



Muema v Independent Electoral and Boundaries Commission (Petition E013 of 2023) [2023] KEELRC 2749 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2749 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E013 OF 2023
JK GAKERI, J
NOVEMBER 2, 2023**

BETWEEN

ELIUD MUMO MUEMA PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

JUDGMENT

1. The Petitioner initiated the suit herein by a Petition filed on 27th January, 2023 challenging termination of his employment by the Respondent vide letter dated 19th January, 2023.
2. The Petitioner cites Articles 1(1) & (3), 2(1), (2) and (4), 3(1), 10(1), 19(3)(a), 20(4), 21(1), 25(c), 27(1) and (2), 28, 29(a) and (f), 32, 33, 35, 41, 43, 47(1)(2), 50(1)(2), 59(4), 73(1)(2), 75, 231(g), 232, 236 and 259(1) as the foundation of the Petition.
3. The Petitioner avers that he joined the Respondent in February 2010 at a gross salary of Kshs.50,000/= which by his exit in 2023 had risen to Kshs.90,323.00 per month and served diligently for 13 years.
4. It is the Claimant's case that on 16th February, 2022, he was requested to drive one of the Directors, Dr. Kamindo to Mombasa for a 2 week workshop and acted accordingly.
5. That on returning to Nairobi on 24th February, 2022, he received a notice to show cause alleging absence from duty without leave from 22nd February, 2022 to 23rd February, 2022 at 3.30 pm and accorded 7 days to respond, which he did on 2nd March, 2022.
6. That on 30th December, 2022 at 12.08, he received text message from one Ken Evusa summoning him for a disciplinary hearing on 3rd January, 2023 and he was present before Commissioners Prof. Abdi Guliye and Boya Molu as well as the Respondent's Human Resource Director, Lorna Onyango.
7. That he appeared alone and was asked about his absence from duty and responded.



8. That he was directed to pass by Human Resource Director's Office to pick a letter where he was issued with a notice of invitation to appear before the Commission Disciplinary Committee dated 23rd December, 2022 which made reference to the show cause letter and response.
9. That the Respondent served the Petitioner with a dismissal letter on 19th January, 2023 which alleged insubordination not previously raised.
10. The letter informed the Petitioner of his right to appeal.
11. It is the Petitioner's case that the Respondent acted unconstitutionally and illegally as the notice to show cause accorded him 7 days as opposed to 14 as per the Respondent's Human Resource Manual (Clause 12.11.1).
12. That the Disciplinary Committee was illegally constituted as it comprised Commissioners who are policy makers who hear appeals and their presence breached Clause 12.4 of the Human Resource Manual.
13. That the dismissal letter alluded to the 284 plenary meeting held on 6th January, 2023 which deliberated the case.
14. The Petitioner avers that he was denied the right to attend the hearing with a colleague which vitiated the hearing procedurally.
15. According to the Petitioner, since the hearing was conducted after 6 months, it was illegal as well as because no testimony was adduced by the supervisor or any person.
16. The Petitioner alleges that the provisions of *the Constitution* of Kenya, 2010 were violated in that, the Respondent did not avail copies of minutes of the disciplinary hearing and investigation report for purposes of filing the appeal, he was not accorded a fair hearing, payment of half salary for 8 months, hearing took place after more than 9 months, the decision to terminate his employment was made by a plenary as opposed to a disciplinary committee.
17. The Petitioner prays for;
 - a. A declaration that the purported disciplinary proceedings conducted by the Respondent between 3rd January, 2023 and the resultant decision made on 6th January, 2023 communicated vide letter dated 19th January, 2023 dismissing the Petitioner from employment was unconstitutional and in violation of the rights under Articles 41, 47, 50 and 159 of *the Constitution* of Kenya, Section 45 as read with Section 35(1)(c) of the *Employment Act*, 2007.
 - b. Reinstatement of the Petitioner to the position held as a driver prior to the dismissal without any loss of rank/insignia/Grade and payment of salary and allowances and other benefits entitled to him from January 2023.
 - c. Damages for constitutional violations under Articles 23 of *the Constitution* of Kenya.
 - d. Costs and interest be provided for.
 - e. Any other relief the court deems fit and just to grant.

Respondent's case

18. In its Replying Affidavit sworn by its Director, Legal and Public Affairs, Mr. Chrispine Owiye, the affiant deposes that the Petitioner had not shown any violations of *the Constitution* and his dismissal from employment was not illegal or in breach of Constitutional principles.



