



Marete v Kenya Power & Lighting Company Limited (Employment and Labour Relations Cause 1205 of 2018) [2023] KEELRC 3419 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3419 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1205 OF 2018**

**K OCHARO, J
DECEMBER 20, 2023**

BETWEEN

ERIC KATHURIMA MARETE CLAIMANT

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated the 10th July 2018, the Claimant instituted a Claim against the Respondent seeking the following reliefs;
 - a. Reinstatement to his previous position/job without any loss of benefits.
 - b. Salary arrears for the entire period the Claimant has been out of employment.
 - c. Special damages as set out above and proved at the hearing.
 - d. Exemplary damages.
 - e. Maximum compensation of 12 months for wrongful termination.
 - f. In the alternative, payment of all the lawful dues owed to the Claimant.
 - g. Cost of the suit with interest thereon.
2. Contemporaneous with the Statement of Claim, the Claimant filed a witness statement dated 10th of July 2018 and a bundle of documents, documents that he intended to place reliance on as documentary evidence in support of his case.



3. Upon being served with the summons to enter appearance, the Respondent entered appearance on 22nd August 2018 and filed a Memorandum of Reply on 11th September 2018 denying the Claimant's claim and entitlement to the reliefs sought.
4. After the close of the pleadings, the matter proceeded to an inter-party hearing on 21st September 2022.
5. At the hearing, the parties' respective witness statements and documents that they had filed were adopted as part of their evidence in chief and the documentary evidence respectively.

The Claimant's case

6. It is the Claimant's case that he first joined the Respondent's workforce on the 26th of May 2018 as a Trainee Engineer within the Management Cadre.
7. He states that through a letter dated 8th August 2011, he was absorbed into the Respondent's permanent workforce as 4th Assistant Engineer on salary scale MGII in the Distribution Division Projects Department (L& T) Central Office with effect from 9th August 2011, at a monthly salary of Kshs. 63,325 and a House allowance of KShs. 31,592. Further, he was later appointed as the L& T Team Leader for the rerouting of power lines along the Standard Gauge Railway Line on the 8th of June 2016.
8. The Claimant further contends that he was transferred from the Construction Department L&T Section to the Projects Development Department Special Projects on 19th April 2016 and was later promoted from the position of 4th Assistant Engineer to 3rd Assistant Engineer through a Memo dated 16th November 2016.
9. The Claimant asserts that he worked for the Respondent devotedly and with great commitment for eight (8) years without any disciplinary issues. In the course of his employment he on several occasions received performance Bonuses following annual performance assessments.
10. He states that by a letter dated 30th April 2018 the Respondent through the Acting General Manager, Infrastructure Development accused him of having acted in a conflict of interest and breaching the Company's code of Ethics. This was allegedly revealed through an Audit Investigation Report No. 16.2017/2018 on the Prequalified L&T Contractors. The allegations were neither true nor valid. Nevertheless, he was required to Show Cause why disciplinary action could not be taken against him. Further, through his letter dated 2nd May 2018, he comprehensively responded to the allegations and denied any involvement in the alleged transactions.
11. The Claimant states that through an invitation letter dated 11th May 2018, which letter he received on the 14th of May, 2018, the Respondent summoned him to a disciplinary hearing that was scheduled for the 15th May 2018. He attended the hearing on the date and gave explanations for each allegation levelled against him.
12. He states that he was accused of having received a sum of Kshs. 153,100 from one Robert Njiru a director of one of the prequalified service providers of the Respondent. He didn't receive this money from Robert. The allegation was investigated, but the investigations didn't reveal the alleged receipt.
13. The Claimant asserted that way before Robert's Company got prequalified, he [the Claimant] had guaranteed him a loan facility that was advanced to him by Stima Sacco, in 2015. Along the way, Robert defaulted on the loan repayment forcing the Sacco to issue a default notice to the Claimant. Further, the Sacco started recovering the owed sum from the Claimant. In turn, he started pursuing Robert



for the sums that the Sacco recovered from him. Robert's Company was prequalified following an invitation of tenders that was floated in April 2017.

