



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1523 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

JOSEPHAT OTIENO KONGO.....CLAIMANT

VERSUS

RILEY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant commenced this action by a statement of claim dated 3rd August 2017 and filed on 3rd August 2017 alleging that he was unfairly terminated by the Respondent. The Claimant prays for –

- a) A declaration that the Respondent breached the principles of natural justice in the process of terminating the Claimant's employment.
- b) A declaration that the termination of the Claimant was both unfair and unlawful and in breach of mandatory proceedings and processes of the Constitution of Kenya, the Employment Act and the Respondent's disciplinary proceedings.
- c) A declaration that the summary dismissal of the Claimant by the Respondent was unlawful and/or unfair.
- d) Reinstatement
- e) Compensation for unfair and unlawful termination.
- f) Terminal dues.
- g) Unpaid salary at Kshs.18,000/- per month.
- h) Payment in lieu of notice.
- i) General damages.
- j) Aggravated damages for breach of the employer's contractual duty of good faith.
- k) Costs of the suit.
- l) Certificate of service.
- m) Interest.

2. The Respondent filed a reply to the statement of response on 31st August 2017 praying for dismissal of the suit with costs.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent on 6th May 1991 as a security guard and on 2nd August 2014, he was arrested at his workstation, Milimani Law Courts on suspicion of aiding an alleged theft at the work place and was later released on cash bail.

4. It is averred that throughout his employment, he performed his duties professionally and diligently. That by a letter dated 11th August 2014, the Respondent sent the Claimant on an indefinite suspension without pay and was not taken through a disciplinary hearing or issued with a notice to show cause.

5. That he was acquitted of the criminal charges by a judgment delivered on 9th March 2017.

6. It is averred that the indefinite suspension was an unlawful and a violation of principles of natural justice.

7. That the Respondent withheld the Claimant's salary, benefits and allowances thereby violating the Claimant's constitutional rights as well as the provisions of the Employment Act germane to right to fair trial.

8. It is the Claimant's case that the Respondent did not provide any document or information of the alleged breaches before termination.

9. The Claimant contends that his dismissal was malicious and conducted in blatant disregard for the law and the reasons advanced were fabricated.

10. Finally, it is the Claimant's case that the withholding of salary and allowances caused the Claimant enormous suffering.

Respondent's Case

11. The Respondent's case is pleaded as follows:

12. The Claimant was a former employee of the Respondent where he worked as a security guard. That sometime in 2014, the Claimant was stationed at the car park near Milimani Commercial Courts and several instances of theft from vehicles parked thereat (police exhibits) were reported to the Respondent who cautioned the guards stationed there to be extra careful.

13. It is averred that on 2nd August 2014, a Saturday, the Claimant was on duty when an attempted theft took place and he was implicated in the theft, arrested by the police and charged in Court. He was suspended from the workplace for purposes of investigation.

14. It is the Respondent's case that the Claimant was called upon to explain the circumstances which explanation the Respondent found unsatisfactory. He was invited for a disciplinary hearing and attended together with shop stewards subsequent to which a decision was made to terminate the Claimant's services for negligence. That his demand for reinstatement could not be honoured because a decision had already been made.

Evidence

15. The Claimant adopted the witness statement. He testified that he was terminated for an alleged theft and was charged in Court but later acquitted under Section 215 of the Criminal Procedure Act.

16. On cross examination, he confirmed that he was summarily dismissed. The witness confirmed having attended a meeting with the Human Resource and shop stewards and signed the minutes. He denied having received the show cause letter but did a response dated on the same date.

17. The Claimant further confirmed that he was terminated on account of the alleged theft that he was not diligent though he insisted he was. That he had allowed a thief into the compound he was guarding without frisking him.

18. It is averred that the Claimant was dismissed before the criminal case was concluded. The witness confirmed that he proceeded on annual leave regularly. That he often received salary advances.

19. On re-examination the Claimant testified that he had worked as a guard for the Respondent for about 25 years, without a single warning or notice to show cause. The notice to show cause herein was the first. The witness testified that he did not appeal the dismissal.

20. RW1, MR. JONATHAN MUSOMBA, adopted the witness statement and was cross examined. He confirmed that he knew the Claimant personally having employed him. He testified that the Claimant served the Respondent for about 25 years.