19. The affiant depones that the Petitioner was absent from the appointed place of work while on duty in Mombasa from 22nd February, 2022 and his whereabouts as well as the vehicle assigned to him were unknown and attempts to reach him failed.
20. The affiant further states that the Petitioner was served with an invitation for the disciplinary hearing dated 23rd December, 2022 and he was accorded sufficient time to defend himself on 3rd January, 2023.
21. The affiant avers that the Petitioner's absence from duty without leave amounted to misconduct under clause 12.10.1(v) of the Human Resource Manual and justified termination of employment.
22. The affiant states that the delay in conducting the hearing was occasioned by the Respondent's busy schedule in the preparation and conduct of the 2022 General Election and the Human Resource Manual provides for extension of time.
23. That Commissioners were part of the disciplinary committee.
24. The affiant deposes that the hearing was conducted at a convenient time, the committee was properly constituted and acted fairly, the Petitioner was advised of the charges, the Petitioner was not denied the right to be accompanied by a fellow employee and the Petitioner was notified of the right to appeal and the plenary meeting had quorum.
25. The affiant prays for dismissal of the Petition with costs.
26. The Petitioner's Supplementary Affidavit sworn on 12th June, 2023 raised no new issue.

Petitioner's submissions

27. The Petitioner's counsel isolated five issues for determination as violation of constitutional rights, disciplinary procedure and consequences thereof, appropriate reliefs and costs.
28. As to whether the petition discloses violation of the Petitioner's constitutional rights, counsel submitted that the Petitioner had set out the complaints with the required degree of precision and cited *Mumo Matemu V Trusted Society of Human Rights Alliance* and *Anarita Karimi Njeru V Attorney General* and invited the court to find the same.
29. According to counsel, the Petitioner's right to dignity and fair labour practices and reasonable working conditions were violated.
30. As regards the disciplinary procedure, counsel urged that since the Petitioner's Grade was 9, the Commission Disciplinary Committee was not the proper forum.
31. According to counsel, the Respondent's Human Resource Management Advisory Committee was the correct forum.
32. That the Respondent's conduct violated the Petitioner's right to fair hearing and administrative action.
33. The decision in *M W K & another v Attorney General & 3 others* (2017) eKLR was cited to underscore the essence of upholding *the Constitution*.
34. According to counsel, the disciplinary procedure violated the Petitioner's constitutional rights.
35. Reliance was also made on the decision in *Narok County Government & another V Richard Bwogo Birir & another* (2015) eKLR as were the decisions in *Kenya Human Rights Commission & another V Non-Governmental Organizations Co-ordination Board & another* (2018) eKLR and *Dry Associates*



Ltd V Capital Markets Authority & another (2012) eKLR and the provisions of Section 4 of the [Fair Administrative Action Act](#), 2015.