14. He further states that Fidelis Rotich was a colleague who left the employment of the Respondent for one with Giro Bank. He gave him some money. At the time he was advancing the money, he had not been prequalified as a contractor by the Respondent.
15. The Claimant argues that he was not given a fair hearing. The notice that was given was not sufficient to enable him to prepare adequately for the hearing. He received the invitation for the disciplinary hearing on 14th May 2018 at noon, a hearing which was slated for the following day at 9.00 am. Issues that were not raised in the notice to show cause were brought up at the hearing by the Respondent.
16. Through its letter dated 28th May 2018 the Respondent dismissed him from employment. The dismissal was without any justification or any lawful cause.
17. When cross-examined, he confirmed having been given a show cause letter which he received on 30th May 2018.
18. The Respondent took three (3) days to give him the invitation letter. It is not true that he took three days to pick it up. Nevertheless, he attended the disciplinary hearing. At the hearing, he answered the allegations as much as he could in the circumstances. He maintains that the hearing was unfair as he was not given adequate time to prepare for the same. He did not expect that a matter that had not been raised in the notice to show cause could be raised at the hearing.
19. He was not able to avail any witness because of the short notice. The audit report was only availed to him by the Respondent after the dismissal.
20. The Claimant accepted that in his response to the Show Cause letter, he admitted having received money from Robert. The money that he received was a refund of the amount that had been recovered from him as a guarantor. The notice of default speaks to this. Further, he placed before this Court a notice of repayment of a guaranteed loan.
21. The Claimant testified that at the time of the disciplinary hearing, Robert was a contractor but when he was guaranteeing him, he was not.
22. The money that was received from James Wakoli was money that he borrowed from him. However, this is a matter that was just brought up at the hearing for the first time. It was not in the Notice to Show Cause Letter. James Wakoli was a friend and a colleague, therefore, it was not necessary that an agreement be executed between him and the Claimant for the money borrowed.
23. He further testified that while in the employment of the Respondent, the Respondent advanced him a car loan. At the time of separation, he had not repaid the loan.
24. On re-exam, he stated that the notice of default was a testament that he had guaranteed Robert's loan which he defaulted on repaying, leading to the recovery process against him as the guarantor.
25. At the time he was guaranteeing the repayment of the loan, Robert was not a prequalified contractor. Further, the Claimant asserted that he did not contravene any provisions relating to ethical conduct at any time.
26. The issue of James Wakoli was a new matter which was raised at the hearing.



The Respondent's case

27. The Respondent's case was presented by Naomi Mureithi a Human Resource Officer of the Respondent.
28. The witness stated that the Respondent offered the Claimant the post of a Trainee Engineer. The offer was subject to, a medical certification, completion of probation and attending the KPLC Training School. Upon completion of his probation period, he was confirmed to the position of Trainee Engineer on 21st April 2011. After completing his training, he was absorbed as 4th Assistant Engineer. The Claimant was later promoted to the position of 3rd Assistant Engineer earning a basic salary together with allowances and bonuses as accrued from time to time.
29. She further stated that the terms of his contract of employment required him to maintain the highest standard of ethics and abide by the Respondent's ethical principles which included not to accept any gift that could be regarded as an attempt to exert undue influence on him. His employment was also governed by the Respondent's Human Resource Staff Regulations and Procedures.
30. It was stated that as a 3rd Assistant Engineer under special projects, one of the Claimant's duties was supervising the Respondent's turnkey projects which initially involved the outsourcing line construction and related services and allocating jobs to Labour and Transport (L&T) contractors.
31. The witness stated further that in 2017, the Respondent advertised Tender Number KP1/9AA-2/OT/58/PJT/16-17 for L&T services on a two year contract commencing that was to start on 12th April 2017 and end on 31st September 2019. The Respondent opened an invitation for prequalification of contractors on 12th April 2017 and closed the same on 31st May 2017.
32. Various complaints were raised on the transparency of the process used in the prequalification of the L&T contractors. Following this, the Respondent engaged its auditors to conduct an internal and external investigation of the process.
33. The witness stated that the Investigation panel compiled an investigation report. Through the investigation, it was discovered that there were several irregularities in the prequalification process. An exchange of money between the contractors and some of the Respondent's employees was unearthed.
34. It was further stated that the investigations revealed that there was an exchange of funds between the Claimant and Directors of prequalified firms, thus; Kshs. 70,500 from one James Wakoli, an employee of the Respondent who was also the owner of a prequalified L&T firm and who later sold the firm; Kshs. 20,100 from one Robert Njiru, a director of Yves Enterprises Limited which was a prequalified L&T Firm; and Kshs. 40,000 having been sent to Videlis Rotich a director of six prequalified L&T Firms.
35. It is the Respondent's position that the said findings revealed that the Claimant had not properly conducted himself in his dealings with the pre-qualified firms and that his actions gave rise to a conflict of interest, and a breach of his contract with the Respondent. The Claimant was called upon to explain his conduct and was warned that the matter could lead to his summary dismissal.
36. On the 2nd May 2028, the Claimant submitted his reply to the show cause letter which was considered by the Respondent. The Claimant admitted to receiving money from Robert Njiru and sending money to Videlis Rotich which he alleged was a soft loan. The Claimant stated that the amount received from Robert Njiru was a repayment of the sum that had been recovered from his salary as a result of the default in the repayment of the loan by, Robert Njiru. However, he did not address the issue of having received a sum of Kshs. 70,500.



