



**Nzoki v Kenya Power & Lighting Co Ltd (Cause 1983 of 2017)
[2023] KEELRC 2798 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2798 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1983 OF 2017
JK GAKERI, J
NOVEMBER 8, 2023**

BETWEEN

DICK KWINGA NZOKI CLAIMANT

AND

KENYA POWER & LIGHTING CO LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging unlawful dismissal and condemnation without being heard.
2. The Claimant avers that he joined the Respondent on 6th December, 1996 as a Civil Superintendent in Administration and rose to become the Chief Administration Officer in charge of Administration services and was involved in many new, repair and maintenance projects of company facilities where he supervised the Project Managers.
3. It is the Claimant's case that in the 2013/2014 Financial Year, the budget provided for the drilling of a borehole at the Rabai Control facility to alleviate water shortage and procurement approved the design and procured a list of drilling contractors from the Ministry of Water Development.
4. That the project required a Hydrogeologist to conduct a hydrogeological survey for purposes of authority to drill from the Water Resources Management Authority (WARMA) and a drilling contractor.
5. That the Tender Committee approved the procurement method and awarded the Tender to Ms Ring Technical Services at Kshs.19,309,186.00.
6. That the contractor engaged the services of Mr. W.W Karanja, a licenced Hydrogeologist to conduct the survey which he did and prepared a report dated 6th March, 2014 and WARMA issued its authority



- for the construction of a borehole dated 16th July, 2014 and drilling commenced despite some delay due to lack of a 3 phase power line.
7. The Claimant avers that the Tender Processing Committee (TPC) of the Respondent was mandated to approve works, visited the site, inspected the work and approved it for payment.
 8. That the Claimant's recommendations for payment were based on the report of the Tender Processing Committee and the Project Manager.
 9. It is the Claimant's case that he received two notices to show cause dated 11th May, 2016 and 17th May, 2017 requiring explanations about verification of the Hydrogeological report before recommending payment and failing to carry out due diligence on feasibility of the project, negligence and failing to supervise the Project Manager and Contractor for the project and failure to detect that the Hydrogeological report was defective as its yield was low.
 10. That in his response, he explained that he was not a hydrogeologist to have noticed the defects of the report and in any case the report was approved by WARMA.
 11. That in a 'design and build contracts,' the consultant and the contractor are procured under the same tender.
 12. That drilling did not require a permit but authorization which WARMA granted vide letter ref WRMA/30/MSA/3MDI/11193/G dated 16th July, 2014 and all payments authorised were based on the recommendations of the TPC which approved the work done for payment.
 13. Finally, the Claimant avers that the Respondent hatched a scheme to dismiss him from employment out of 8 people who authorised payment thereby violating his rights.
 14. The Claimant prays for;
 1. A declaration that the termination or dismissal was unlawful.
 2. Unpaid notice of Kshs.361,530.00.
 3. 12 months compensation for unlawful termination Kshs.4,338,360.00.
 4. Salary until retirement for at least 10 years Kshs.43,383,600.00.
 5. Punitive and exemplary damages.
 6. Interest on 2, 3 and 4 above from date of termination till payment in full.
 7. Any other statutory entitlement.
 8. Costs of the cause and interest thereon.

Respondent's case

15. In its Memorandum of Response and Counter-claim filed on 15th December 2017, the Respondent admits that the Claimant was its employee as alleged and avers that it terminated his employment in accordance with the law as he did not adhere to and uphold the terms of his employment.
16. That he was unprofessional and negligent in the discharge of his duties.
17. The Respondent avers that sometime in 2016, he failed to facilitate the recovery of over-expenditure and was issued with a notice to show cause dated 23rd March, 2016 but was given the benefit of doubt after he pleaded leniency.