36. Counsel further submitted that the allegations of absenteeism and insubordination were not substantiated and in particular the latter which the Petitioner had no opportunity to respond to.
37. Reliance was made on the sentiments of the court in R V Kenya University Ex Parte Njoroge Humphrey Mbuthi (2015) eKLR.
38. It was submitted that the Petitioner was entitled to face his accusers at the hearing.
39. The sentiments of Ojwang J. (as he then was) in Menginya Salim Murgani V Kenya Revenue Authority (2008) eKLR were relied upon to buttress the submission and urge that neither the alleged reasons for termination of the Petitioner's employment nor the procedure employed met the prescribed threshold.
40. The sentiments of the Court of Appeal and Supreme Court in Kenfreight (EA) Ltd V Benson K. Nguti (2019) eKLR were relied upon to reinforce the submission.
41. Counsel, in addition, faulted the delay in the disciplinary proceedings of about 10 months and the invitation for the hearing was made during the holiday season while the letter was handed over on 3rd January, 2023.
42. Counsel submitted that the disciplinary process was hurriedly done without affording the Petitioner sufficient opportunity to defend himself.
43. That clause 12.11.4 of the Respondent's Human Resource Manual was not complied with as the Respondent did not prepare the report which informs the decision of the committee.
44. Counsel urged that as a consequence, the Petitioner's right to fair administrative action was violated.
45. As to the consequences of the impugned disciplinary process, counsel submitted that same was a nullity and cited the sentiments of Emukule J. in Republic V Institute of Certified Public Accountants of Kenya Ex Parte Joy Vipinchandra Bhatt T/A Jv Bhat & Company (2008) eKLR to buttress the submission.
46. Reliance was made on the provisions of Section 41 of the [Employment Act](#), 2007 to urge that the procedure adopted by the Respondent was faulty.
47. Also cited were the sentiments of the court in Kenya Union of Commercial Food & Allied Workers V Meru North Farmers Sacco Ltd (2014) eKLR as well as those in Jared Aimba V Fina Bank Ltd (2016) eKLR to urge that termination of the Petitioner's employment was unfair.
48. As regards the reliefs sought, counsel submitted that guided by the sentiments of the Court of Appeal in Kenya Airways Ltd V Aviation & Allied Workers Union & 3 others (2014) eKLR, Cooperative Bank of Kenya Ltd V Banking Insurance & Finance Union (Kenya)(2015) eKLR as well as sentiments in Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (2014) eKLR and Alex Wainaina Mbugua V Kenya Airways Ltd (2017) eKLR, the remedy of reinstatement was merited and should the court find otherwise, 12 months' salary would be sufficient and reasonable compensation as well as general damages for violation of constitutional rights.
49. Sentiments of the court in Gitobu Imanyara & 2 others V Attorney General (2016) eKLR as well as Kenya Human Rights Commission V Non-Governmental Co-ordination Board (2016) eKLR were relied upon to urge that the sum of Kshs.2,500,000/= would be fair compensation for the alleged violations.



50. Other decisions were also relied upon to buttress the submission.

Respondent's submissions

51. Counsel identified five issues for determination touching on grounds for termination of the Petitioner's employment, procedure employed, whether termination was unfair and costs.
52. On sufficiency of grounds for termination of employment, counsel submitted that the Petitioner's absence from duty was a breach of the contract of service and amounted to gross misconduct under clause 12.01.1(v) of the Human Resource Manual and warranted dismissal.
53. Reliance was made on the sentiments of the court in Joseph Nzioka V Smart Coatings Ltd (2017) eKLR on the duty of the employer to demonstrate the attempts made to contact an absconding employee.
54. Counsel discounted the Petitioner's argument that the absenteeism was occasioned by abuses from the immediate supervisor as the Human Resource Manual had a grievance handling mechanism.
55. Moreover, the Petitioner admitted that he was absent from duty from 22nd to 23rd February, 2022 which justified summary dismissal.
56. Counsel relied on the sentiments of the court in Ann Njoroge V Topez Petroleum Ltd to urge that the summary dismissal was premised on the Petitioner's absence from duty without any justifiable cause in accordance with Section 44(4)(a) of the *Employment Act*.
57. Counsel further submitted that the Petitioner deserted his duty without leave from the immediate supervisor.
58. As regards the procedure employed by the Respondent, counsel relied on the provisions of Sections 42, 43 and 47(5) of the *Employment Act*, as well as the decisions in Gilbert Michael Maigacho V Coast Development Authority (2021) eKLR and Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others to urge that the Respondent is bound to show that it had a genuine reason for the termination of employment and had done so in this case.
59. Counsel submitted that the Petitioner was unable to puncture the procedure employed by the Respondent in that the Respondent issued a notice to show cause on 24th February, 2022 and the Petitioner responded, it subsequently invited him for a disciplinary hearing which he did, and the same was fair and a dismissal letter dated 19th January, 2023 was issued thereafter.
60. Counsel relied on the sentiments of the court in George Okello Munyolo V Unilever Kenya Ltd (2019) eKLR to urge that the Petitioner had failed to prove that the termination of his employment was unfair.
61. Counsel further submitted that the Disciplinary Committee was constituted in accordance with clause 12.5.3 of the Human Resource Manual and had a quorum as held in Isaiah Biwott Kangwony V Independent Electoral & Boundaries Commission & another (2018) eKLR.
62. As to whether the termination of employment was unfair, reliance was made on the provisions of Section 45(2) of the *Employment Act* and the sentiments of the court in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd to submit that the Respondent complied with the substantive and procedural aspects of the termination of employment.
63. As regards the reliefs sought, counsel submitted that none was merited since the termination was grounded on legitimate grounds.