37. The witness stated that after considering the Claimant's reply, the Respondent found that it was not satisfactory as it confirmed his dealings with parties in a manner that created a conflict of interest and did not fully address the charges against him. Subsequently, the Claimant was invited to a disciplinary hearing by a Memo issued on the 11th May 2018 which stated that the disciplinary hearing was to take place on 15th May 2018 and that he had the right to be accompanied by any witness in support of his case, and lastly, he had the right to bring to the panel any evidence in support of his case.
38. It is the Respondent's case that after the hearing of the Claimant's representation, the Respondent decided to summarily dismiss him from employment. The decision to dismiss him was formally communicated to him in writing on 28th May 2018.
39. The witness contended that the Claimant had accrued several liabilities in the course of employment with the Respondent and thus remained indebted to the Respondent, thus:
- i. Car loan.....Ksh. 800, 563.00.
 - ii. Insurance Premium.....Ksh. 14, 228.68.
 - iii. Employee sales.....Ksh. 1, 000.
40. The witness further stated that the decision to summarily dismiss the Claimant was fair, lawful and procedural as he was allowed to bring any evidence and witness before the disciplinary panel, the reasons for the termination were justified as the Claimant had committed gross misconduct and had breached ethical principles expected of him and that he was unable to give credible reasons for sending and receiving money from prequalified contractors.
41. Lastly the Respondent avers that the Claimant's claim has no basis and should be dismissed with costs.
42. In her evidence under cross-examination, she testified that the notice to show cause letter was concerning Prequalified L&T Contractors. The pre-qualification of the contractors was opened on 12th April and closed on 31st May 2017.
43. She testified that the Notice to Show Cause letter refers to Robert Njiru giving money to the Claimant and was referred to as an L&T Contractor. She confirmed that she was a member of the Stima Sacco and that one needed a guarantor to get a loan from the Sacco. The letter from Stima Sacco indicates that Robert was a borrower and the Claimant a guarantor.
44. She admitted that at the time the Claimant was guaranteeing Robert, he was not a prequalified contractor.
45. The witness further testified that the second issue raised in the show cause letter was that the Claimant sent money to Videlis Rotich on 13th January 2017. She added that at this time, however, the prequalification had not been done. The second involvement was on 26th May 2017. At this time, the prequalification had not been done and the contractors too had not been selected.
46. As per the investigation report, the money that Robert Njiru gave out to the Claimant was KShs. 20, 100. However, the notice to show cause which the Respondent expressed to have flowed from the investigations, indicated that he received KShs. 153, 100. There was a variance, therefore.
47. It was her testimony that the disciplinary procedure contained in the Human Resource Manual. Clause 4 (i) provided for the investigation procedure. The investigation that was carried out by the Respondent didn't entail taking witness statements from Robert Njiru and Videlis Rotich.
48. Lastly, she testified that the issue of James Wakoli was only introduced during the disciplinary hearing.



49. On re-exam, she clarified by stating that at the time the Claimant received the money, Robert was a contractor.

The Claimant's submissions

50. The Claimant's counsel filed her written submissions on 17th November 2022 distilling the following issues for determination;
- i. Whether the Claimant's termination was substantively unfair.
 - ii. Whether the Claimant's dismissal was procedurally unfair.
 - iii. What remedies is the Claimant entitled to?
51. On the first issue it was submitted that the dismissal of the Claimant from employment was substantively unfair. Counsel submitted that section 43 of the *Employment Act*, enjoined the Respondent to prove the reasons for the termination of the Claimant's employment. Section 45 placed a further burden on it to prove that the reason[s] was valid and fair.
52. On the charge of receiving Ksh. 153,000 from Robert Njiru, the Claimant was able to demonstrate that; the alleged investigation report didn't mention this figure but Kshs. 20,100; that he received Kshs. 20,000 from Robert not as an inducement but as a refund of a sum that had been recovered from his salary following Robert's failure to repay a loan that he [the Claimant] guaranteed him; a principal-guarantor relationship existed between him and Robert; and that he guaranteed Robert way back before he became a prequalified contractor.
53. On the allegation concerning the KShs. 40,000 that the Claimant gave Mr Rotich, Counsel submitted that the money was so given on the 31st of January 2017. As of this date, the tender had not been opened and the said individual was not a prequalified L& T Contractor. The tendering process ended on the 31st May 2017.
54. By reason of the premises, the Court was urged to find that the dismissal was without any substantive justification.
55. On procedural fairness it was submitted that section 45[2][c] requires the employer to prove that the termination of an employee was procedurally fair. Where the employer fails to so prove the termination shall be deemed unfair.
56. Part VII of the Respondent's Human Resource & Regulation and procedures provided for the disciplinary procedure that ought to be adopted in the disciplinary process. Further, it provided for a specific disciplinary procedure for Management employees. According to the manual, the letter dated 30th April 2018 was supposed to be copied to the Regional HR and Administration officer, the Chief Manager, Human Resources and Administration.
57. It was submitted that the wording of the HR Manual used the word "should" indicating that compliance thereto is a must. A close examination of the explanation letter dated 30th April 2018 reveals that the same was authored by the Acting General Manager, of Infrastructure Development, however the same was not copied to the Regional HR & Admin Officer, the Chief Manager. Human Resources as required. It is clear therefore that the Respondent did not adhere to fair procedure.
58. Counsel further submitted that the investigators did not at all examine Robert Njiru and Videlis Rotich. This, at the end of the day, deprived the Claimant of an opportunity to cross-examine them



contrary to section 4 of the *Fair Administrative Action Act* which provides that an accused person must be accorded opportunity to cross-examine witnesses.