18. That the Claimant was issued with another notice to show cause on the partitioning of offices at Stima Investment where the Respondent lost the sum of Kenya Shillings 5,133,877.00 and the disciplinary proceedings culminated in a warning and the scenarios was replicated in April and May 2017 in relation to irregular delivery of furniture by Bevaj Furniture Ltd.
19. As regards the Rabai Borehole Project, the Respondent avers that the Claimant failed to safeguard the Respondent's interest and an investigation conducted by the Respondent recommended disciplinary action against those found culpable.
20. That the Claimant was negligent and reckless and the Respondent lost a huge sum of money.
21. That the Claimant's failure to play his role led to a loss of Kshs.14,000,000/=.
22. It is the Respondent's case that the Claimant authorised payment before the inspection certificate on the progress of the work was issued.
23. That the 1st payment of Kshs.6,569,848.50 was made before WARMA had authorised the drilling.
24. That the Claimant was invited for a hearing and attended, responded to questions and the committee recommended dismissal and he was dismissed on 4th July, 2017.
25. That the failure of the project was attributable to the Claimant's failure to supervise it.
26. In its Counter-claim, the Respondent avers that after deductions, the Claimant had an outstanding loan of Kshs.1,863,810.77 and prays for the sum of Kshs.1,863,810.77, costs of the suit and interest and any other relief that the court may deem fit to grant.
27. In his reply to the Memorandum of Response and Counter-claim, the Claimant denied having been involved in the investigation by the Respondent but did not deny the statement attributed to him in the report.
28. He maintained that he was diligent in the discharge of his duties.
29. The Claimant avers that the committee was not properly constituted and he was denied the necessary material, including the project file for purposes of the hearing.
30. That the work commenced after authorization by WARMA.
31. Finally, the Claimant denies the Counter-claim and prays for its dismissal with costs.

Claimant's evidence

32. On cross-examination, the Claimant stated that his duties included supervision of the Project Managers as well as Civil Superintendent Administration project.
33. It was his testimony that the Rabai Borehole project took place about 5 years before his employment was terminated. He denied having authorised payments as that was the duty of the Accounting Officer.
34. He testified that his duty was to ensure that all procedures were followed and was answerable to the Supervisor Manager.
35. The witness confirmed that all the recommendations for payment made were from the TPC and his duty was to do the paperwork as the supervisor. That he had been informed of the investigations and was aware of the charges against him, attended the hearing and responded to the questions asked. That he was informed of the charges and the right to representation.



36. The Claimant stated that he was not aware that he authorised payment before inspection and had no record that he asked for any documentary evidence for purposes of the hearing and did not file an appeal.
37. The witness admitted that he had had other notices to show cause.
38. That he had a car loan and paid the amount back but had no evidence of payment of the sum claimed by the Respondent.
39. The Claimant admitted having been issued with a clearance certificate and certificate of service.
40. On re-examination, the witness testified that as Head of Section (Projects, his duty was to ensure that all procedures were followed by the Tender Processing Committee and the Project Manager.
41. That he had not received a demand letter for the balance of the car loan from the Respondent.

Respondent's evidence

42. RWI, Mary Kaaria confirmed on cross-examination that she was not the supervisor of the Rabai Project but was aware of the reasons for the Claimant's dismissal. The witness also confirmed that the Claimant was not a Hydrogeologist.
43. On re-examination, the witness testified that the Claimant reported to her as head of section as she was the Manager, Administration and Property.
44. That part of the Claimant's duties included visiting project sites from time to time.
45. RWII, Mr. Benson Kioni confirmed that he was requested by Human Resource to conduct an investigation on the Rabai Borehole Project and the Respondent had no Hydrogeologist.
46. It was his testimony that the Claimant was the one who signed off projects and the Hydrogeological Report was approved by WARMA and a permit issued.
47. The witness confirmed that he attended the hearing to respond to questions from the committee and brief it on the investigation report.
48. That the Hydrogeologist engaged by the contractor was registered and the report was given to the Claimant and though not a Hydrogeologist, he had Project Management Skills.
49. The witness stated that whereas the Project Manager, Mr. Daniel Achuchi was dismissed, the Claimant's supervisor was not.
50. On re-examination, the witness testified that he filed the investigation report, visited the site and obtained statements for purposes of the report and was assisted by a Qualified Hydrogeologist.
51. That he was not part of the decision makers and the Claimant did not object to his presence at the hearing.
52. Evidence on record reveal that the witness was requested to take the Claimant through the investigation report.
53. That Mr. Daniel Achuchi was a building technician based at the Coast and reported to the Claimant.
54. The witness confirmed that WARMA approval for the project was obtained after the 1st instalment had been paid to the contractor.



55. RWIII, Mr. Duncan Ndungu testified that although the Claimant was not a Hydrogeologist, he was a competent Project Manager and documents signed by the Claimant passed through his office but he had not filed any document evidencing approval by the Claimant.
56. On re-examination, the witness stated that the Claimant was a trained building technician qualified to deal with civil works of the projects and had the opportunity to engage an expert.
57. That the Claimant did not complain about his inability to supervise the project.
58. That since the Claimant had a debt of Kshs.2,227,302.00, his 41 leave days of Kshs.363,491.23 was netted off and he still owed the Respondent.

