



**Kamande v Teachers Service Commission (Cause 1754 of 2016)
[2022] KEELRC 1777 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1777 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1754 OF 2016**

**K OCHARO, J
MAY 31, 2022**

BETWEEN

CHARLES KAMANDE CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. This suit was initiated by a statement of claim dated 29th August 2016. The Claimant prays for –
 - a. An Order for reinstatement back to work
 - b. A declaration that the Claimants dismissal is void and illegal
 - c. Compensation proper at law
 - d. Cost of the suit
2. Contemporaneously with filing of the statement of claim, the Claimant filed a list of documents dated 29th August 2016, under which he filed the documents which he intended to place reliance on as his documentary evidence in support his claim. The documents were, a termination of employment letter dated 24th August 2016, summons and plaint in 1558 of 2016, copy of advertisement for senior Deputy Director [Supply Chain Management Services], TSC-2015/08/19, invitation for interview letters dated 13th October 2015 and 6th November 2015 and letter of appointment from the Teachers Service Commission dated 11th January 2016. He too filed a witness statement.
3. Upon being served with summons to enter appearance, the Respondent entered appearance and filed a response to the statement of claim dated 9th September 2016, wherein it totally denied, that the Claimant’s employment was unfairly terminated, and his entitlement to the reliefs sought. Side by side with the response, it filed a bundle of documents, its documentary evidence.



4. The Claimant's case was heard on the 25th October 2021, while the Respondent's case was on the 10th November 2011.

The Claimant's Case.

5. The Claimant adopted his witness statement as part of his evidence and the documents hereinabove mentioned as his documentary evidence. He briefly testified orally, clarifying a few areas of his statement and documents that required to, before being cross examined by Counsel for the Respondent.
6. The Claimant states that through a letter of appointment dated 11th January, 2016 he got employed by the Claimant as a Senior Deputy Director supply chain management, an appointment which was subject to successful completion of a 6-month probation period.
7. The Claimant stated that on the 24th August 2016 he was dismissed by the Respondent through a termination letter of the even date. He alleged that the termination letter was not clear on the reasons attributed to his dismissal. Prior to the dismissal he was not asked to show cause why he shouldn't be dismissed.
8. The Claimant stated that the Respondent's position that he failed to make a disclosure to the effect that he had been dismissed from the Parliamentary Service Commission, prior to joining the its employment, was untrue. He declared his status immediately upon joining and when he filed suit [suit no. 1558 of 2016] against his former employer [PSC], he availed the pleadings thereof to the latter.
9. The Claimant avers that the process of dismissal by the Parliamentary Service Commission was a matter that was still under consideration as he had assailed the same through claim number 1558 of 2016 Charles Kamande vs Parliamentary Service Commission pending in court.
10. The Claimant further states that the Respondent's action was in bad taste as Respondent decided to use the disclosure above mentioned- the existence of the suit, to his prejudice. The grounds relied on in dismissing him was not supported by any known law.
11. He asserted that the fact that an employee has been dismissed from the employment of one employer doesn't mean that that employee's right to work gets limited to an extent that he cannot be employed subsequently by another employer.
12. He further contended that prior to the dismissal he could have been given an opportunity to explain himself on the ground[s] for dismissal, this never happened.
13. The Claimant contended that the Respondent further held that he had not made an application for confirmation.
14. Shown the Respondent's exhibit No. 4, the Claimant acknowledged that it was a prescribed form by the Respondent, form which he duly filled. The form had a field for filling by one, whether he/she had been employed, dismissed, or convicted. Thereat he stated that he hadn't been dismissed. This was informed by the fact that, then there were ongoing proceedings in challenge of the decision to terminate his employment against the former employer. To his mind the pendency of the challenge and meant that there was no dismissal.
15. He asserted that the challenge against the former employer's decision to dismiss him from employment was two- prong, the suit, and an appeal. The Respondent would have awaited their outcome.
16. Cross examined by Counsel for the Respondent, the Claimant stated that he had been in the employment of the Parliamentary Service Commission, who in the course of his employment accused