59. Lastly the Counsel submitted that the Claimant was served with the notice late on the 14th May 2018 for the disciplinary hearing. The notice was inadequate. Further at the disciplinary hearing new allegations that were not on the notice to show cause were introduced. The new allegation constituted an ambush on the Claimant.
60. On the last issue it was submitted that Having proved his case, the Claimant is entitled to the reliefs sought. Further, section 49[1]and [4] bestows authority on this Court to award general damages. The Respondent contravened Article 47 of *the Constitution* of Kenya and Section 4 of the Fair Administrative Actions Act by failing to accord the Claimant a fair hearing. An award of KShs. 5,000,000 shall suffice as damages. Reliance was placed on the case of *Mayieka vs DHL Exel Supply Chain (K)* (2016) eKLR as well as the case of *Onesimus Kinyua Magoiya vs Prudential Life Assurance Kenya* (2019) eKLR in fortification of this submission.

The Respondent's submissions

61. Counsel for the Respondent filed his submissions on the 1st of December 2022, setting forth the following issues as those that present themselves for determination, thus:
 - i. Whether there were valid grounds for the termination of the Claimant's employment.
 - ii. Whether proper procedure was followed in the termination.
 - iii. Whether the Claimant is entitled to the reliefs sought.
 - iv. If he is, what reliefs are available to the Respondent against the Claimant?
62. Submitting on the first issue, Counsel stated that the termination of the Claimant's employment sprang out of the findings of the internal audit report dated 16th April 2018. The audit report unearthed malpractices by employees of the Respondent in the course of the public tendering process for L&T contractors which was opened in April 2017 but had a start date of October 2017. The process would lead to a contract period of 2 years for successful bidders. The Claimant was among the employees singled out as one of those who were involved in malpractice. He received Kshs. 70,500/- and Kshs. 20,10 0/- from James Wakoli and Robert Njiru respectively, both of whom were directors of prequalified contractors. He sent KShs. 40,000 to Mr. Rotich who was also a director of 6 prequalified contractors. The investigators interviewed the Claimant during the audit and he admitted to receiving money from the two and sending money to Mr. Rotich.
63. It was further submitted that the contents of the audit report had not been challenged by the Claimant in his pleadings or at trial. No doubt, the Respondent demonstrated that they had a valid reason for terminating the Claimant's employment namely the conflict of interest and a breach of the company's code of ethics by the Claimant, especially since the Claimant had not reasonably addressed the suspicions against him. It was submitted that the Respondent had genuinely believed that the Claimant was being influenced by the directors of the prequalified contractors in relation to the tender, there was a valid reason for the termination of the Claimant's employment, therefore. Reliance was placed on the cases of *Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike* (2017) eKLR and *Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others* (2019) eKLR in fortification of this submission.
64. It was submitted that based on the audit, the various admissions by the Claimant during, the audit investigation, the disciplinary hearing of 15th May 2018, and in a letter dated 2nd May 2018, and a



failure to adduce sufficient evidence that the money received and sent by the Claimant during the tendering period related to loans, there arose a reasonable suspicion/genuine belief on the part of the Respondent that the Claimant's actions constituted the offences of conflict of interest and breach of ethical policies which amount to gross misconduct. The Respondent was not required to conduct a forensic examination of the facts. Further, any error in the sum is not material. Reliance as placed on the case of *Robert Kenga & Another vs Ocean Sports Resort (2015) eKLR*.

65. On the second issue the Respondent submitted that there was procedural fairness in the Claimant's dismissal. The Respondent stated that the Claimant was interviewed during the audit process and made aware of the specific transactions that were flagged against him, and granted an opportunity to make a statement addressing them. Further, the Claimant was issued with a notice to show cause letter dated 30th April 2018 and given 72 hours to prepare a defence. The Claimant submitted a response dated 2nd May 2018 to the show cause letter. The Respondent also submitted that the Claimant was invited to a disciplinary hearing scheduled for 15th May 2018 vide a letter dated 11th May 2018, and given adequate opportunity and time to make representations. On adequacy of time to mount a defence, the Respondent cited the case of *Henry Isaiah Onjelo vs Maridadi Flowers Limited [2015] eKLR* where the Court held that sufficiency of time to prepare for a disciplinary hearing depends on the circumstances of each case, and that 1 day was sufficient in that case.
66. It was submitted that the Claimant did not raise an objection to the date of the hearing or request more time to prepare his defence. He also signed the minutes of the hearing as being a true reflection of what transpired therein. Having been given notice of and allowed to address all the allegations levelled against him, the Claimant was afforded a fair hearing in compliance with Section 41 of the *Employment Act 2007*. Finally, the dismissal letter dated 28th May 2018 was issued to the Claimant giving reasons for the termination. To buttress the point that fair procedure was adhered to, reliance was placed on the case of *Joseph Onyango Asere vs Brookside Dairy Limited (2016) eKLR* where it was held:
- “The Claimant confirmed that he was given a hearing as required under section 41(2) of the *Employment Act*. Though not documented, this is confirmed by the Claimant in his sworn evidence. As submitted in the case of *George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR* indeed internal disciplinary proceedings are not similar to Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.”
67. Similarly, the Respondent relied on the case of *Joseph Mwangi Gioche vs Gatamaiyu Dairy Farmers' Cooperative Society Limited (2019) eKLR* where it was held:
- “Concerning the procedure followed in terminating the claimant's service, the court is persuaded that due process was followed. The requirement of issuance of notice to show cause and invitation to a disciplinary hearing does not have to follow a pedantic and mechanical path. Once the court is satisfied as the case here that the employee had reasonable notice of the allegations against him and he has been called upon to answer questions around those allegations and has done so, if a dismissal follows thereafter the employee cannot insist on a mechanical process of notice to show cause and a disciplinary hearing. In the court's view, therefore, the dismissal was procedurally fair.”
68. On the last issue of reliefs, it was submitted that the Claimant was not entitled to the relief of reinstatement as, pursuant to section 12 (3) (vii) of the *Employment Act* an order of reinstatement



