



**Akuja v Turkana University College Council (Cause E002 of 2021)  
[2022] KEELRC 1623 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1623 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E002 OF 2021**

**HS WASILWA, J  
MAY 24, 2022**

**BETWEEN**

**THOMAS EKAMAIS AKUJA ..... CLAIMANT**

**AND**

**TURKANA UNIVERSITY COLLEGE COUNCIL ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed this suit on January 26, 2021 alleging that he was unfairly and wrongfully terminated and seeks to be reinstated to employment and in the alternative he be compensated for the unfair termination.
2. The facts of this case are that the claimant was employed by Amb Amina Mohamed, the then cabinet secretary in the Ministry of Education, as the respondent's principal *vide* its letter of appointment (the contract) dated June 27, 2018 for a period of 5 years.
3. He immediately commenced his employment to serve the respondent which work he performed diligently and faithfully in accordance with the employment contract, the respondent's HR and Staff/ Employee Code of Ethics and Regulations therein.
4. On January 29, 2020 the claimant was placed on indefinite compulsory leave to pave way for investigations into allegation of corruption and abuse of office, insubordination and conflict of interest, financial impropriety and flouting of procurement procedures.
5. While on leave, the claimant was served with a show cause letter dated February 26, 2020 which raised issue for concern as neglect of duty and absenting himself from work on 28<sup>th</sup> and January 29, 2020 at a meeting in KIPi when he had received Kshs 88, 200 for the said purpose and also purchasing a motor vehicle registration KCY 16XY for office use and instead converted it to personal use as reflected in the daily work ticket. Subsequently, he responded to the show cause letter on even date and no further action was taken by the respondent.



6. On September 17, 2020 the claimant was served with another show cause letter which he responded to on the September 25, 2020. He was then invited to a disciplinary hearing scheduled for October 22, 2020 *vide* a letter of invitation dated October 12, 2020.
7. The meeting was convened as planned on the October 22, 2020 however the claimant sought to be furnished with more documents and further particulars which the respondent failed to comply though adjourned the meeting to the next day. On October 23, 2020 the claimant further pressed to be given the documents requested however the respondent panel was adamant forcing the claimant to walk out of the said disciplinary meeting. Consequently, the claimant was terminated from employment *vide* a letter of terminated dated January 14, 2021.
8. The claimant contends that his termination was unfair because;
  - a) The respondent placed him on compulsory leave for 11 months contrary to the provisions of clause D.5.2.2(c) of the Human Resource manual that provide for compulsory leave for a maximum of 6 months.
  - b) It is alleged that the disciplinary proceedings were conducted over six months contrary to the provisions of section 63 of the Universities Act which enjoins the respondent to carry out and complete disciplinary proceedings within 6 months of commencement.
  - c) The respondent failed to furnish the claimant with the requested documents before conducting the disciplinary hearing without giving any reason or excuse thereof.
  - d) That disciplinary hearing was conducted in absence of the claimant therefore that the same was a sham and a total violations of the rules of natural justice.
  - e) Terminating the claimant from service without giving a cogent reason for the said decision.
9. Following the termination, the claimant avers that he was not given any notice of termination neither was he paid his terminal dues. He therefore prayed for the following reliefs;
  - a) That the honorable court be pleased to declare that the termination of the claimant by the respondent was unlawful.
  - b) That the honourable court be pleased to order that the claimant be reinstated to his previous employment with the respondent with no loss of benefits or emoluments.
  - c) That the honourable court be pleased to award the claimant monetary salary in arrears for the period between January, 2021(When the respondent purported to terminate the claimant) until the date of judgement.
  - d) That in the alternative, the honourable court be pleased to award the claimant 12 months' salary compensation/damages for wrongful and unfair termination.
  - e) That the honourable court be pleased to award salary *in lieu* of notice.
  - f) The honourable court be pleased to award exemplary and general damages.
  - g) Interest on the sums claimed above from the date of filling of this cause in court.
  - h) Certificate of service.
  - i) Costs of this cause.
  - j) Such further orders and or reliefs as this court may deem just and fit to award.