64. As regards reinstatement, counsel relied on the sentiments of the Court of Appeal in Elizabeth Wakanyi Kibe V Telkom Kenya Ltd that employees had an obligation to move on and search for new employment where termination is fair.
65. Equally, counsel submitted that reinstatement was not automatic as the parameters of Section 49(4) of the *Employment Act* had to be taken into consideration.
66. Counsel invited the court to dismiss the Petition.

Determination

67. The issues for determination are;
 - i. Whether the Petition herein meets the threshold of a constitutional petition.
 - ii. Whether termination of the Petitioner's employment was unfair.
 - iii. Whether the Petitioner is entitled to the reliefs sought.
68. The petition herein is expressed under Articles 20, 21, 27, 28, 33(3), 35, 41, 43, 47, 88(5), 232(1) (e)(1) and (2), 236, 249(1)(c) and 250 of *the Constitution* of Kenya, 2010 as well as Sections 41, 43, 44(2), 45(4)(b) and (5) of the *Employment Act*, 2007 and Sections 4, 7, 10(1), 11 and 12 of the *Fair Administrative Action Act*, 2015 and Sections 11A and paragraph 8 of the Independent Electoral & Boundaries Commission Act, 2011.
69. The Petitioner alleges that the Respondent violated the provisions of Articles 35, 41, 47, 49, 50, 59, 79, 73(1)(2)(b), 159, 236, 248, 252, 10, 201(a) among others in that it did not provide copies of minutes of the hearing and investigation report for purposes of appeal by the Petitioner, it did not accord the Petitioner a fair hearing, the disciplinary committee was not properly constituted, the Respondent paid the Petitioner half salary from the date of interdiction till dismissal, the disciplinary process took too long (9 months) and the Petitioner was dismissed by the Respondent's plenary as opposed to the Disciplinary Committee.
70. Granted that the suit is grounded on the provisions of *the Constitution* of Kenya, 2010, it is important to determine whether it meets the threshold of a constitutional petition as enunciated in Anarita Karimi Njeru V Republic and restated in other decisions such as Trusted Society of Human Rights V Attorney General & 2 others (Supra).
71. In Anarita Karimi Njeru V Republic (Supra), Trevelyn and Hancox JJ stated as follows;

“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.”
72. The court expressed similar sentiments in Kiambu County Tenants Welfare Association V Attorney General & another (2017) eKLR.
73. In the instant suit, the Petitioner cites several articles of *the Constitution* of Kenya, 2010 allegedly violated by the failure of the Respondent to provide the investigation report or minutes of the disciplinary proceedings or delay in concluding the process.



74. For instance, the Petitioner alleges that the Respondent's failure to avail the investigation report and minutes of the hearing violated Articles 35, 59(4), 79, 248 and 252 of the Constitution of Kenya, 2010.
75. While Article 35 is on access to information, Article 59(4) relates to the Kenya National Human Rights and Equality Commission, Article 79 addresses the establishment of the Ethics and Anti-corruption Commission, 248 address independent commissions generally and 252 addresses the functions and powers of commissioners generally.
76. The precise nature of the alleged violations is unclear.
77. Did the failure to provide the report and the minutes violate the foregoing Articles of the Constitution in the same manner?
78. Similarly, how did the unfair and malicious termination of the Petitioner's employment violate Articles 10 and 201(a) of the Constitution of Kenya, 2010?
79. While Article 10 sets out the national values and principles of governance, Article 201(a) itemises the principles of public finance.
80. To his credit, the Petitioner has in addition to the various articles of the constitution allegedly violated, alleged violations of the Employment Act, 2007 and the provisions of the Fair Administrative Action Act, 2015 perhaps to underscore the fact that the Petitioner's suit has a statutory foundation as well, which would suggest that the statutory route was also viable.
81. It is trite law that where a matter or matters addressed by the Constitution are equally addressed by an Act of Parliament, the statutory provisions ought to be invoked in the first instance before invocation of articles of the Constitution.
82. It requires no emphasis that the relationship between the Petitioner and the Respondent was that of employer and employee and the Petitioner is challenging the termination of that relationship by the Respondent and nothing else.
83. All the constitutional and statutory rights allegedly violated by the Respondent were violated in the context of an employment relationship and the reliefs sought are grounded on the relationship.
84. Nothing demonstrates the foregoing more vividly that the Petitioner's prayer for the remedy of reinstatement.
85. Needless to belabour, the remedy of reinstatement, which is the primary remedy sought by the Petitioner, is statutory.
86. A comprehensive view of the Petitioner's case reveals that the alleged violations of rights by the Respondent are in their totality remediable in under the statutory arrangement in place without invoking the Constitution of Kenya, 2010 which is the over-arching framework.
87. For the forgoing reasons, the court is persuaded that the petition before the court does not meet the threshold enunciated in Anarita Karimi Njeru V Republic (Supra).
88. On whether termination of the Petitioner's employment was unfair, counsels have adopted opposing positions, with the Respondent's counsel submitting that it was substantively and procedurally fair while the Petitioner's counsel maintains that it was unfair for non-compliance with the law.
89. It requires no gainsaying that the provisions of the Employment Act, 2007 prescribe the architecture of termination of employment contracts and the architecture is mandatory as held in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR.