can only be made within three years from the date of the dismissal, which lapsed on 28th May 2021. Therefore, this court lacks jurisdiction to make this award.

69. It was submitted that the Claimant's contract did not come with a lifetime guarantee of employment and could be terminated for cause and thus the claim for salary arrears for the entire period of the contract had no legal basis. Reliance was placed on the case of Kenya Ports Authority vs Edward Otieno Civil Appeal No. 120 of 1997 as cited in Kenya Power & Lighting Company Limited vs Lydia Chepkosgei Mutai (2019) eKLR.
70. As for the relief of special damages the Respondent submitted that the Claimant was summarily dismissed for cause in accordance with the law and is thus not entitled to notice pay or compensation for the unfair termination. The Respondent stated that if the Court was inclined to grant the compensation for unfair termination, it should be guided by the factors contained in Section 49 of the *Employment Act* 2007 and consider the Claimant's suspicious conduct of receiving from and sending money to prequalified contractors. Hence it should award a maximum of 1 month's salary as compensation. The Respondent cited the Court of Appeal case of Kiambaa Dairy Farmers Cooperative Society Limited vs Rhoda Njeri & 3 Others to support the position that compensatory damages must only be awarded in deserving cases.
71. On exemplary damages, the Respondent submitted that the same is not payable in employment disputes save in limited instances where a party pleads that their Constitutional rights have been violated, which is not the case here. Reliance was placed on the case of Leonard Gethoi Kamweti vs National Bank of Kenya Limited (2020) eKLR.
72. Lastly, the Respondent submitted that the Claimant owed it liabilities in the form of a car loan that the Claimant admitted he had taken and not repaid during cross-examination in the sum of Ksh. 479, 290.60; outstanding car insurance in the sum of Ksh. 14, 228.68; and unpaid welfare contribution in the sum of Kshs. 1,000, making up a total of Ksh. 494, 519.28. It was stated that these liabilities were particularized in the termination letter dated 28th May 2018. The Respondent submitted that the Claimant should be ordered to settle the aforesaid liabilities or if the Court is inclined to make any award in favour of the Claimant, the same should be offset against the total liability owed.

Analysis and determination

73. From the pleadings, the evidence on record and the rival submission by the parties herein, the following issues present themselves for determination thus:
 - i. Whether the Claimant's summary dismissal was procedurally and substantively fair.
 - ii. Whether the Claimant is entitled to the reliefs sought or any of them.
 - iii. Whether the Respondent's counter-claim is merited.
 - iv. Who should shoulder the costs of the suit?

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

74. It is evident on the record that the Claimant herein was employed by the Respondent as a Trainee Engineer. He was further confirmed as a Trainee Engineer and later promoted to the position of 4th Assistant Engineer and finally 3rd Assistant Engineer, which position he held until 30th April 2018 when he received a Show Cause Letter alleging a conflict of interest against him. He was invited to a disciplinary hearing and subsequently, issued with a dismissal letter dated 28th May 2018. Based on the above, it is clear that at all material times there existed an employer-employee relationship between



the parties herein. This Court is now called upon to determine whether the Claimant's dismissal from employment was procedurally and substantively fair.