- him of gross misconduct and summarily dismissed him. In their dismissal letter, they accused him of dishonesty, misuse of its property and breach of regulations.
17. He hasn't been exonerated by any Court or forum of the grounds that led to his dismissal by the former employer. The Claimant asserted that he did appeal to the Public Service Commission.
 18. The case against the Parliamentary Commission was filed in July 2016. It was not filed in anticipation of the dismissal by the Respondent. The Respondent's CEO was aware of the dismissal by the Parliamentary Service Commission and she is the one who advised him to file the suit against it.
 19. Referred to the Respondent's form, the application for employment, he admitted that at item 9 [a] a question was posed as to whether he had ever been dismissed or otherwise removed from Government, other public Service or the Teaching service, he stated that in regard thereto, his answer was in the negative, and without details.
 20. He stated that according to his letter of appointment, his probation period was to run from 21st January 2016 -21st July 2016, and his confirmation to the position as a permanent and pensionable employee was to be upon a successful completion of the probation period.
 21. According to the letter of appointment, after the successful completion there was to be an offer for the permanent appointment. No such an offer was made.
 22. In his evidence in re-examination, the Claimant asserted that he duly explained in his letter dated 18th August 2016, the circumstances under which he left the Parliamentary Service Commission. After the explanation, he didn't receive any letter from the Respondent.
 23. He asserted that he made the disclosure to the CEO of the Respondent somewhere in March 2016, and that is when she advised him to challenge the decision by PSC.
 24. The Claimant stated that the letter that the Respondent wrote to the Clerk of the senate only sought for reference on his skills, academic qualifications capability and experience. That in his letter, the Clerk went off mark and gave information that was never sought for. He didn't not even mention the case that was pending between the Commission and the him.

Respondent's Case.

25. The Respondent presented Mr. Sammy Njuguna, its Deputy Director Human Resource Manager of the secretariat staff to testify on its behalf. The witness adopted his witness statement as part of his evidence in chief and urged the court to admit the documents that were filed by the Respondent as its documentary evidence.
26. The witness stated that by a letter dated 11th January 2016, the Claimant was offered employment by the Respondent as a Senior Deputy [Supply and Chain Management]. Confirmation to the position was subject to a successful probationary period of 6 [six] months.
27. The witness stated that while on probation the Claimant was subjected to a due diligence process and requested to fill the Form TSC/ APPT/1 upon reporting to work. In the form the Claimant was asked whether he had ever been dismissed or otherwise removed from the Government, or other Public Service or Teachers Service, and he answered in the negative.
28. Since the Claimant had stated in the form that he had worked with the Parliamentary Service Commission, information about his service with the Commission was sought.
29. It was further stated that by a letter dated 31st March 2016, PSC confirmed that the Claimant had been employed by it and his services terminated on an account of gross misconduct, pursuant to