90. The Act has provisions on notice, reason(s) for termination, validity and fairness of the reason, proof of reason, examples of gross misconduct, burden of proof and termination procedure among others.
91. Under these provisions, for a termination of employment to pass muster, it must be shown that the termination was based on a valid and fair reason and was conducted in accordance with a fair procedure, as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (Supra)* cited by the Respondent's counsel, and echoed by the Court of Appeal in *Naima Khamis V Oxford University Press E.A. Ltd (2017) eKLR*.
92. In the words of Ndolo J. in the *Walter Ogal Anuro* case (*Supra*);

“ . . . 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.”
93. The court is guided by these sentiments.

Reason(s) for termination of employment

94. It is common ground that the Petitioner was employed by the Respondent as a driver on 3rd March, 2010 at Kshs.50,185 per month and had served for almost 13 years.
95. The terms of employment were permanent and pensionable subject to a 6 months probationary contract.
96. As at the date of termination, the Petitioner's salary had risen to Kshs.90,323.40.
97. The case against the Petitioner is that he absented himself from his place of work without leave or permission from the supervisor and attempts to reach him by the supervisor were unsuccessful and the whereabouts of the motor vehicle assigned to him were unknown.
98. The charge was expressed to be contrary to clause 12.12.2 of the Respondent's Human Resource Manual, March, 2020.
99. The letter accorded the Petitioner 7 days to respond and he responded by letter dated 2nd March, 2022.
100. The Petitioner admitted having absented himself from the work place without leave or permission.
101. In his letter, the Petitioner is unambiguous that he decided to be away and unreachable by anyone on account of having been insulted by his boss allegedly for no reason and opted to remain away to escape more wrath, though aware that there were better ways of dealing with the issue and was contemplating reaching out to the Boss/Supervisor for reconciliation.
102. The Petitioner apologised to the Human Resource and Administration for failing them.
103. The Petitioner's letter contradicts his counsel's submissions that the Petitioner indeed performed his duties as instructed despite the ill-treatment.
104. The Petitioner's Supporting Affidavit makes no reference to the fact that he reported the matter to the Human Resource Office.



105. Documents availed by the Petitioner reveal that the Respondent was conducting some trainings in Mombasa and the Petitioner drove to the city on 9th February, 2022 via Voi and stayed there until 26th February, 2022.
106. The Work Ticket of Motor Vehicle Reg. No. GKA 920R shows that on 22nd February, 2022, the vehicle was supposed to proceed from Nyali at 9.00 am – proceed to Mombasa – then to Shanzu – Mtwapa and back to Nyali at 6 pm, a total of 69 kilometers.
107. On 23rd February, 2022, it left Nyali at 8 am proceeded to Mtwapa – Shanzu – Mombasa and then Nyali at 5.30 pm, a distance of 91 kilometers. These are the days the Petitioner is alleged to have been away, a fact he admitted.
108. Puzzlingly, the response to the notice to show cause has neither date nor time as to when the insulting or hostility by the boss was exhibited. What is indisputable is that the Petitioner decided on his own volition to keep off his place of work and could not be reached, facts he did not contest.
109. If the Petitioner’s evidence is to be believed, then his entries in the Work Ticket of the Motor Vehicle he was driving are untrue.
110. On both days (22nd and 23rd February, 2022), the Petitioner drove to the same places but the distance covered has a deferential of 22 kilometers.
111. Curiously, the dismissal letter dated 19th January, 2023 states that the show cause letter made reference to absence from duty without leave and insubordination which is not the case. The only charge against the Petitioner was absence from duty. Disregard of instructions in this context could only be with reference to the duties assigned to him in Mombasa of driving Dr. Kahindo from her residence to the training venue and back. However, it is not part of the charges preferred against the Petitioner and is therefore of no consequence in this judgement.
112. Since the Petitioner’s employment was terminated on the basis of clause 12.12.2 of the Human Resource Manual, it is essential to interrogate the clause in some detail, but before delving into it, it is significant to indicate that under clause 12.10.1(v) of the Manual, absence from duty without leave or lawful cause was categorised as gross misconduct.
113. Clause 12.12.2 states that