75. The Employment Act provides the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee. The procedure is mandatory. It embodies three components. First is the information/notification component, the employer must notify the employee of his or her intention to terminate the employee's employment and the grounds attracting the intention. Second the hearing component, the employer must accord the employee an adequate opportunity to make a representation on the grounds. This component also avails to the Claimant the right to accompaniment, either by a colleague where he or she is not a member of a trade union or a union representative, where he or she is a member. Lastly the consideration component, the employer must consider the representations made by the employee and or the colleague or representative of the union as the case may be, before taking a decision.
76. By dint of the provisions of section 45 (2), the duty to prove that there was procedural fairness in the termination or summary dismissal lies on the employer. I draw inspiration from the holding in the case of *Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR*. In the said decision, Ndolo J. stated thus: -
- “..... 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.”
77. Part VII of the Respondent's Human Resource and Policy Manual provides for the disciplinary procedure in instances of the contravention of the stipulated rules and regulations of the Respondent by an employee. Under Clause 2, it provides:
- “In all discipline cases, investigations should be carried out by the appropriate function head who will thereafter issue and sign an appropriate explanation letter in liaison with the Regional Manager. The letter should be copied to the Regional HR & Administration Officer, the Chief Manager Human Resource and Administration and the appropriate Divisional Chief Manager.”
78. It is clear and evident that the explanation letter dated April 2018 was signed by Engineer Daniel Tare, the Acting General Manager, Infrastructure Development, whereupon it was copied to the General Manager, Human Resources & Administration; General Manager, Supply Chain; General Manager, CA & CS; Ag. General Manager, Finance; and Manager, Security Services. However, it was not copied to the Regional HR & Administration Officer, and the Chief, Manager Human Resource and Administration, who did not append his or her comments or observations.
79. This Court notes that Respondent has deliberately or otherwise not addressed this procedural issue raised by the Claimant. In my view, procedural stipulations embodied in an enterprise's Human Resource Policies and Procedure Manual, are so embodied to ensure fairness, transparency, equity, non-discrimination, and a level playing ground at the place of work. The stipulations must be adhered to by both the employer and the employee unless they provide an option explicit or implied for either party, or the employer to depart therefrom. Time and again this Court has said that terms contained in an Organization's Human Resource Policies and Procedure Manual become part of the terms of the contractual terms. Therefore, an unexplained departure by an employer will be considered a factor that will form a basis for holding that there was a want of procedural fairness. The Respondent did not explain why the explanation letter was not copied to all those whom the Manual contemplated.



80. The Claimant contended that the invitation to the disciplinary hearing was issued on the 11th of May 2018 but he only received it on the 14th of May 2018 at noon, which was a short period to prepare a defence on the alleged charges. There is no doubt that the invitation letter was received by the Claimant on 14th May 2018. The Minutes of the Disciplinary Hearing reveal that the meeting started at 10.30 am on 15th May 2018. The Claimant further contended that he could not avail a witness or representative in the exercise of his right under section 41 of the Employment Act 2007 due to the short notice. Nevertheless, he attended the disciplinary hearing and answered the questions levelled against him as much as he could in the circumstances.
81. The right to a fair hearing has to be examined taking regard to the peculiar facts and circumstances of each case including the nature of the investigations undertaken in the case. The complexity of the matter that was investigated against the employee, the type of witnesses as regards the matter, the subject of the disciplinary process -are they internal or external, were relevant documents availed to the employee contemporaneously with the show cause letter issued? All these factors inter alia will be considered in determining the sufficiency of the notice issued for a disciplinary hearing. At this point, the question that crops up is whether the failure to issue the Claimant the invitation letter early enough as demonstrated above prejudiced him in any way. The answer to this in my considered view will be in the affirmative. In the circumstances of the matter, the less than 24 hours' notice in my view was inadequate to allow the Claimant to prepare for his defence against the accusations.
82. Respondent's Human Resource and Policy Manual provides for investigation procedures under Part VII Clause 4(i) which are enumerated as hereunder:
- i. Cases have occurred where employees who are being disciplined have, after a period for reflection, brought up issues of which no mention was made at the time of the incident and which is difficult to disapprove in the absence of a statement taken at the time of the occurrence. Speedy action in obtaining written statements is therefore most important.
 - ii. Where there are witnesses present at the time of the offence, written and signed statements should be obtained from them as soon as possible after the incident.
 - iii. A copy of any statement made should be forwarded to the chief Manager, Human Resources and Administration by the relevant Regional/Divisional Head together with any explanatory information relating to the case in question, and recommendation as to the appropriate course of action.
83. RW1 in cross-examination confirmed that no witness statements were taken from Robert Njiru and Videlis Rotich to ascertain whether they were prequalified L&T Contractors or not and it is my considered view that Clause 4 (i) of the Respondent's Human Resource and Policy Manual on the investigation procedures was contravened.
84. The Claimant further contended that the disciplinary hearing was unfair as the Respondent relied on other matters that were not in the show cause letter specifically the issue of receiving money from one James Wakoli. In the case of Peter Mutuku Kiilu vs Isinya Resorts Limited 2021 eKLR the court held:
- “Issues to be discussed at a disciplinary hearing must be the same as in the show cause letter, and minutes taken during a disciplinary meeting ought to be signed at the meeting during or in which they are taken, but not in a separate or subsequent meeting.”
85. The Respondent's witness under cross-examination, in admission stated that indeed the issue of James Wakoli was introduced at the disciplinary hearing. To see the Respondent's action of bringing into