- Parliamentary Service Commission Regulations 2002 as he had contravened procurement regulations, was dishonest, perpetrated falsehood and misused PSC's property.
30. The Respondent subsequently obtained a copy of the dismissal letter that was issued by the PSC and asked the Claimant to comment on the serious allegations that were contained therein.
 31. The witness stated that the Claimant responded to the concerns raised and admitted that he had been a subject of disciplinary proceedings at the PSC and had been dismissed on the grounds of misconduct.
 32. Due to his record with the Parliamentary Service Commission and his conduct in failure to disclose what touched on his past record, his integrity became questionable. The Respondent declined to confirm him in service and his services were terminated on account of failure to successfully complete the probation period.
 33. The witness asserted that there was no record at the time of the Claimant's termination of service to show that the Claimant had been exonerated from the allegations of gross misconduct during his tenure with the PSC.
 34. The Respondent in light of the revelations and the fact that if the Claimant's employment was to be confirmed, the confirmation would go against the provisions of the Article 232 of the Constitution and the Public Service – Human Resource Policies and Procedures Manual the Respondent could not confirm the Claimant and as a result terminated his services.
 35. Cross examined by the Claimant's Counsel, the witness stated that the appointment letter for the Claimant was done by the then Director of Human Resource.
 36. The witness asserted that the form that the Claimant filled was pertinent to his employability. He filled the same and signed it on the 27th January 2016. The form was therefore signed later than the date of the appointment letter. The fact that the form came later did not in any manner diminish the importance of the form.
 37. The witness refuted a suggestion by Counsel that the form only applied to teachers only and therefore not the Claimant.
 38. The Claimant's probationary period was ending on the 21st July 2016. The termination came after the period. One of the reasons for the termination of his employment was that he failed to apply for confirmation. The letter of appointment required him to apply for confirmation two months prior to the lapse of the probationary period.
 39. The witness stated that his case for confirmation was set to be discussed in the month of August 2016.
 40. Referred to the Respondent's document number 9, the Public Service Commission HR Manual, page 22, the witness stated that the manual required the employer to assess the employee and consider whether or not he is suitable for confirmation. However, the Respondent used its Manual.
 41. The Respondent didn't get any consent from the Claimant to get information concerning him from PSC. The CEO gave him an opportunity to address the issues that were raised by PSC.
 42. He stated that though in the letter to the Clerk the Respondent had not sought to know whether the Respondent had been dismissed from employment with the PSC, the Clerk decided to give information on the Claimant's integrity.
 43. On re-examination the witness stated that at the time of termination, the Respondent had received a report on his integrity. The Board considered the report and decided to bring his employment to an end.



Claimant's Submissions.

44. The Claimant submits that he was recruited by the Respondent in January 2016 and on 24th August 2016 the Respondent purported to dismiss the Claimant on two reasons:
 - i. That the Claimant failed to disclose in the form he filled that he had been dismissed by Parliamentary Service Commission.
 - ii. That he failed to apply for confirmation to permanent status on expiry of the probation period.
45. The Claimant submits that his dismissal was done without statutory notice. Having served past the probationary period, the Respondent was obligated to conform to section 41,43,44,45 and 47(a) of the *Employment Act*. It failed to.
46. The Claimant relies on the case *Machafu Isindu v Lavington Security Guards* where the court held that the *Employment Act* places a duty upon the employer in matters of summary dismissal for breach of contract and unfair termination involving breach of statutory law to prove the reasons for dismissal, that the reason[s] are valid and fair, and that the grounds are justified.
47. The Claimant further submits that he was not subjected to any disciplinary hearing.
48. The Claimant submits the termination was contrary to section 45 of the Act and failed to give valid reasons under section 44.
49. The Claimant further submits that the Public Service Human resource policies and procedure manual states that "A candidate whose appointment in the public service had been terminated for any reason including resignation shall not be employed without prior approval of the public service commission" the Claimant states that the Respondent were put under a duty to inform the public service commission but not to terminate his employment.
50. Fair labour practices as enshrined in Article 41 of *the Constitution*, required the Respondent to consult the Public Service Commission for advice. This is what Article 10 of *the Constitution* would also advocate for. Had the Respondent properly interpreted it, they wouldn't have terminated the Claimant's employment without first getting approval from the Public Service Commission.
51. It was further submitted that the form which the Claimant was accused of not filling properly was not signed by the Respondent's CEO, and that a close look of the same, section, indicated that it was applicable to those applications which could have been submitted through an approved agent of the Respondent. The form was not therefore material and applicable to the Claimant.
52. The Claimant did disclose his relationship with the Parliamentary service Commission, he even supplied the name of a contact person there, Ms. Beatrice Wandera. If indeed he was bent to conceal the dismissal, he wouldn't have given the details. The failure to properly fill a form cannot be a ground for summary dismissal under section 44 of the *Employment Act*.
53. As to whether the Claimant was supposed to apply for confirmation is controversial. In the set of the Human Resource Manual, Public Service Commission, the Respondent was required to assess the Claimant and decide on his suitability for confirmation. The Code Regulation required the Claimant to apply for confirmation one month before expiry of the probationary period. The letter of appointment required him to apply for confirmation two months before.
54. The code was never availed to Court. However, the most reasonable conclusion would be that an employer should assess an employee for suitability for confirmation. Any other conclusion would be one destitute of reasonableness.