Claimant's submissions

59. Counsel isolated four issues for determination touching on procedure for termination, reason for termination, reliefs and counter-claim.
60. On procedure, reliance was made on the provisions of Section 41 of the [Employment Act](#), 2007 and the decision in Geoffrey Gikonyo Mathu V Intex Construction Co. Ltd (2017 eKLR to urge that the Claimant was not accorded procedural fairness, that he was not accorded the opportunity to cross-examine witnesses.
61. That the investigation team were members of the committee, namely; Mary Kaaria and Benson Kioni.
62. As regards the validity and fairness of the reason for termination, counsel submitted that reliance was made on the provisions of Section 43 of the [Employment Act](#) to submit that the Respondent adduced no evidence to show that the Hydrogeological Report prepared by W.W Karanja was rejected by WARMA which gave authorization on 24th October, 2014 for the project to continue.
63. Counsel submitted that no alternative Bill of Quantities were availed by the Respondent and the Hydrogeologist engaged was qualified.
64. Counsel further submitted that since WARMA had not complained that the project commenced before approval, the same was inconsequential.
65. That the Respondent tendered no evidence of the approvals for payment the Claimant was being accused of.
66. The sentiments of the court in Judicial Service Commission V Gladys Boss Sholei & another (2014) eKLR were cited to urge that no reasonable employer would have dismissed the Claimant.
67. On the reliefs sought, counsel submitted that the Claimant had a legitimate expectation of serving the Respondent till retirement and relied on H.W.R Wade & C F Forsyth at 449 – 450 and the decision in Communication Commission of Kenya & 5 others V Royal Media Services on legitimate expectation.
68. Section 47(5) of the [Employment Act](#) was also cited to buttress the submission.
69. As regards the Counter-claim, counsel submitted that the Claimant owed the Respondent no monies as evidenced by the Clearance Certificate on record dated 22nd May, 2023.
70. According to counsel, the Respondent had not fulfilled the requirements of Sections 41, 43, 45 and 47(5) of the [Employment Act](#), 2007 and urged the court to allow the claim.



Respondent's submissions

71. Counsel identified three issues touching on whether the suit is pre-mature, whether termination of employment was unfair and unlawful and the reliefs sought.
72. As to whether the Claimant instituted the suit prematurely; counsel submitted that the Claimant filed the suit before the disciplinary process had been concluded citing the sentiments of the court in *Rose W. Kiragu V Teachers Service Commission (2016) eKLR*.
73. That the Claimant ought to have filed the suit after the appeal was determined.
74. Reliance was also made on the sentiments of the court in *Corporal Thomas Othoo V National Police Service Commission & 3 others (2016) eKLR*.
75. Counsel prayed for dismissal of the suit in this ground.
76. On termination, counsel submitted that the Respondent had a valid and fair reason to dismiss the Claimant from employment as held in *Ruth Nyasuguta Areimba V Conference Caterers Ltd (2021) eKLR* as his explanations were unacceptable
77. On procedure, counsel cited the decision in *Monica Wanza Mbavu V Roofspec & Allied Works Co. Ltd (2021) eKLR* where Onyango J. cited with approval the decision in *Janet Nyandiko V Kenya Commercial Bank Ltd (2017) eKLR* to urge that the Respondent complied with the procedural requirements of Section 41 of the *Employment Act* and the provisions of Section 44 of the Act were applicable as held in *Linus Barasa Odhiambo V Wells Fargo Ltd*.
78. Counsel further submitted that Clause 11 of the Employment Contract gave the Respondent the right to terminate the employment contract without notice and the Claimant was manifestly negligent and the summary dismissal was warranted.
79. As regards the reliefs sought, counsel urged that the Claimant was not entitled to any relief as the remedies under Section 49 of the *Employment Act* were discretionary. Counsel urge that the claim for punitive and exemplary damages had no basis as held in *Standard Group Ltd V Jenny Luesby (2018) eKLR* and costs do not automatically follow the events.