21. It was his testimony that that Claimant was summarily dismissed for allowing a stranger into the compound he was guarding who attempted to steal tyres from a motor vehicle parked in the compound but was acquitted of the criminal charges. He further confirmed that the Claimant could be reinstated because decision to dismiss him had already been made and the criminal case concluded two years later. The witness testified that he was not present during the disciplinary hearing.

22. In re-examination, the witness stated that the Claimant was charged with stealing not negligence for which he was terminated and the decision to terminate him was made before the decision in the criminal case.

23. Finally, the witness testified that although the Claimant had the right to appeal the decision, he did not.

Claimant's Submissions

24. The Claimant isolates five issues for determination namely whether;

- i) the Claimant was an employee of the Respondent for 25 years;
- ii) the Claimant was suspended for three years;
- iii) the Claimant was guilty of gross misconduct to warrant summary dismissal;
- iv) the Claimant's employment was unlawfully and/or unfairly terminated;
- v) the Claimant is entitled to the reliefs sought.

25. As regards the length of service, it is submitted that the Claimant was employed by the Respondent on 6th May 1991 and remained in employment until 3rd August 2017, a total of 25 years or 24 years from the date of dismissal on 7th August 2015. The employment date is also confirmed by the minutes of the disciplinary proceedings.

26. On suspension for three years without pay, it is submitted that by a letter dated 11th August 2014, the Claimant was suspended from duty indefinitely until the criminal case was concluded and was dismissed by letter dated 7th August 2015 (12 months after the suspension) and the dismissal letter was not served upon the Claimant.

27. It is the Claimant's submission that he was unaware of the Respondent's decision until he was acquitted of the criminal charges in 2017.

28. That the dismissal letter was posted to an address without a postal code and the Respondent provided no evidence of postage. It is submitted that the Respondent did not serve the Claimant with the dismissal letter. That all this time the Claimant was on suspension.

29. The Court is urged to find that the Respondent's disciplinary process was anchored on the outcome of the criminal case in Court.

30. As regards the alleged misconduct and summary dismissal, the Court is urged to find that the Respondent's action was unlawful and unfair. That although the Claimant was terminated for negligence both the internal disciplinary process and police investigations established that no theft had taken place and the tyres were found intact.

31. That since the dismissal letter was not dispatched to the Claimant, he was deliberately denied the right of appeal within the 14 days specified in the dismissal letter.

32. It is submitted that the Claimant was innocent of the theft allegations and the internal disciplinary proceedings did not find him culpable and did not recommend any specific action.

33. It is further submitted that the reason relied upon by the Respondent to dismiss the Claimant from employment did not amount to gross misconduct. The Court is urged to find that the facts in this case did not warrant summary dismissal of the Claimant.

34. The decision in **Patrick Njuguna Kariuki v Del Monte (K) Limited [2012] eKLR** is relied upon to reinforce the submission as are the decisions in **Mary Chemweno Kiptui v Kenya Pipeline Company [2014] eKLR**, **James Muiruri Njenga v Nakumatt Holdings Limited [2015] eKLR** and **Emmanuel Mambo Oduory v One Acre Fund [2020] eKLR**.

35. As to whether the Claimant's termination was unlawful and or unfair, reliance is made on Sections 43 and 47(5) of the Employment Act to urge that the Respondent has not established a justification for the termination.

36. Finally on reliefs, it is submitted that the Claimant is entitled to the maximum compensation for having served for 25 years at total of Kshs.262,056/-. The decision in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** is cited as authority.

37. On arrears during suspension, it is urged that the dismissal letter dated 7th August 2015 is an admission of the fact that the Claimant had been on suspension for about 12 months but was unaware of the termination until June 2017.

38. The decision in **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR** is relied upon to urge that the Claimant had a legitimate expectation of payment if the disciplinary process exculpated him. The Court is urged to award Kshs.786,186/- as arrears during the suspension for 36 months.

39. It is submitted that the Claimant is entitled to the one (1) month's notice in lieu of notice Kshs.21,838/- as well as reinstatement. In the case of reinstatement, the decision in **Donald C. Avude v Kenya Forest Service [2015] eKLR** is relied upon as is the decision in **Elizabeth Wambui Mburu v Board of Directors, Kenya Plant Health Inspectorate Service [2019] eKLR**.