55. It was argued that the probationary period lapsed in July 2016 and the Claimant gained permanent employment by conduct of the Respondent.
56. The Claimant submits that the termination was not proper, consequently he is entitled to the reliefs sought in his pleadings. In support of this, he placed reliance on the case of *Kenya Broadcasting Corporations vs Geoffrey Wakio* Court of Appeal No. 352 of 2017.
57. The Claimant submits that he is a young man in his 40's and having been unfairly terminated prays for reinstatement as per Section 49(3)(a) of the *employment Act*.

Respondent's Submissions.

58. The Respondent lists the following issues for determination:
 - a. Whether the Claimant completed his probation period successfully.
 - b. Whether fair procedure was followed
 - c. Whether the reliefs sought should be granted
59. The Respondent submits that Claimant failed to disclose that he had been dismissed by PSC on matters that touched on his integrity. Concealment demonstrated the Claimant's dishonesty and lack of integrity which actions are in breach of the standards expected of a public official. Hence the inescapable conclusion that it was justified in not confirming him to the post of Deputy Head of Procurement.
60. The Respondent argues that the Claimant's subsequent disclosure of the reasons for his departure from PSC did not cure the fact that he had lied in the form. It maintains that he had committed an infraction, despite the fact that he had been pre-warned. The form made it an offence for one to submit false or misleading information or make misrepresentations to or knowingly mislead a member or staff of the Commission.
61. It was argued that the Claimant's services were terminated by the PSC on the 22nd December 2015. The suit against it was not filed in Court until August 2016 some eight months later. The Claimant alleged in his testimony that the delay was occasioned by the fact that he had preferred an appeal against the decision, yet he didn't tender any document to show this. The only reasonable conclusion that one can make is that he only rushed to file the suit after realizing that his integrity was an issue under consideration.
62. Relying on the provision of section 43[2] of the *Employment Act* 2007, the Respondent submitted that it issued the termination letter against the Claimant genuinely believing, based on the information received from the PSC, as confirmed by the Claimant in his explanation to the CEO, that he had been dismissed because he was a person of questionable integrity.
63. The Respondent further submits that the Claimant had been employed by PSC as a public officer and as such, within the meaning of Article 260 of *the Constitution* and subsequently employed as such by the Respondent, and was at all material times subject to the values and principles enshrined in Article 232. He breached the values and principles.
64. To buttress the submission reliance was placed on the case of *Kusow Billow Issack vs Ministry of Interior and Coordination of National Government & 3 others* (2021) eKLR, where the court held that where the public officer conceals his tainted past in trying to secure fresh employment in the same public service would be a justification for termination of the contract of employment in his second episode



in the public service as it amounts to a sign of dishonesty and lack of integrity on his part which is incompatible with public service by dint of Chapter 6 of *the Constitution*.