Determination

80. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
81. Before delving into the issues isolated herein above, it is essential to dispose of the preliminary issue as to whether the Claimant's suit was filed prematurely, raised by the Respondent.
82. Simply put, it is common ground that the Claimant's employment was terminated on 4th July, 2017 and the suit herein was filed on 4th October, 2017, three months later.
83. It is common ground that the Claimant did not file any appeal against the Respondent's decision to terminate his employment.
84. In its submissions on this issue, the Respondent maintained that the Claimant ought to have filed an appeal as opposed to filing the instant suit so as to comply with the internal dispute resolution mechanisms from which he would then file a case in court.



85. In the court's view, the pith and substance of this issue is whether failure or refusal to file an appeal after dismissal or termination of employment denies the employee the right to challenge the dismissal or termination in a court of law.
86. The court is not so persuaded.
87. As much as compliance with internal dispute resolution mechanisms is essential, it requires no gainsaying that termination of employment or dismissal is terminal. It signifies a separation between the employee and the employer and although employer's Human Resource Policies and Procedures provide for appeals, the outcome is seldom different and in many instances it is a mere formality and no other termination or dismissal notice is issued.
88. In the court's view, nothing prevents a person from challenging his or her dismissal or termination from employment before filing an appeal against the decision.
89. If this was not the case, it would deny those who are not desirous of appealing the termination or dismissal the right to legally sanctioned remedies.
90. Equally, none of the authorities relied upon by the Respondent are spot on as regards pendency of an appeal where none has been filed and the employee has no inclination to do so.
91. Finally, even assuming the Respondent had a sustainable argument, it had sufficient time since 2017 to apply for the dismissal of the suit on the alleged ground of exhaustion but slept on its rights and it would be inequitable to torpedo the Claimant's case at this late stage.
92. In sum, the court is not persuaded that the absence of an appeal denies the employee the right to challenge the termination of employment or dismissal.
93. The court is satisfied that the Claimant's suit was not filed prematurely.
94. As regards termination of the Claimant's employment, while the Claimant maintains that it was unfair for want of a valid and fair reason and procedural fairness, the Respondent submitted that it had a justification to terminate the Claimant's employment as he was not only negligent but reckless and it conducted the termination in accordance with a fair procedure.
95. Significantly, the provision of the *Employment Act*, 2007 and case law are unambiguous that for a termination or dismissal to pass muster, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and conducted the same in accordance with a fair procedure.
96. The relevant provisions of the *Employment Act*, 2007 set out elaborate requirements on notice, procedure to be employed, requirement of reason, prove of the reason(s) for termination, summary dismissal and justification as held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
97. Section 45 of the *Employment Act* underscores the essence of fairness in termination of employment and itemises the substantive and procedural elements of a fair termination as exquisitely captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;

“ . . . 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. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”



98. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.

Reason(s) for termination

99. Needless to emphasize, the Claimant was issued with and responded to the notice to show cause.

100. The accusations set out in the notice dated 17th May, 2017 were repeated in the two notices of invitation to attend a disciplinary hearing slated for 3rd May, 2017, later postponed to 2nd June, 2017.

101. The same charges were read out during the hearing on 2nd June, 2017.

102. The letter of dismissal identifies four (4) grounds for termination, namely;

- a. Failed to notice a defective hydrogeological report which lacked some tests and measurements.
- b. Provided for the contractor to carry out the Hydrogeological Survey in the bill of quantities to establish the depth of availability of ground water as opposed to having the survey procured and authorised independently.
- c. Authorised commencement of execution of drilling works without a requisite permit from WARMA.
- d. Recommended payments irregularly when not due.

103. It is common ground that the Claimant worked in the projects department of the Respondent and admitted having about 40 projects in a year under Project Managers whom he was supposed to supervise.

104. Although the Claimant could not recall the date, the Rabai Borehole Project was conceived in 2013 and he was involved in its execution as supervisor. His Project Manager and Supervisee was Mr. Daniel Achuchi based at the Coast and he is the one who drew the specifications of the user department.

105. It is unclear as to who made the decision to have the consultant engaged by the contractor as opposed to being procured independently by the Respondent.

106. This decision denied the Respondent objectivity on whether or not to proceed with the project and it is not surprising that it turned out to be a 'white elephant' as alleged.

107. The contractor had a contract to perform irrespective of the viability of the project and the Hydrogeologist it engaged lacked independence as he was on the contractor's payroll.

108. Although the Respondent alleged that the Claimant was to blame for the decision and cited it as one of the grounds for termination, it adduced no credible evidence as to when and how the Claimant made that important decision.