10. The respondent entered appearance and filed a response to claim on the July 13, 2021, admitting that the claimant was employed as its principal in 2018 for a duration of 5 years, which employment was subject to the provisions of the Universities Act and respondent's Human Resource Manual.
11. It is stated that under the law and the Human resource manual, the respondent was empowered to exercise disciplinary control over all its employees including the claimant herein.
12. It is alleged that the claimant failed to perform his duties as expected which issues were raised in the meeting held on January 29, 2020 and the board resolved to place the claimant on compulsory leave to pave way for investigation into the allegations. This was done in accordance with section 16 of the Turkana University College Order, 2017 and section E.2.11 of the respondent's Human Resource Manual.
13. It is then contended that the claimant has already challenged the fact that he was placed on compulsory leave in his case filed in Eldoret Employment and Labour Relation Court under ELRC Petition Number E003 of 2020; Between the claimant and the respondent herein, which case was determined and dismissed as such the matter is res judicata.
14. The respondent avers that the claimant was terminated in accordance with the laid down procedure in that he was served with a show cause letter, invited to disciplinary hearing, afforded ample time to prepare for the defence and gather all evidence he needed for his defence, allowed to tag along a union representative or employee of his choice together with counsel of his choice which he did, served with rules of business of the committee and finally that the outcome of the hearing was communicated to him vide the notice of summary dismissal .
15. It was stated that the allegations forming the basis of the claimant's termination were proved by the respondent during the disciplinary hearing.
16. On the delayed disciplinary process, the respondent avers that the process commenced immediately but was delayed by the fact that the term of the then council expired on March 9, 2020 and the new council was gazette on May 19, 2020 then inaugurated on May 27, 2020. Subsequently that since the issue of the claimant's compulsory leave was pending in court the respondent opted to wait its outcome which came on the June 26, 2020. The respondent then proceeded with the disciplinary process and since it had discovered new evidence it issued a new Notice to show cause on the September 16, 2020 and scheduled a meeting which the claimant raised a preliminary objection which had to be determined first and the same was determined in the same month. Later in November 2020 an injunction was granted in ELRC E3 of 2020 which was later dismissed on December 10, 2020. Finally, that the respondent then concluded the disciplinary hearing on December 23, 2020 as such that the delay was not intentional.
17. It was further stated that the ravaging effects of Covid-19 pandemic in the country during that periods limited social gatherings, further contributing to the delay in the determination of the disciplinary issues.
18. The respondent then stated that the claimant is abusing the court process in the way in which he filed several suits arising from the same set of facts.

### **Hearings.**

19. This cause proceeded for hearing on the December 15, 2021 where the claimant testified as CW1, while the respondent called two witnesses Solomon John Muchiwa Munyua and Mary Wanjiku Kareithi as RW1 and RW2 respectively.



20. The claimant adopted his witness statement dated July 20, 2021 and in addition stated that on January 8, 2020 he received a letter from the permanent secretary ministry of education asking him to reinstate Prof Stephen Odebero, which request also came from the board of the respondent. He avers that even though, he does not have powers to employ anyone as per the *universities Act*, he responded to the letter indicating that Prof Odebero was a *bonafide* employee of Masinde Muliro university and that there was an active case against him with the respondent.
21. Subsequently that a meeting was convened with the council on the January 29, 2020 to approve the budget, after the budget issue was discussed he together with the finance officer were chased out. Later in the midnight he received a letter placing him on compulsory leave. Soon after he filed a suit in the Employment Court in Eldoret and obtained interim orders, the court then directed the claimant to submit to the disciplinary process as the 6 months had not lapsed. He went back to the respondent only to find prof Fredrick Kassily who was the acting principal had been removed and replaced. The disciplinary process did not proceed and 6 months lapsed. He was later on invited to disciplinary hearing on December 23, 2020, which he contends was not fair to him because he was not served with the documents he requested to enable him fully prepare for the hearing. Later on he was terminated on January 14, 2021.
22. Upon cross examination by Odongo Advocate, the witness testified that he was appointed as the principal by the CS Education on June 27, 2018 and received a letter of appointment from the respondent on the July 18, 2018. He confirmed that the letter of appointment contained a termination clause. He avers that the council meeting of 29.1.202 was conducted in Nairobi and the only agenda was for approval of the budget, however that he was send out of the meeting on the basis that the matter that followed touched on him and later on he was placed on compulsory leave to pave way for investigation. He stated that clause 2.11(a) of the Human Resource Manual empowers the appointing authority to send an employee on compulsory leave. He stated that when he was on leave he received his full salary and benefits attached to his office. He also testified that during the intervening period the former councils term expired and a new one was inaugurated on May 27, 2020 and a disciplinary hearing was later slated for October 23, 2020. He avers that after the preliminary objection the meeting did not proceed as he had not been served with some documents he had requested. Later on, he received another invitation for disciplinary hearing scheduled for November 3, 2020 however that he did not attend it and instead filed ELRC Cause no 3 of 2020 in Nakuru and challenged the process which was granted but later orders were discharged on December 11, 2020 and the respondent invited him to a further disciplinary hearing scheduled for December 23, 2020 which he attended together with his advocate and a Union representative. The issue of document not served on him was also raised and the meeting could not proceed on that basis.
23. On re-examination CW-1 testified that the document he requested were audit reports from the office of the Auditor general, minutes of meeting that send him on compulsory leave and the investigations report and recommendations thereof which formed the basis of the disciplinary hearing. He added that the documents were never served on him in the initial disciplinary meeting of October 12, 2020 and the final meeting of December 23, 2020. He also stated that the meeting of December 23, 2020 was conducted in his absence.
24. The respondent first witness was dr Solomon John Muchina Munyua, the chairperson of the respondent's Council, testified as RW-1. He adopted his witness statement dated November 16, 2021 and produced the respondent's list of document dated May 27, 2021. He testified that as the head of the council his roles include to head the council, provide guidance and policy to the *constitution*, link between the Ministry of Education and Finance among others. He stated that as a chairperson of the council he does not have any direct role in the disciplinary process of an employee and only receives a