40. On aggravated damages, the decision in **Patrick Njuguna Kariuki v Del Monte (K) Limited (supra)** is relied upon to urge the Court to award Kshs.500,000/-.

41. Finally, it submitted that the Claimant is entitled to leave days for 2014 and 2015, a total of Kshs.43,676/-.

Respondent's Submissions

42. The Respondent submits that the Claimant has by his submissions amended the pleadings and testimony by alleging that the Respondent did not serve the notice of dismissal and the Claimant only learnt of it after the criminal case was concluded. Counsel relies on specific paragraphs of the Claimant's statement of claim such as paragraph 19. That in his oral testimony, the Claimant informed the Court that he was summarily dismissed. That the Claimant was aware of the summary dismissal before acquittal in the criminal case.

43. As to whether the Respondent had justifiable reasons to terminate the Claimant's employment, it is submitted that the Claimant was dismissed for negligence or careless as the notice to show cause and letter of dismissal indicates and as evidenced by the Respondent's investigation report on record. The Claimant did not notice anything until after the cleaner had removed tyres from the motor vehicle. He was not vigilant as a guard. That the Claimant admitted leaving the cleaner in the yard unsupervised for about 15 minutes.

44. It is submitted that the Claimant's negligence led to suspicion of collusion with the co-accused in the attempted theft. The Respondent submits that the acquittal in the theft case did not acquit him from the negligence. That although the Claimant was initially suspended on 11th August 2014, a decision was made to terminate his employment and the same was communicated by post. It is submitted that the Respondent did not have to prove with certainty but on a balance of probabilities. The South African decision in **National Union of Mineworkers & others and the Commission for Conciliation Mediation and Arbitration & 2 others JR 2910/08** is relied upon in support of the submission.

45. That the Respondent's decision to dismiss the Claimant was reasonable and based on the operational requirements of the Respondent's business.

46. Section 44(4)(c) of the Employment Act is relied upon to urge that negligence is a ground for summary dismissal.

47. As regards the procedure adopted by the Respondent, it is urged that the Claimant on cross examination admitted being invited to a disciplinary hearing together with shop stewards and made a written response to the notice to show cause. That the procedure followed by the Respondent met the threshold prescribed by law. It is also submitted that even after receipt of the dismissal letter, the Claimant did not exercise his right of appeal.

48. As regards reliefs, the Respondent submits that the Claimant is not entitled to any since the dismissal was substantively justifiable and procedurally fair. In addition, reinstatement was unavailable after three years as ordained by law.

49. The only relief available to the Claimant according to the Respondent is the certificate of service.

Analysis and Determination

50. After due consideration of the pleadings, oral and documentary evidence on record, submissions and the relevant law, the issues for determination are whether: -

- a) the Claimant was on suspension until the criminal case was finalised;
- b) the Claimant's summary dismissal was unlawful or unfair;
- c) Whether the Claimant is entitled to the reliefs sought.

51. As to whether the Claimant was on suspension from 11th August 2014 until 9th March 2017 as submitted by the Claimant's Counsel, it is not in dispute that by a letter dated 11th August 2014 the Claimant was placed on an indefinite suspension without pay "*until a ruling is made in Court regarding this matter.*"

52. It is also not in dispute that the Claimant was issued with and received a notice to show cause dated 5th August 2014. He testified that he recalled having met the human resource with shop stewards in 2014 and was called in to sign minutes of a meeting and was subsequently summarily dismissed by letter dated 7th August 2015.

53. For unexplained reason(s), the Claimant's written statement make no reference to the notice to show cause and the dismissal letter. However, on cross examination the Claimant admitted more than once that he was summarily dismissed for negligence. He testified that he did not receive the notice to show cause letter dated 5th August 2014 yet he responded to it by a hand written letter which he did not disown in Court. He admitted it was his statement.

54. Relatedly, the Claimant recalled having had a meeting with the human resource officer, one Ann with shop stewards. That he sat outside until he was called to sign the minutes. The Claimant also admitted on cross examination that he was dismissed from employment before the criminal case concluded.