109. Typically, the mode of execution of a project is determined by several factors including urgency, degree of sophistication among others and user departments typically proceed on the advice of procurement which is manned by procurement professionals.

110. From the evidence on record, the court is not persuaded that the Claimant made the decision on how the services of the consultant were to be procured and opted for the contractor to do so.

111. The Respondent did not avail evidence of the decision making process on this project.



112. Similarly, as regards the Claimant's failure to detect that the Hydrogeological Survey was defective for want of tests and measurements, the Respondent adduced no evidence that the Claimant had the requisite capacity to interpret the report and was required to do so.
113. The Claimant testified he had no qualification in Hydrogeology and did not author the report in question which was authored by Mr. W. W. Karanja, a duly registered and licensed Hydrogeologist.
114. The Claimant confirmed that he was a Building and Civil Engineering Superintendent and had no training in Hydrogeology.
115. Relatedly, the Claimant testified that the Hydrogeological Report prepared by Mr. W. W. Karanja was submitted to WARMA which authorised the project.
116. How is it that WARMA, the regulator did not detect the alleged defects?
117. Puzzlingly, RWII, Mr. Bension Kioni confirmed that the Respondent had no Hydrogeologist at the time yet the Claimant, a Building and Civil Engineer was expected to not only understand the report but detect its defects as a professional in the area would readily do and his alleged failure was not apparent as WARMA's Hydrogeologist did not detect the alleged defects.
118. For the above stated reasons, it is the finding of the court the Respondent has not placed sufficient material before the court for a finding that the Claimant was guilty of dereliction of duty or negligent as regards the Hydrogeological report.
119. As regards commencement of the project before authorization by WARMA and recommending irregular payments, the Claimant's evidence is that he relied on the recommendations of the Tender Processing Committee to recommend payments and it was his testimony that he was indeed unaware that he recommended payment before inspection.
120. It is common ground that as far as the Rabai Borehole Project was concerned, the Project Manager, Mr. Daniel Achuchi was under the supervision of the Claimant.
121. According to the Claimant, the Tender Processing Committee was supposed to visit the site, inspect, report and take possession of the project when handed over. That his primary role was to ensure procedures were followed using the documents submitted to him. Asked about the procedures in question, the Claimant mentioned tender document, evaluation of tender, award of contract and inspection reports by the Tender Processing Committee.
122. Intriguingly, the Claimant led no evidence on his visits to the site and what he found out yet his supervisee was in the field.
123. As the supervisor, he was supposed to know what was happening in the field as opposed to relying on documents exclusively.
124. The retort he had over 40 or so projects in a year cannot avail him as it was his duty to know what he was supervising.
125. At the hearing, the Claimant testified that his role was that of general supervision and coordination of the administration projects country wide and look at amount to be paid, the work done and the Project Managers recommendation and whether the TPC agrees by checking the paper works i.e certificate and inspection reports.
126. In any event, 40 projects in a year are not too many.



127. The Claimant had the capacity to monitor all the projects and ought to have been aware of the status of each at any given time as each of them had a Manager on the ground, yet he had no evidence on how he supervised the projects in terms of status update, challenges faced, if any, stage of completion, reporting to his supervisor in case of challenges and providing status update and so forth.
128. When asked about how he was able to determine the milestones in the project or decision points, the Claimant had no answer. Asked whether the project was completed, he responded that he left before it was completed in February 2015 and did not hand over.
129. From the responses, it is evident that the Claimant was unaware of the status of the project when he left in early 2015.
130. Relatedly, the Claimant had not read the Mbaraki Hydrogeological report prepared before Rabai and the Project Manager was John Achuchi, the Claimant's supervisee.
131. It is therefore not surprising that the Claimant was unaware of having recommended payment before inspection of the project by the Tender Processing Committee.
132. Equally, the Claimant tendered no evidence on how he related with Mr. Daniel Achuchi, his supervisee at the Coast who was his eye on the ground.
133. As admitted by the Claimant, the Respondent directed its General Manager, Internal Audit to investigate the Rabai Borehole Project who produced the report dated 13th April, 2017. He was assisted by Mr. Kennedy Mwachala, a Hydrogeologist based in Mombasa.
134. Shockingly, by 13th April, 2017, the project had neither been formally completed or commissioned nor handed over notwithstanding the project completion period of 24 weeks as per the Notification of Award dated 19th December, 2013 and the contract between the Respondent and M/S Ring Technical Services was signed on 21st January, 2014.
135. The report found inter alia that;
- i. Ring Technical Services was supposed to be paid by instalments based on the work done and the 1st interim certificate dated 24th April, 2014 was prepared before inspection of works as the Inspection and Acceptance Form was dated 5th May, 2014 and the first instalment was paid on 17th April, 2014 before the interim certificate was generated and 17 days before issuance of the Inspection and Acceptance Form.