65. The Respondent submits that having been in breach of *the Constitution*, his employment with the Respondent was a nullity and no rights or benefits would ensue therefrom including rights and benefits which would ordinarily ensue pursuant to statutory provisions like the *Employment Act*.
66. As for his probation, the Respondent submits that the completion of probation by the Claimant did not automatically qualify him for confirmation as the legal provisions of the *Employment Act* were not only applicable as there were procedural requirements equally imposed by the Code of Regulations for the Respondent's Secretarial staff which regulated his confirmation in employment. That the code is a product of Section 48 of the Teacher's Service Commission Act.
67. Regardless of the above, it argues that the termination letter was clear that the main reason for termination of employment was due to his questionable integrity which act amounted to a gross misconduct under Section 44(1)(b) and 2(b)(c) of the *Teachers Service Commission Act*. The Respondent relied on the case of *Micheal Chege Ndichu vs Dedan Kimathi University of Technology* (2019) eKLR to support its position. It therefore maintains that the reasons for terminating the Claimant were fair and justifiable within Section 45 of the *Employment Act*.
68. The Respondent submits that the Claimant having been given an opportunity to explain the circumstances surrounding adverse allegations on his integrity as a public officer then fair procedure was followed by the Respondent.
69. The Respondent submits relief of reinstatement is available under Section 49(3) as read with Section 50 of the *Employment Act* 2007, however Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 provides a period within which a court can make an order for reinstatement, and outside which it cannot, three years from the date of a dismissal. The limitation operates against the Claimant's claim for reinstatement herein.
70. The Respondent submits that the Claimant merely stated he seeks compensation proper in law and there were no particulars given with respect to the same, no figures were provided. It submits that a prayer for quantum pleaded must be particularized and proved which the Claimant has not done. It relies in the holding in *Dr. John Nabukule Omukuba vs N.Mesh P Shah Brimji* (2008) where lady Justice Mary Kusongo observed;

“It's trite law that special damages must first be pleaded and then strictly proved....”

71. The Respondent submits that it's not the duty of the court to invent what would be proper compensation for the Claimant then award it as such submits that the prayer must fail.

Determination.

72. From the pleadings, evidence on record and submissions, the following broad issues for determination emerge;
 - a. Whether the termination of the Claimant's employment was procedurally fair.
 - b. Whether the termination of the Claimant's employment was is entitled to the reliefs sought.
 - c. Whether the Claimant is entitled to the reliefs sought.
 - d. Who should be condemned to shoulder the costs of this suit?



Whether the termination was procedurally fair.

73. There is no doubt that the Claimant was employed by the Respondent vide a letter dated 11th January 2016 and was put on a 6-month probation period. The letter read in part;

“you will be appointed initially on temporary terms of service and placed on probation for 6 [six] months.

On successful completion of your probation period, you will be offered appointment on permanent and pensionable terms of service to work with effect from the dated of appointment.”

However, it is difficult to discern from the letter, how the success or otherwise of the probation period was to be weighed, and at what time was to be determined, was it to be a time within the six months or at the lapse of the six months? In a situation of unclarity like was here, then recourse must be had to the employer’s Human Resource policy and procedures Manual, if there is one and or the general rules of practice that emerged over time. The Manual or general practices, cannot however be considered in isolation from the relevant statutory provisions available.

74. In *Daniel Mutuku Njuguna vs- Kenya Institute of Mass Communication* [2021]eKLR, this Court expressed itself, thus;

“A probationary term of employment is best understood as part of a contract of employment where the contract of employment where the employee is held to the requirement that for a specific period of time the employee must demonstrate certain suitability requirements set by an employer; and the

75. The Respondent tendered before this Court as its documentary evidence a set of Regulations, Teachers Service Commission Code of Regulations for Secretariat Staff and Public Service Commission, Human Resource Policies and Procedure Manual for the Public Service, and all through referred to the in support of its defence, leaving a clear impression that both of them were applicable to the Claimant’s case.

76. It is upon this that it becomes imperative to bring forth what the two provided as regards the probation and probationary period of an employee. The TSC Code of Regulations provided;

Probationary Period.

“The first months of an appointment on permanent and pensionable terms will be on probation.

This period may be extended only once for up to a further six months after which the appointment may be terminated or confirmed.

Confirmation of Appointment.