- the Disciplinary Proceedings, matters that were not brought to the attention of the Claimant, will be to allow diminishment of the statutory protection and right availed to employees under section 41 of the *Employment Act*. The act negates the notification component of procedural fairness, leading to a violation of the right to a fair hearing.
86. In my view, it would not be a defence for the employer to just assert that the employee did not protest the insufficiency of the notice or seek an adjournment of the disciplinary hearing.
87. By reason of the foregoing premises, it is my conclusion that the Respondent's decision to summarily dismiss the Claimant from employment was procedurally unfair.
88. Section 47 (5) of the *Employment Act* embodies a dualistic burden scheme. It places legal burdens on the employer and the employee, the parties in a dispute. The employee is enjoined to prove that the termination was unfair or wrongful before the employer's burden sets in. The employee has to tender evidence establishing prima facie that the employer did not have a valid and fair reason as the basis for the action of dismissing him from employment. It is only after discharging this burden that the requirement that the employer establishes that the dismissal was justified sets in.
89. In the case of *Mirera vs Barclays Bank Limited (2018) eKLR* the Court amplified the above position by stating:
- “The Plaintiff/Claimant must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities.”
90. Considering what I have found hereinabove regarding procedural fairness, and what emerges shortly hereinafter on the substantive justification aspect of the dismissal, I have no doubt that the Claimant has discharged the legal burden on him as the employee, under the above stated provision.
91. Section 43 of the *Employment Act*, 2007 places a duty on the employer to prove the reason[s] for termination of an employee's employment whenever there is a dispute regarding the termination. However, it should be noted that it is not enough for the employer to just state that the employee was dismissed for this reason or the other. Section 45 of the Act, sets out a further burden that the employer must surmount. He or she must demonstrate to the requisite standard that the reason[s] was valid and fair. It is with this lens that I now turn to consider whether the Claimant's dismissal was justified.
92. The Court notes that central to the Respondent's decision to dismiss the Claimant from employment was the fact that he received money from prequalified L&T contractors in two instances, and gave out money to Videlis Rotich. According to the Respondent, this amounted to a conflict of interest and breach of ethics, on the part of the Claimant.
93. To answer the question of whether or not the reason[s] was fair and valid, it becomes vital to consider the alleged revelations by the investigation report, the timing of the alleged receipt and giving of the money, and the reasons given by the Claimant for the receipt and giving. The Respondent alleged that the show cause letter flowed from investigations referred to hereinabove. However, on what was received from Robert Njiru, undoubtedly, there is no dispute that there is a variance between the amounts set out in the Report, and that which the Claimant was asked through the show cause letter to explain. The huge variance needed to be sufficiently explained by the Respondent considering that the



amount in the show cause formed part of the basis for the dismissal. Without a proper explanation by the Respondent, an impression that the Claimant was wrongfully accused abounds. The Respondent didn't give any reasonable explanation, with due respect.

94. I have considered the explanation given by the Claimant on the amount he received from Robert, and the documents he tendered in support of the explanation. I find the same reasonable. A reasonable employer objectively considering the explanation and material could not dismiss on the ground of receiving money from Robert. Clearly, the money received was a reimbursement of money that was recovered from the Claimant as a guarantor following the default in loan repayment by the principal, Robert.
95. I have found great difficulty in understanding how the money that the Claimant admittedly gave Mr Rotich, could be a factor in influencing the award of the tender in his favour. In light of the explanation he gave as regards the giving, it became imperative for the Respondent to place forth evidence to rebut the explanation. It didn't so do.
96. In my view, which was not part of those raised in a show cause letter, but brought up in the course of the disciplinary hearing therefore without prior notification to the employee cannot be held to be fair and valid to be a basis for termination of an employee's employment.
97. Lastly, this Court notes that the receipt of the money from Mr. Wakoli and Mr. Njiru occurred way before the tender in issue was floated. It didn't happen after the invitation to tender or in the course of the tendering process. In light of this, the Respondent who was asserting that the money was to influence the award of the tenders to specific contractors was burdened to prove that indeed the money was for that purpose. The Respondent did not lead evidence to the effect.
98. In the upshot, I hold that the dismissal of the Claimant from employment was without a valid and fair reason. It was therefore substantively unjustified.

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

i. Reinstatement

99. The Claimant sought an order for reinstatement to his previous position or job without loss of benefits. Section 12 (3) (vii) of the [Employment and Labour Relations Court Act](#) which provides:
 - “(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:
 - (viii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or”
100. In the case of *Kenya Airways vs Aviation & Allied Workers Union* (2013) eKLR the court held as follows as far as the relief of reinstatement of an employee is concerned:
 - “As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the [Employment Act](#) and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance,



the traditional common law position is that courts will not force parties in a personal relationship to continue in such a relationship against the will of one of them. That will engender friction, which is not healthy for businesses unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”

101. Considering the fact that the order of reinstatement is not an automatic remedy, and the provisions of section 12 (3) (vii) of the *Employment and Labour Relations Court Act* that reinstatement order is only available for three years after dismissal of an employee from employment, I am impeded to make the said order in favour of the Claimant. It is apparent that the Claimant herein was dismissed on 28th May 2018 and almost five years have lapsed since the date of the dismissal. I decline to make the order.