The Claimant recommended payment and the Administration Manager approved the same for payment.
 - ii. The 2nd and 3rd Interim Certificates were dated 14th August, 2014 and were the Inspection and Acceptance Forms. Thus, inspection of the works took place on the same day the 2 certificates were generated.

That the SAP System revealed that the second payment of Kshs.7,433,310.40 was made on 23rd July, 2014, 21 days before the 2nd and 3rd Interim Certificates and Inspection and Acceptance Forms were generated. The Claimant recommended payment and the Manager approved the same for payment.
136. In both instances, the Claimant would appear to have recommended payments for approval before inspection of the works which implicates compliance with procedures, which was the Claimant's remit. It is unclear as to how the recommendations were made without essential documentation to validate the payment.



137. This finding lends credence to the Respondent's last charge against the Claimant of recommending payments when not due.
138. During the hearing, the Claimant maintained that the most important date was when the certificate was signed, 7th May, 2014. He also admitted that the payment of 1st instalment at 34% of work done made on 17th April, 2014 could not have been right.
139. The disciplinary committee found the Claimant negligent for failure to diligently supervise the Project Manager and the Contractor for the Rabai Borehole Project and recommended summary dismissal in its report dated 7th June, 2017.
- iii. As regards drilling of the borehole, authority was sought from WARMA and the same was granted vide letter dated 16th July, 2014 after Inspection and Acceptance Form dated 5th May, 2014, thus inspection was done before WARMA granted authority to drill and payment of the 1st instalment had been finalised.
140. Even assuming that the authority by WARMA to drill was granted on 23rd October, 2014 as the Claimant alleged, question would still linger as to how the two payments amounting to over Kshs.13 million was done accounting for more than 68% of the total project cost, if no drilling or other work was on-going.
141. The foregoing would appear to vindicate the Respondent's third charge against the Claimant that drilling commenced without WARMA's authorization.
- iv. The investigation made adverse findings on the Hydrogeological Report prepared by Mr. W.W. Karanja in that it lacked critical data on the viability and sustainability of the borehole and Mr. W.W. Karanja declined to avail himself for a statement notwithstanding invitation.
- The investigation made other findings including a demand for Kshs.1,058,500/= by the contractor for additional work requested by Mr. John Achuchi, the Project Manager for the Rabai Borehole and Kshs.559,396.00 for the Mbaraki Borehole.
142. The Claimant left the section on 19th February, 2015 with no status report on the project, a few days before the contractor issued a status report stating that the project was complete working and had been handed over to the Respondent.
143. From the foregoing, it is apparent the manner in which the Claimant supervised the Project Manager and the Rabai Borehole Project fell below the threshold expected of a diligent supervisor in the 21st century.
144. Even assuming that the Claimant could not visit the project site more than once, evidence of close supervision of the Project Manager and demonstrable status updates and personal record keeping would have vindicated the Claimant. The evidence on record cannot.
145. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reasons or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”



146. Similarly, in *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*, the Court of Appeal expressed itself as follows;

“ . . . reasons for termination are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract. For example, poor performance, insubordination and lack of loyalty are some of the grounds . . . ”

147. In *Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR*, the court stated that;

“ . . . All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists . . . ”

148. Finally, in *Kenya Revenue Authority V Reuvel Withaka Gitahi & 2 others (2019) eKLR*, the Court of Appeal stated as follows;

“The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons it genuinely believed to exist causing to terminate the employee’s services. That is a partly subjective test.”

149. The foregoing comports with the sentiments of Lord Denning in *British Leyland (UK) Ltd V Swift (1981) I.R.L. R 91* on the “band of reasonableness test.”