“Absence from duty without leave or lawful cause for a period exceeding twenty four (24) hours and is not traced within a period of ten (10) from the commencement of such absence, the employee’s salary shall be stopped and action to dismiss the employee initiated.”
114. Although the notice to show cause makes no reference to the timing of the Petitioner’s French leave, the Petitioner did not contest the duration he was allegedly away nor disclose when he resumed duty.
115. He did not contest that his cell phone was on and could thus receive calls and messages.
116. In other words, the Petitioner deliberately absented himself from duty and made himself unreachable by the employer.
117. The Petitioner states that he decided to keep of his work to cool off or escape “any more wrath.” He had the option to call the Respondent’s Human Resource Office to lodge a complaint or register his displeasure with the manner in which he had been treated as opposed to withdrawing labour.
118. Intriguingly, the Petitioner is reticent on what the alleged insults or abuses or tirade by the boss was all about, how they originated and whether it was work related or not. Such details would have



- contextualized the alleged insults and it would have been easier to assess the Petitioner's reaction and how he dealt with them.
119. In the absence of such evidence, the Petitioner has no defence to the absence from duty and making himself unreachable.
120. Contrary to the Respondent counsel's submission that the Petitioner deserted or absconded duty, he did not.
121. According to Black's Law Dictionary (10 Edition) desertion is "the wilful and unjustified abandonment of a person's duties or obligations", and is explained in the South African Court decision in *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), desertion is distinguishable from absence from leave in the former the employee has no intention of returning to the work place.
122. Section 44(4)(a) of the *Employment Act*, 2007 constitutes absence without leave or lawful cause gross misconduct.
123. The provision provides inter alia;
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same or whether any other matters not mention in this section, constitute justifiable or lawful grounds for the dismissal if –
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work."
124. Evidently, the Petitioner's conduct violated the provisions of Section 44(4)(a) of the *Employment Act*, 2007. He knowingly and deliberately absented himself from the place of work while not indisposed or for any other lawful cause while fully aware that the Respondent had a documented grievance handling mechanism.
125. The retort that "it was not intended" cannot avail the Petitioner as he had other ways of registering his displeasure for the alleged insults.
126. He absented himself from work during working hours while out of his work station of Nairobi and his services were needed.
127. In the circumstances, the court is in agreement with the Respondent's counsel's submission that the Respondent had sufficient grounds to terminate the Petitioner's employment for breach of the employment contract on account of his absence without permission or any justifiable cause.
128. For the foregoing reasons, it is the finding of the court that the Respondent has demonstrated on a balance of probabilities that it had a valid and fair reason to terminate the Petitioner's employment summarily.

Procedure

129. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra), and as correctly submitted by the Petitioner's counsel, Section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory process of termination of employment contracts.