An officer on probationary appointment shall be required to apply for confirmation one month before the expiry of the probationary period by completing the application form for confirmation as specified in Schedule v.

The officer will be issued with a Letter of Confirmation of Appointment as specified in Schedule VI subject to a satisfactory performance report from the immediate supervisor.

And the Public Service Commission Manual provided;



Appointment on probation to Pensionable Establishment.

B. 16

- [1] Where vacancies exist in the pensionable establishment, candidates recruited to fill such vacancies shall be appointed on probation for a period of six [6] months.
- [2]. An officer appointed on probation to the pensionable establishment shall be regarded as being on assessment with a view to learning his work and being tested as to his suitability for it. It is duty of the supervise[s] to ensure that every officer on probation is given adequate opportunities to qualify for confirmation in appointment.
- [c]. At least one [1] month before the expiry of the probationary period, the Authorized Officer shall consider in the light of the reports on the officer's performance. Conduct and capabilities whether or not officer is suitable for confirmation.
- [d]. Where an officer's performance is unsatisfactory, he shall be informed in writing and the probation may be extended for a maximum period of three months."

77. What is clear from the stipulations of the two documents on the probation, probationary period, and confirmation or otherwise of an employee in employment, is that the confirmation or otherwise was to be preceded by a report flowing out of an assessment done on the employee's performance during the probationary report. Non- confirmation was to be on basis of a negative report.

78. I have carefully considered the material placed before this Court by the Respondent, there is none to discern from, that there was any structured assessment on the Claimant's performance or at all on which a report was drawn to form basis for a non-confirmation of the Claimant in employment. The Respondent faulted in following a procedure, set by itself and or that it as a matter of practice relies on in matters its human resource.

79. No doubt, the success of the Claimant in his probationary period was dependent on an assessment of his performance. My view is that an assessment of performance of an employee whether during his probationary period or in appointment has to be premised on parameters known by both the employer and the employee. Otherwise, absurdity and abuse of authority will reign.

80. From the material placed before this Court, it is not difficulty to conclude that there were no set parameters for assessment of the Claimant's performance during his probationary period.

81. The Respondent wrote to the Clerk of the Senate/ Secretary, a letter dated 9th February, 2016, letter which read in part;

"The purpose of this letter therefore, is to request you to provide a reference of the above-named person in writing which attests to Mr. Kamande's qualifications, skills and experience in the field of procurement."

82. In response, the Clerk wrote a letter to the Respondent dated 31st March, 2016, the letter read in part;

"On the 24th August, 2015 the parliamentary Service Commission, pursuant to Regulation 28 of the parliamentary Service Commission Regulations resolved that the dismissal



proceedings be instituted against him on account of gross misconduct for contravention of the following provisions of Regulations 25: -

- [b]. Contravention of regulation
- (d) Dishonesty
- (e) Falsehood
- (j) Misuse of the Commission's property.”

83. The Respondent made the failure to disclose the afore stated dismissal a ground for termination of the Claimant's employment way after the lapse of the probationary period. The Clerk's disclosure came in only two months after the Claimant's probationary period kicked off. If the Respondent considered this a gross misconduct, one would have expected a termination to happen before the lapse of the probationary, for an employer has a right to bring into termination an employee's during the period on a just cause. The Respondent remained vague on why this didn't happen.
84. Section 41 of the *Employment Act* dictates that no employer shall terminate the employment of an employee unfairly. Section 45[2][c], provides the consequence that attends non-adherence to fair procedure- the termination shall be deemed unfair. Severally judicial attention has been given on the provisions of section 41 of the *Employment Act*, 2007. The section provides for a mandatory procedure that must be adhered to whenever an employer contemplates to terminate an employment of an employee.
85. The section provides, and I find to be in sync with the Constitutional provisions of the right to a fair hearing, that the employer contemplating as hereinabove stated, must explain to the employee, reason[s] for which he intends to cause the termination, and give the employee an opportunity to defend himself against the employer's intention and the grounds stirring the intention.
86. There is no evidence on record by the Respondent, that at any time during, or after, the 6 months probationary period there was any notification that was extended to the Claimant that the Respondent had an intention of terminating his employment on the grounds to that were put forth in the termination letter or at all, and call upon him to defend himself.
87. I have carefully read the Claimant's letter dated 18th August 2016, and considered the circumstances under which it was written as it comes out in the first paragraph of the letter and the termination letter, one cannot be heard to argue that the same was written in a situation where the Claimant had been notified of an impending termination adverse action against him.
88. The Respondent cannot therefor assert successfully as it tried to that the Claimant was heard before the termination. In fact, the matter was one in my view that required an oral hearing considering what the Claimant asserted of the CEO, as regards the dismissal by the PSC, and the case against it. Further considering the fact that the failure to apply for confirmation which was made a ground for termination was not one of those matters that the CEO had asked the Claimant to give an explanation on.
89. In the upshot, I find that the termination was procedurally unfair.