150. In totality, the evidence before the court reveals a sorry state of affairs where both senior and other officers of the Respondent with clear lines of responsibility and accountability abandoned their duties and permitted a contractor to conduct itself as it desired. This is vividly illustrated by the training of an outsider, yet the bill of quantities provided for the training of an employee of the Respondent coupled with payment of the 1st instalment before WARMA had authorised drilling. Its letter on completion of the project was the icing of the cake.

151. For the foregoing reasons and guided by the statutory and judicial authorities cited above, it is the finding of this court that the Respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant’s employment on 4th July, 2017.

Procedure

152. As correctly submitted by the Claimant’s counsel, the provisions of Section 41 of the *Employment Act*, 2007 prescribe the minimum procedural requirements in termination of employment and they are mandatory as held in *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*.

153. Non-compliance with the provisions of Section 41 renders the termination of employment procedurally unfair.

154. The elements of procedural fairness as articulated in legions of decisions are explanation of the grounds on which termination of employment was being considered in a language understood by the employee and in the presence of another employee of the employee’s choice or shop floor representative, right of the employee and the representative to make representations, hearing and considering the representations made by the employee and/or the representative. (See *Loice Otieno V Kenya Commercial Bank Ltd (2013) eKLR*, *Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR*.)



155. In the instant case, although the Respondent made significant efforts to comply with the provisions of Section 41 of the [Employment Act](#), 2007, its attempts did not meet the statutory threshold of a fair hearing.
156. Although the Respondent issued the necessary notice to show cause setting out the charges against the Claimant and he responded in writing and was subsequently invited for a hearing and the invitation notice reiterated the charges and notified the Claimant his right to adduce documentary and oral evidence by a witness, it did not avail to the Claimant the investigation report which it relied upon at the hearing.
157. More significantly, the Respondent adamantly refused to avail the project file to the Claimant notwithstanding enormous effort by the Claimant made as disclosed during the hearing.
158. The Claimant cited the Respondent's failure to avail the project file as the reason for his inability to respond to several questions from members of the disciplinary committee.
159. At page 71 of the Respondent's Bundle of Documents, the Claimant is emphatic that "Absence of file has hampered my responses."
160. The Claimant was unequivocal that he sent two emails to the Manager, Human Resource, Dr. Francis Kangure, but he did not assist or respond, a fact he did not deny during the hearing.
161. Further, the Claimant insisted that he was denied the project file intentionally and the Respondent adduced no evidence to contradict the Claimant's position.
162. Indeed, the Manager, Human Resource, Dr. Francis Kangure regretted that the Claimant was not given the project file, a significant piece of evidence for the Claimant's defense. This was a vivid acknowledgement that the project file was essential for the Claimant's case.
163. The effect of the Respondent's failure to avail the investigation report and more significantly the project file disabled the Claimant from mounting a strong defense to the charges against him.
164. He could, for instance tell when drilling of the Rabai Borehole commenced or when he recommended payments as well as decision points among other issues.
165. Needless to emphasize, the right to fair hearing encompasses the right to be provided with the documentary and other evidence to be relied upon by the accuser whether exculpatory or not and the Respondent failed in this respect.
166. The foregoing finds support in the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui (Supra)* as follows;

". . . The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting . . ."
167. These sentiments apply on all fours to the facts of the instant suit.
168. Contrary to the Claimant's counsel's submission that the Disciplinary Committee was improperly constituted, that was not the case as the Claimant adduced no evidence to show that the Respondent had violated its Human Resource Policies and Procedures Manual or other procedure.



169. Similarly, the Claimant adduced no evidence to show that Mary Kaaria and Benson Kioni were his accusers as he was not answerable to any of them during the Rabai Borehole Project.
170. In particular, Mr. Benson Kioni, the General Manager, Internal Auditor's role was merely to investigate the project at the instance of the Human Resource Manager.
171. Although the investigation report implicated the Claimant's conduct in the handling of the project, the investigator cannot be regarded as the accuser and during the hearing, the investigator was called upon to take the Claimant through the report.
172. For the above-stated reasons, the court is satisfied that the Respondent has failed to demonstrate that it conducted the Claimant's termination in accordance with a fair procedure as by law required.