130. The procedural elements or requirements of Section 41 have been enumerated in legions of decisions including *Loice Atieno V Kenya Commercial Bank Ltd* (2015) eKLR by Radido J. and the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR among others. They include an explanation of the grounds of termination in a language understood by the employee, reasons for which termination is being considered, entitlement of the presence of another employee of the employee's choice during the explanation and hearing and considering the representations made by the employee and/or the person chosen by the employee.
131. The Petitioner faults the procedure employed by the Respondent in that he was not given a copy of the investigation report or minutes of the disciplinary hearing for purposes of lodging an appeal, the disciplinary committee was not properly constituted, the process took 9 months to conclude, which is too long, he was invited for the disciplinary hearing through a cell phone message received on 30th December, 2022 at 12.08 pm, that he had no time to prepare for his defense, was not informed of his right to be accompanied by another employee and was not accorded time to present his case.
132. In sum, the Petitioner faults the entire procedure adopted by the Respondent.
133. First, as regards the notice of invitation to the disciplinary hearing, the Petitioner's uncontroverted evidence is that after the hearing on 3rd January, 2023, he was asked to pass by the Human Resource Office to collect his letter which he did and the letter he received was dated 23rd December, 2022 inviting him for the disciplinary hearing.
134. In a similar vein, the Respondent adduced no evidence to show that the letter inviting the Petitioner for the disciplinary hearing was served on the Petitioner before 3rd January, 2023 or deny having sent an invitation message to the Petitioner as demonstrated by print outs of cell phone messages.
135. The notice invitation to a disciplinary hearing is intended to inter alia remind the employee the charges he/she is facing so as to prepare his defence, specify the date, time and place of the proposed hearing, attach the evidence or materials the committee proposes to rely on and most importantly inform the employee of his right to be accompanied by a fellow employee of his choice or shop floor union representative and the right to adduce evidence at the hearing.
136. It is also required that the employee be informed that he/she will be accorded time to present his case and cross-examine witness, if any.
137. The absence of a formal invitation letter by the Respondent denied the Petitioner liberty to respond to it if he was so inclined, for any reason including requesting for documents in the Respondent's possession.
138. More significantly, it denied the Petitioner the opportunity to be accompanied by a fellow employee of his choice as ordained by law.
139. Second, the Petitioner faulted *the constitution* of the Disciplinary Committee on the ground that based on this Grading at 9, the proper forum was the Respondent's Human Resource Management Advisory Committee (HRMAC) which consists of management staff appointed by the Commission Secretary.
140. According to the Petitioner, subjecting his case to the Commission Disciplinary Committee was irregular as the same Commissioners would sit on appeal.
141. The Respondent's Human Resource and Administration Manual, 2020 prescribes the division of disciplinary powers between the HRMAC and the Commission Disciplinary Committee (CDC).



142. Clause 12.4.2 of the Human Resource Manual is explicit that the HRMAC was responsible for disciplinary matters involving employees in IEBC Grades 5 (excluding CECs) and below.
143. Clause 12.5.1 on the other hand provides that the CDC “shall handle cases involving officers in IEBC Grades 1 to 4 and 5 (CECs only).
144. However, under Clause 12.5.2, disciplinary cases jointly involving employees of different levels and where one of the officers is in Grade 5 and below and the other officer(s) is Grade 4 and above, the case shall be dealt with by the CDC.
145. Granted that the Petitioner’s case did not involve any other officer, clause 12.5.2 of the Human Resource Manual was inapplicable and the Respondent did not invoke it.
146. Based on the Respondent’s Human Resource Manual, the court is in agreement with the Petitioner’s assertion that this case ought to have been heard by the HRMAC as opposed to the Commission Disciplinary Committee.
147. For unexplained reasons, the Respondent opted to bypass the HRMAC, the organ with the mandate to handle the Petitioner’s case.
148. Strangely, the Respondent did not avail evidence of the disciplinary hearing held on 3rd January, 2023. Neither the minutes of the meeting nor the list of attendees was provided.
149. The Petitioner testified that the committee comprised two Commissioners and the Director Human Resource and Administration, evidence the Respondent did not controvert.
150. Third, as regards the process, it is common ground that while the notice to show cause was served on 24th February, 2022, the Petitioner was invited for a disciplinary hearing on 30th December, 2022, more than 10 months later which was inordinately long.
151. According to the Petitioner, the delay violated his constitutional right in that the process was neither expeditious nor efficient as demanded by Article 47(1) of *the Constitution* of Kenya, 2010 and Section 4(1) of the *Fair Administrative Action Act*, 2015.
152. Section 3(1) of the *Employment and Labour Relations Court Act*, 2011 contain a similar provision.
153. According to the Respondent, the long delay in concluding the disciplinary process was occasioned by the busy schedule involving the preparation and conducting the 2022 General Election of the Republic of Kenya.
154. It requires no gainsaying organizing and conducting a national general election is a heavy responsibility that requires long meticulous planning and implementation and may have led to the delay in concluding the Petitioner’s case.
155. Although clause 12.1.4 of the Respondent’s Human Resource Manual states that “All” disciplinary cases should be concluded within 6 months, clause 12.1.5 provides an exception where the 6 months period need not apply. “In exceptional circumstances due to nature and complexity of the case as long as it does not exceed 24 months.
156. Finally, although the Respondent did not tender evidence to demonstrate that the Petitioner’s case was of an exceptional nature or complicated, it is common knowledge that the Respondent planned, prepared for and conducted the 2022 General Election of the Republic of Kenya which is a humongous responsibility and which could have occasioned the delay.
157. In the court’s view, the Respondent’s explanation for the delay is reasonable in the circumstances.



