimant's employment was unfair and unlawful.



- b. Award the Claimant Kshs. 6,882,792/- being 12 month's salary as compensation in terms of section 49(1)(c) of the Employment Act.
- c. Certificate of service in terms of section 51 of the Employment Act.
- d. Costs of the suit.
- e. Interest at court rates on the sum in (b) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