Appropriate reliefs

- a. Having found that termination of the Claimant's employment by the Respondent was substantively justifiable but procedurally flawed, a declaration that the same was unlawful is merited and is decreed.
 - b. Unpaid notice
173. Having found that the Respondent had valid and fair reasons to terminate the Claimant's employment but did so unfairly and did not pay salary in lieu of notice under Section 36 of the [Employment Act, 2007](#), the same is merited and is awarded.

c. 12 months' salary compensation

174. The Claimant is entitled to the discretionary relief provided by Section 49(1)(c) of the [Employment Act, 2007](#) for unfair termination of employment by the Respondent.
175. In determining the quantum of compensation, the court has taken into consideration the following;
 - i. The Claimant was an employee of the Respondent from 5th December, 1996 to 4th July, 2017, a duration of more than 20 years, which is reasonably long and had risen to the position of Chief Administrative Officer.
 - ii. The Claimant had at least two previous warnings and had been cleared in another disciplinary case which dented his long career at the Respondent.
 - iii. The Claimant substantially contributed to the termination of employment.

From the evidence on record, and as the Claimant confirmed in court, he understood his role as ensuring that all procedures had been followed by looking at the papers and doing no more, yet he had Project Managers in the field and he was the supervisor.

- iv. The Claimant did not express his wish to continue in the Respondent's employment and did not bother to appeal the dismissal.
176. In the circumstances, the court is satisfied that the equivalent of two (2) months gross salary is fair.

d. Salary till retirement

177. This is a claim for anticipatory earnings which the Court of Appeal has unequivocally held has no legal anchorage and thus unsustainable.



178. As held by Rika J. in *Engineer Francis N. Gachuri V Energy Regulatory Commission* (2013) eKLR,
- “There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word permanent employment.”
179. The Court of Appeal adopted the foregoing sentiments with approval in *D.K. Njagi Marete V Teachers Service Commission* (2020) eKLR where the court further held as follows;
- “On expectation of the employee as to the length of time that he would have continued to serve in the employment of the Respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself is not an indication that the appellant would have continued to be employed until the age of 60 years. In *Elizabeth Wakanyi Kibe V Telkom Kenya Ltd* (2014) eKLR, this court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement . . .”
180. The Court of Appeal expressed similar sentiments in *D.K. Njagi Marete V Teachers Service Commission* (Supra).
181. These sentiments apply on all fours to the facts of the instant case in that although the employment contract dated 5th December, 1996 provided that the Claimant would retire at the age of 55, it had a qualification by the words “unless otherwise agreed.”
182. More significantly, Clause 13 provided for termination of the contract by either party giving the other one (1) month’s notice or pay in lieu of notice.
183. In sum, the Claimant could not have had a legitimate expectation of being in the Respondent’s employment till retirement and the claim for salary till retirement is unsustainable and it is accordingly dismissed.
- e. Punitive and exemplary damages
184. In determining whether the Claimant is entitled to punitive and exemplary damages which are not compensatory in nature, the court is guided by the sentiments of the Court of Appeal in *Obonyo & another V Municipal Council of Kisumu* (1971) EA 91, where Law JA stated that;
- “. . . exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended . . .”
185. Needless to underscore, the Court of Appeal relied on the decision in *Rookes V Barnard* (1964) AC 1129.
186. Based on the evidence adduced by the Claimant, it is clear that it had not been demonstrated that the Respondent’s conduct fell within the principle enunciated in *Rookes V Barnard* (Supra) and thus entitlement to punitive and exemplary damages, the prayer is dismissed.



Counter-claim

187. Apart from pleading that the Claimant had outstanding loan facilities totalling Kshs.1,863,810.77, the Respondent tendered no scintilla of evidence to establish the alleged indebtedness of the Claimant.
188. Although RWIII, Mr. Duncan Ndung'u who testified in place of Dr. Francis Kangure, the Respondent's Human Resource Services Manager mentioned, on re-examination that the Claimant had a debt of Kshs.2,227,302.00 and a balance of Kshs.1,863,810.77 was outstanding, he availed no evidence of the indebtedness.
189. Put differently, the Respondent led no evidence of the particulars of the alleged loan facilities.
190. However, the Claimant admitted that he had a car loan and provided no evidence that the same had been cleared, which would appear to suggest that he owed the Respondent monies which the Respondent is entitled to and enforceable by court action distinct from the Claimant's action for damages for unlawful termination.
191. For purposes of this suit, the Counter-claim is disallowed with no orders as to costs.
192. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
 - b. One month's salary in lieu of notice.
 - c. Equivalent of two (2) months' salary.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF NOVEMBER, 2023.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil 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.

DR. JACOB GAKERI

JUDGE



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