158. Fourth, the Petitioner deponed and submitted that he was not accorded sufficient opportunity to present his case during the hearing. That he was only asked why he absented himself from duty, he explained and was ushered out with instructions to pass by the Human Resource Office.
159. Strangely, the Petitioner did not allege that he had questions to ask or needed an explanation or a particular witness called and the request was denied.
160. Having been asked why he was away from work without permission and he explained his case and made no request or raise any objection, the proper course of events was to conclude the hearing.
161. The Petitioner's allegation that the disciplinary committee was hurriedly constituted or that other employees appeared before the same disciplinary committee and were reinstated was not substantiated by evidence.
162. Finally, although the dismissal letter informed the Petitioner of his right to appeal the decision and did so on 23rd January, 2023, the appeal has been pending since then and the Respondent by Notice of Preliminary Objection dated 31st January, 2023 sought to stall this suit on the ground that the Petitioner had not exhausted internal dispute resolution procedures cognizant that appeals by the Respondent are heard by the Commission and it did not and does have commissioners to date. The court declined the invitation.
163. The totality of the evidence adduced in court reveal that the Petitioner's employment was not terminated in accordance with a fair procedure as by law required as the mandatory provisions of Section 41 of the *Employment Act*, 2007 were not complied with.
164. Consequently, it is the finding of the court that termination of the Petitioner's employment by the Respondent was procedurally flawed and thus unfair.

Appropriate reliefs

a. Declaration

165. Having found that termination of the Petitioner's employment was unfair for want of procedural propriety, a declaration to that effect is merited.

b. Reinstatement

166. Reinstatement is a remedy under Section 12(3)(vii) of the Employment and Labour Relations Court, 2011 read with Section 49(3)(a) of the *Employment Act*, 2007.
167. The essence of the remedy is to restore the employee to the position he or she was in prior to the termination so that the employee is treated as an employee whose employment had not been terminated.
168. Relatedly and analogous to other reliefs under Section 49 of the *Employment Act*, 2007, the remedy of reinstatement is discretionary as aptly captured by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (Supra).
169. The Respondent vehemently opposes the remedy of reinstatement on the premises that the termination of the Petitioner was fair as he was guilty of gross misconduct and the trust the Respondent had in him was irretrievably broken down. Moreover, the Petitioner is capable of securing comparable employment.



170. Having found that termination of the Petitioner's employment was substantively justifiable by his admission of having absented himself from duty without leave or lawful cause, the court finds no compelling reason to grant the remedy of reinstatement.

Reinstatement is declined.

c. Damages for Constitutional violations under Article 23 of *the Constitution* of Kenya, 2010

171. Having found that the suit herein did not meet the threshold in *Anarita Karimi Njeru V Republic (Supra)* and having further found that the Petitioner failed to establish violations of the various articles of *the Constitution* of Kenya relied upon in the Petition, the remedy of general damages is unsustainable and is declined.

d. Compensation for unfair termination

172. Having found that termination of the Petitioner's employment was unfair for want of procedural propriety and the court's discretion under prayer No. 73(e) of the Petition, the Petitioner is entitled to the relief provided under Section 49(1)(c) of the *Employment Act*, 2007 subject to the 12 months' salary limit and consideration of the relevant parameters under Section 49(4) of the Act.

173. In this case, the court has considered the following;

- i. The Petitioner was an employee of the Respondent from 2010 to early 2023, duration of about 13 years which is long.
- ii. The Petitioner had no recorded case of indiscipline or misconduct.
- iii. The Petitioner wished to continue serving the Respondent in his capacity as a driver as evidenced by the appeal dated 23rd January, 2023 and prayer for the remedy of reinstatement.
- iv. The Petitioner substantially contributed to the termination of his employment by the Respondent by unapologetically absenting himself from the place of work and refusing to pick calls made to him.

174. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair.

175. In the upshot, judgement is entered in favour of the Petitioner against the Respondent in the following terms;

- a. Declaration that termination of the Petitioner's employment by the Respondent on 19th January, 2023 was unfair and unlawful.
- b. Equivalent of 3 months gross salary compensation.
- c. Costs of this suit.
- d. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND 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

DRAFT

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