One month's salary in lieu of notice

102. The Claimant sought for one month's salary in lieu of notice Ksh. 234,000. Before I delve further into this issue, the Respondent contended that at the time of the Claimant's termination, he was earning Ksh. 139, 299 per month, a figure which is less than the one placed before this court for consideration by the Claimant.
103. The Claimant's payslip presented before this court as his documentary evidence reflects a lesser amount than the one stated in his pleadings. I am unable to see the justification for the amount of Kshs. 234,000. I hold that at the separation, the Claimant's salary was Kshs. 139, 575 per month.
104. There is no contention that the termination of the Claimant's employment was through a summary dismissal. This court having found that the dismissal was procedurally and substantively unfair, I hereby award the Claimant Ksh. 139, 575 as salary in lieu of notice.

ii. Pay for 14 leave days earned but untaken.

105. The *Employment Act* section 28 enjoins an employer to allow the Employee to proceed for leave and the leave not taken be compensated in lieu of not having been taken. The Claimant contended that at the time of his summary dismissal, he had accrued 14 leave days which were never paid for by the Respondent.
106. By dint of section 74 of the *Employment Act* 2007, the employer is obligated to keep proper records pertaining the Claimant's employment including the leave taken or not taken and the payment thereto. The Respondent did not present any records regarding the Claimant's accrued leave to rebut the Claimant's position. By reason of the foregoing premises, I hereby award the Claimant Kshs. 81,418.75 under this head.

Salary arrears for the entire period the Claimant was out of employment.

107. This relief that the Claimant has sought is not one of those contemplated under Section 49 of the Act. Further, the Claimant didn't place before this Court any evidence that would justify a grant of the relief. The legal basis for the grant of the remedy under this head has not been demonstrated. By reason of these premises, I reject to grant the same.

iii. 12 months compensation for the wrongful termination.

108. The Claimant also sought for compensation for the wrongful termination, Ksh. 2, 808, 000, being 12 months' gross salary. This Court is alive to the fact that 12 months' gross wages or salary is the maximum awardable compensation provided under section 49 (1) (c) of the *Employment Act* 2007.



Granting of the relief is discretionary. Whether to grant the compensation or not, and the extent of the award depends on the circumstances of each case.

109. I have considered the period the Claimant was engaged by the Respondent, the fact that he was dismissed summarily without a justifiable reason and with want of procedural fairness, the fact that had it not been for the limitation imposed by Section 12 of the Employment and [Labour Relations Act](#), this Court could have made an order for reinstatement and that it was not proved that the Claimant contributed to the dismissal, and find that the compensatory order sought is deserved but to an extent of eight (8) months' gross salary. Ksh. 1, 116,600.

iv. Exemplary damages

110. The Claimant lastly sought Ksh. 5,000,000 as exemplary damages for the unfair termination and the contravention of Article 47 of [the Constitution](#) of Kenya and section 4 of the Fair Administrative Action by failing to accord the Claimant a fair hearing.
111. As held in the celebrated case of *Rookes vs Bernard* (1964) 1 ALL ER 367, an award of exemplary damages is granted in exceptional cases, thus, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in a case where the defendant's conduct was calculated to profit him to an extent which might exceed the compensation payable to the Plaintiff/ Claimant. The Claimant has not satisfied any or all of the conditions set out in the decision. Consequently, he did not meet the threshold for an award of exemplary damages.

Whether the Respondent's Counter-Claim is merited.

112. It is evident that the Claimant took a loan for the purpose of purchasing a car worth Ksh. 1,000,000 which was to be repaid at the rate of Ksh. 16,667 per month plus appropriate interests. By an email dated 25th June 2018 from Richard Tirop, the Claimant's car loan balance stood at Ksh. 479, 290.58. The Claimant during cross-examination confirmed that he had taken a car loan which he had not fully repaid at the time of separation.
113. Due to the foregoing premises and the admission of the Claimant that he owed the Respondent the stated amount, I find that the Respondent's Counter-Claim is merited and award the amount admitted, Kshs. 479, 290.58.

Who should bear the costs of the suit?

114. The costs of this suit to be borne by the Respondent herein.
115. The upshot, judgment is hereby entered in favour of the Claimant in the following terms:
- a. A declaration that the Claimant's termination was both procedurally and substantively unfair.
 - b. One month's salary in lieu of notice.....Kshs. 139,575.00.
 - c. Compensation for the 14 leave days earned but unutilized. Kshs. 81, 418.75.
 - d. Compensation pursuant to section 49 (1) (c) of the [Employment Act](#) at the extent of 8 (eight) months' gross salary..... Ksh. 1,116,600.
 - e. Interest on the sums awarded above at the Court rates from the date of this judgment until full payment.
 - f. The cost of this suit.



g. The sums above shall be paid less by KShs. 478,290.58 awarded in the Counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE

ORDER

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

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

OCHARO KEBIRA

JUDGE