Whether the termination was substantively justified.

90. The Claimant doesn't deny that he was asked to fill a form which among other fields had one where he was supposed to input whether or not he had been in any employment, dismissed from any employment or convicted of a criminal offence, and that his input was that he hadn't been dismissed from any employment. As it emerged this was not a correct response. He admits as much. I have



carefully considered his reason as to why he gave the answer he did knowing very well that he had been dismissed from the employment of PSC, and take a view that it doesn't with due respect make any sense. Nothing wouldn't have been easier than stating that he had been dismissed, then go ahead to explain that he had challenged the dismissal.

91. It cannot be difficulty for it to be concluded that the Claimant's failure to make the disclosure was deliberate. An employment relationship is one that thrives on trust, forthrightness, good faith and candidness of the parties. A failure to disclose appropriate details of his past, when asked to, can be a justified ground for termination of a contract of employment of the employee who has so failed.
92. That I agree with the Respondent that the failure by the Claimant to disclose the status of his termination with Parliamentary Service Commission amounted to dishonesty, and a taint on his integrity. Therefore, they were justified not to confirm the Claimant into permanent employment.

Whether the Claimant is entitled to the reliefs sought.

93. The Claimant sought inter alia an order for reinstatement. The court in the case of *Aggrey Lukorito Wasike v Kenya Power and Lighting Company Limited* [2016] eKLR the court observed;

“order of reinstatement means that the employee is restored to the position held, or a position substantially similar to the one held, prior to the removal, or dismissal, or otherwise separation with the employer with full prevailing pay and other benefits”

94. *Employment Act* 2007 Section 49(3)(a)

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

- (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated;
- or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

95. *Employment and Labour Relations Court Act*, 2011 Section 12(3)(Vii), provides that;

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders

- (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; or

96. No doubt, this Court is bestowed with a statutory authority to make an order for reinstatement, however this is a matter it cannot exercise the authority in favour of the Claimant for the reasons that, the termination was substantively justified, and it is now beyond the three years contemplated in the above stated provision of the law.

97. Having found that the termination was procedurally unfair but substantively justified, I grant the Claimant a nominal compensatory award pursuant to section 49[1][c] of the *Employment Act*, to an extent of one month's gross salary, Kshs. 223,212.

98. In the upshot, Judgement is hereby entered in favour of the Claimant against the Respondent in the following terms;



- [a]. A declaration that the termination of the employment of the Claimant in the manner it was, was procedurally unfair.
- [b]. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, Kshs. 223,212.
- [c]. Costs of the suit.
- [d]. Interest on [b] above at court rates from the date of this Judgement till full payment.

READ, DELIVERED AND SIGNED THIS 31ST DAY OF MAY 2022.

OCHARO KEBIRA

JUDGE

In presence of:

Mr. Omino for the Claimant.

Mr. Mbeche holding brief for Mr Obura for the Respondent.

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