55. Contrary to the Claimant's Counsel submission that that Claimant was unaware of the dismissal before the criminal case was finalised, there are sufficient indications that the Claimant was in fact aware of the summary dismissal. The Claimant did not deny having received the dismissal letter as he did for the notice to show cause. Significantly, the fact of not receiving the dismissal letter was neither pleaded nor

testified about.

56. The Claimant also confirmed that the post office box number in the dismissal letter is the one he had given the employer and used the same address on leave application forms on record.

57. Finally, the Claimant confirmed that he did not exercise the right of appeal and gave no reason or it.

58. For the foregoing reasons, the Court is satisfied that the Claimant was aware of the summary dismissal long before the criminal case was finalised. The submission that the postal address had no postal code is inconsequential.

59. Be that as it may, it beats logic why the Respondent conducted a disciplinary hearing in August 2014 and dismissed the Claimant a year later and backdated the date of dismissal to the date of the indefinite suspension. It is an unfair labour practice to punish an employee for the shortcomings of the employer.

60. The Court is persuaded that although the Respondent had initially placed the Claimant on an indefinite suspension from 11th August 2014, a decision was subsequently made to dismiss him from employment. The Claimant was therefore in employment until 7th August 2015. The indefinite suspension was countermanded by the dismissal letter dated on 7th August 2017.

61. As to whether the Claimant's termination was unlawful and/or unfair, the first point of call are the provisions of the Employment Act, 2007 on termination of contracts of employment, Section 45(2) of the Act provides that –

(2) A termination of employment by an employer is unfair if the employer fails to prove —

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements

of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

62. This provision is the substratum of fair termination of employment contracts. As explained by this Court and the Court of Appeal, this provision sets out the prerequisites of a fair termination of a contract of employment irrespective of the method employed by the employer. This substratum is reinforced by other provisions, specifically Sections 41, 43 and 47(5) of the Employment Act.

63. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the Court of Appeal expressed itself as follows

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

64. Similar sentiments were expressed by the Court in **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR** as well as in **Kenafic Industries Limited v John Gitonga Njeru [2016] eKLR**. The Court is in agreement with these sentiments.

Reason(s) for Termination

65. The letter of summary dismissal of the Claimant dated 7th August 2015 stated as follows –

“Further to the letter dated 11th August 2014, the management has made a decision to summarily dismiss you from the date of your suspension, which is August 11th 2014 on account of negligence. you allowed someone into the assortment area who then went ahead to steal tyres from a client's vehicle and caused embarrassment to the company.

Your certificate of service and final dues will be processed less any amounts owed to the Company.

You should further note that you have the right of appeal to the Managing Director against this decision within 14 days from the date of this letter.”

66. Whereas the Claimant submits that both the internal disciplinary process and the Magistrates Court found him blameless, the Respondent contends that the Claimant was negligent in that he allowed a person to access the yard he was guarding ostensibly to cut grass but appear to

have had other motives. It is submitted that in fact no theft of tyres took place.

67. The foregoing notwithstanding, the Claimant admitted in writing that he left the yard unattended for about 15 minutes which obviously gave the “cleaner” an opportunity to remove tyres and fix the old ones. He admitted on cross examination that he did not frisk the “cleaner”.

68. It is trite law that whereas the standard of proof in criminal cases is beyond any reasonable doubt, the standard of proof in civil matters is on a balance of probabilities. In employment matters the standard of proof is invariably on balance of probabilities. See **Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR**.

69. Consistent with the submissions of the Respondent, the employer is only required to justify the ground for termination on a balance of probabilities as held in **National Union of Mineworkers & others and the Commission for Conciliation Mediation and Arbitration & 2 others (supra)** where the Court stated that –

“The employer did not have to prove with absolute certainty that employee was guilty of the alleged misconduct but that prove (sic) on a balance of probability was sufficient.”

70. For the above reasons, the Court finds and holds that the Respondent had a valid and fair reason to dismiss the Claimant notwithstanding the long service.

71. The fact that the Claimant was acquitted by the Magistrates Court does not exculpate him from negligence. Relatedly, the Respondent made its decision before the criminal case was concluded.