- report at the end of the process. He indicated that he is empowered to issue notice to show cause for senior staff of the respondent of job group 14 and above, he added that, it was on those grounds that he issued the NTSC to the claimant because he was the principal of the respondent under job group 18. He also testified with regard to the delay in the disciplinary process and stated that the delay was a result of the lapse of the tenure of the previous council and the inauguration of the incoming council that took up about 3 months. He also blamed the delay on the ravaging effects of Covid-19 that was prevalent during that period.
25. Upon cross examination by Matunda Advocate, the witness testified that he had never met the claimant till the time in court. He stated that indeed the disciplinary process ought to have taken 6 months as provided for under section 63 of the Universities Act however that the delay has been explained. He stated that the disciplinary process does not collapse after the 6 months. The witness maintained that investigations were carried out in accordance with the Human Resource Manual, however that the report was not filed in court. He admitted that investigation ought to precede Issuance of Notice to show cause. He then confessed that he did not sit in the disciplinary meeting of October 12, 2020 and the last one of December 23, 2020 though he testified that he was informed that the claimant walked out of the 2<sup>nd</sup> meeting. He finally stated that the decision to fire the claimant emanated from the unanimous decision of the council.
26. On re-examination, the witness testified that the preliminary investigation that informed the notice to show cause emanated from unethical issues unearthed by the Human Resource Committee and the finance committee of the council. He added that the claimant had an opportunity to appeal to the council through the chairperson but he failed to do so.
27. The second witness was, Mary Wanjiku Kareithi, one of the respondent's council members, who testified as RW-2 and also adopted her witness statement dated November 16, 2021 and stated that she sits in two committees; Human Resource and Appointment Committee and the Academic Research, extension and collaboration committee, where she chairs the former. In addition, she testified that as the chairperson of the Human Resource and appointment committee, she chairs the disciplinary committee as such she was the chair in the committee that carried out disciplinary proceedings against the claimant. She testified that disciplinary hearing with regard to the claimant started in October, 2020 when she invited the claimant to a disciplinary hearing scheduled for 22.10.2020 however on beginning the meeting the claimant raised preliminary issue which the council thought it fit to dispense with before proceeding with hearing. The issues raised were on procedure and recusal of one of the council members. The council then deliberated on the issue and a ruling was delivered after a few hours and then communicated to the claimant and his team made up of the claimant, an advocate and two union representatives.
28. The advocate representing the claimant communicated their dissatisfaction with the council ruling and they all stormed out of the room. The ruling was never appealed by the claimant. The witness testified further that since the hearing was not completed on 22.10.2020 they rescheduled it and invited the claimant to another hearing that took place on December 23, 2020. In the intervening period the council made a decision not to furnish the claimant with the documents sought and ordered for the disciplinary meeting to carry on as scheduled on December 23, 2020. The witness also testified that on the December 23, 2020 the claimant appeared together with his Advocate and one Union representative. His Advocate raised similar issues raised in the meeting of October 22, 2020 and the fact that they had not been served with crucial documents. The committee however did not bow to their request and instead the committee insisted on proceeding with the hearing. On that basis, the claimant and his team walked out of the room, nevertheless that the claimant was informed that the



council would proceed regardless of their objection. The meeting then proceeded in absence of the claimant and a final report forwarded to the council for their determination and verdict.