Procedure

72. Although Section 45(2)(c) of the Employment Act provides that termination of employment should be conducted in accordance with a fair procedure, it does not prescribe the procedure. As explained by the Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited (supra)**.

73. Section 41 of the Employment Act prescribes the elaborate procedure to be complied with for a termination to pass the procedural fairness test.

74. Section 41 provides that before an employee is terminated on the ground of misconduct, poor performance or physical incapacity, the employer is required to explain to the employee in a language the employee understands the reason for which the employer is considering termination. The employee is entitled to have another employee or a shop floor union representative of his choice present during the explanation. In addition, whether the separation contemplated is a termination or summary dismissal, the employer must hear and consider any representations which the employee and the person, if any, chosen by the employee makes.

75. In **Naima Khamis v Oxford University Press (EA) Limited (supra)** the Court of Appeal underscored the importance of a fair hearing in the following words –

“Further under Section 41, the right of an employee to be heard before being terminated even if gross misconduct is alleged is imperative.”

76. I will now proceed to apply the law to the facts in the instant case.

77. Intriguingly, the Claimant did not submit on the procedural aspects of termination. The Respondent submitted that the Claimant was invited to a disciplinary hearing and attended the meeting and signed the minutes. The Respondent submits that the procedure adopted by the Respondent complied with the law cited above.

78. As mentioned elsewhere in this judgment, the Claimant on cross examination confirmed that he had a meeting with the Human Resource Officer and shop stewards. He testified that he remained outside but was called in to sign the minutes “like anyone else”. The Claimant’s evidence on the alleged proceedings was not controverted. The Respondent did not file any invitation letter or testify how the Claimant was invited for the meeting or whether he was aware that he had the right to be accompanied by a colleague of his choice.

79. RW1 confirmed on cross examination that he did not attend the disciplinary hearing and insisted that the Claimant should have been present throughout the proceedings.

80. The minutes of the disciplinary proceedings dated 6th August 2014 are handwritten with many parts illegible and they no agenda. The minutes do not show or explain who stated what, questions asked, evidence adduced and by who. The four member committee of shop stewards and the human resource officer adduced evidence, prosecuted the Claimant but shied away from making a recommendation.

81. It is not in dispute that the Claimant appear to have participated in some semblance of disciplinary proceedings but on close scrutiny it becomes apparent that the alleged disciplinary process did not meet the threshold prescribed by the law set out above. The Claimant’s uncontroverted evidence is that he was only invited to sign the minutes and thus did not participate in the proceedings. Second, the minutes on record have no agenda nor a record of other proceedings. It is essentially a report with observations as opposed to what transpired at the meeting. Thirdly, the alleged minutes have no findings or recommendation. It is unclear when and by whom the decision to terminate the Claimant was made.

82. Intriguingly, the decision to summarily dismiss the Claimant was made one (1) year after the alleged disciplinary hearing but back dated to 11th August 2014 (the date of suspension).

83. It is unclear why it took the Respondent over one (1) year to make a decision to terminate the Claimant's employment.

84. The submission by the Claimant that he was on suspension for 36 months is unsustainable since the criminal proceedings and the internal disciplinary procedures are parallel and distinct processes and none is dependent on the other and could proceed at the same time.

85. Placing an employee on an indefinite suspension for 12 months without pay and communication is in the Court's view an unfair labour practice and the Claimant ought to have treated himself as constructively dismissed.

86. For these reasons, it is the finding of the Court that the termination of the Claimant's employment by way of summary dismissal was unfair for want of procedural propriety.

87. I will now proceed to deal with the reliefs sought by the Claimant. The first relief is a declaration that the Respondent breached the principles of natural justice in the process of terminating the Claimant's employment. Having found that the termination of the Claimant's employment was unfair and unlawful for want of procedural propriety a declaration to that effect is issued.

88. The second relief is a declaration that the termination was unfair and unlawful for breach of mandatory provisions and processes of the Constitution of Kenya, Employment Act and the Respondent's disciplinary proceeding. The declaration above suffices.

89. The third relief is equally a declaration that the summary dismissal as unfair. The declaration above is sufficient.

90. As regards reinstatement, the Claimant submitted that he ought to be reinstated to his position with full salary and all allowances since there are "*thousands of such positions within the establishment*". The Claimant tendered no evidence in support of the submission. The Respondent on the other had submitted that the remedy is only available within three years from the date of termination and at any rate the summary dismissal was not unfair.

91. Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011 provides that

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) ...;

(ii) ...;

(iii) ...;

(iv) ...;

(v) ...;

(vi) ...;

(vii) 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;

92. Proceeding on the basis on the letter of summary dismissal, the Claimant left employment on 7th August 2015 and it is undoubtedly more than three years for reinstatement to be granted and the position would not change even if the Court was to assume that the Claimant's suspension lasted for 36 months as submitted. The judgment in the **Criminal Case No. 1118 Of 2014**, criminal case was delivered on 9th March 2017 more than four years ago.

93. Regrettably, the remedy of reinstatement is unavailable.

94. As regards compensation, having found that the Claimant's termination was procedurally flawed, the Claimant is entitled to the remedy provided by Section 49(1)(c) of the Employment Act, 2007. In arriving at the quantum of compensation, the Court has taken the following into consideration: -

i) The Claimant was an employee of the Respondent for almost 25 years, which is long time. The Claimant wished to continue as evidenced by the prayer for the remedy of reinstatement.

ii) The Claimant refused to exercise his right of appeal.

iii) The Claimant contributed to the summary dismissal.

95. In the circumstances the equivalent of 6 months' salary is fair.

Terminal dues

96. This prayer lacks the necessary particulars and is declined.

Unpaid salary at Kshs.18,000/- per month.

97. Having found that the Claimant was on suspension from 11th August 2014 to 7th August 2015, the date of dismissal, and had been without pay for about 12 months, the Claimant is entitled to the unpaid salary.

98. The Court is guided by the sentiments of Ongaya J. in **Grace Gacheri Muriithi v Kenya Literature Bureau [2012] eKLR** where the Judge expressed himself as follows: -

“The issue before the court is whether the claimant is entitled to be paid for the period between the date of suspension and the date of conclusion of the disciplinary case ... The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.”

99. It is not in dispute that the minutes filed by the Respondent are handwritten parts thereof are eligible and they have no specific recommendation on the Claimant.

100. But what aggravates the situation and makes the conduct of the Respondent unfair labour practice in the Court's view is that it took the Respondent 12 months to make a decision on the matter and backdated the date of summary dismissal to the date of the indefinite suspension.

101. Relatedly, the disciplinary proceedings neither found the Claimant culpable nor exculpated him.

102. It would be injudicious for the Court not to order payment of salary for the duration of suspension from 11th August 2014 to 7th August 2015. The Claimant had a legitimate expectation that he would be paid and is awarded the unpaid salary based on his last salary.

Payment in lieu of notice

103. Having found that the Claimant's summary dismissal was unfair, the Claimant is awarded the equivalent of one (1) month's salary in lieu of notice.

General damages

104. This is an amorphous claim and is **declined**.

Aggravated damages

105. Aggravated damages for breach of the employer's contractual duty of good faith. In **Gatley on Libel and Slander, 12th Edition, Page 53** –

“The conduct of the defendant his conduct of the case and his state of mind are all matters which the Claimant may rely on as they bear on the injury to him.

It is well established that in cases where the damages are at large, the Judge can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong maybe such as to injure the Plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing appropriate compensation.”

106. In **Obongo & Another v Municipal Council of Kisumu [1971] EA p 91** the Court of Appeal stated that

“It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of are regarded as still being essentially compensatory in nature”

107. The Court is in agreement with these sentiments.

108. Applying the law to the facts of the instant case, it is evident that the Claimant has not made a case for the award of aggravated damages. Specifically, no evidence was led to demonstrate the Respondent acted malevolently or in a malicious or arrogant manner. The claim is **dismissed**.

Certificate of Service

109. The Claimant is entitled to a certificate of service by virtue of Section 51 of the Employment Act.

Conclusion

110. In sum, judgment is entered for the Claimant against the Respondent as follows:

- (a) The equivalent of 6 months' salary as compensation for unfair dismissal.**
- (b) Unpaid salary for the duration of suspension (11th August 2014 – 7th August 2015).**
- (c) Costs of this suit.**
- (d) Interest at Court rates from the date of judgment till payment in full.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2022

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