29. Upon cross examination by Matunda Advocate, the witness testified that she is a member of the council and sits in the HR Committee. He stated that she first dealt with the claimant's issue in October, 2020. She admitted that the procedure dictates that investigations ought to be carried out before a notice to show cause is issued. She avers that she was not aware who carried out the investigation informing the issuance of the Notice to show cause. She testified that four preliminary issue arose in the disciplinary meeting of October 22, 2020 where the claimant requested for a copy of the investigation report, which was not availed because it was not there. She also stated that the minutes of the meeting informing the placing of the claimant on compulsory leave were not served upon the claimant because they were not provided to them either. She then in summation stated that they did not meet any of the claimant's requests. In the meeting of December 23, 2020 the claimant requested for the same documents before proceeding however council insisted on proceeding without furnishing the claimant with the requested documents. She then testified that the meeting proceeded in absence of the claimant.
30. On re-examination, the witness testified that they could not furnish the claimant with the alleged investigation report because they did not have it.

### **Claimants Submissions.**

31. The claimant submitted on two issues; Whether the termination of the claimant was wrongful, unfair and unlawful and Whether the reliefs sought should be granted.
32. On the first issue it was submitted that, it was the responsibility of the respondent as envisaged under section 41 of the *Employment Act*, to ensure he explained the reasons for the intended termination the claimant and secondly allowed the claimant to make representations, which procedure was not followed by the respondent. It was argued that the respondent did not carry out preliminary investigation as envisaged under clause D.5.3 of the Human Resource manual before issuing a Notice to Show cause and also that the respondent failed to furnish the claimant with the document the disciplinary committee was relying on to enable him prepare adequately for the hearing. To support his case the claimant relied on the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co Ltd*, Cause No 66 of 2012 where the court observed as follows;
- (i) That the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
  - (ii) Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/ state his case in person, writing or through a representative or shop floor union representative if possible.
  - (iii) Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.
33. Accordingly, it was submitted that the respondent failed to meet the threshold of procedural fairness and substantive justification under section 41 and 43 of the *Employment Act*.
34. It was further submitted by the claimant that the respondent in contravention of section 63 of the *Universities Act* as read with clause D.5.2 2 of the Human Resource Manuals on General Procedures, extended his disciplinary process for more than the 6 months without any basis. He then cited the case



of *Walter Kiplangat Serem v Turkana University College Council* [2020] eKLR where the court after examining the facts therein, held that the respondent had violated its own internal process and had conducted a sham disciplinary process that fell outside the set legal framework.

35. The claimant then submitted that the respondent never proved the reasons for terminating the claimant. It was argued that, the respondent never proved before court that the said reasons were valid and fair and the respondent never proved the grounds for termination were justified.
36. With regard to the prayers sought, it was submitted that the claimant has established reason to be reinstated back to employment and in the alternative the court to grant the alternative prayers sought under the claim.

### **Respondent's Submissions.**

37. The respondent on the other hand maintains that the reason for termination was valid. It was argued that the letter sending the claimant for compulsory leave dated January 29, 2020 contained the offenses the claimant had allegedly committed. It was argued that clause E.2.11 of Turkana University College Human Resource manual empowered the respondent to send the claimant for compulsory leave to pave way for further investigation into the issue. It was further submitted that the charges against the claimant were further captured in the Notices to show cause dated February 26, 2020 and the one dated September 16, 2020, which offenses according to the respondent were admitted by the claimant in his response dated September 25, 2020. It was then submitted that the employer is tasked under section 44(4) of the *Employment Act* to demonstrate only reasons that it genuinely believed to have been there, therefore that the reason for the termination has been adequately stated.
38. On whether all disciplinary proceeding must be preceded by investigation, it was submitted that the respondent's Human Resource manual under clause D.5.3 does not make it compulsory for the respondent to conduct investigation rather that the investigation can only be conducted when it is necessary. It then argued that the respondent had carried out departmental inquiry and consultation in accordance with clause D.5.2.3 of the Human Resource Manual and therefore that the absence of an investigations report cannot render the entire disciplinary proceedings as a sham when the respondent only relied on the documents annexed to the notice to show cause during the disciplinary hearing.
39. On whether the delay for more than 6 months vitiated the disciplinary process, it was argued that though section 63 of the *Universities Act* and clause D.5.2.2(c) of the Human Resource Manual provides for disciplinary process to be completed within 6 months, it has a proviso that if the period is exceeded then the principal to report to council explaining the reason for the delay. In this case the respondent argued that it had merited reason why the disciplinary process took longer which is based on the fact that the previous council's term expired and time was taken to reconstitute a new council which was also curtailed in its operation by the emergence of the Covid-19 pandemic.
40. The respondent submitted that the claimant was subjected to due procedure before termination that was done in accordance with section 41 of the *Employment Act*. It was argued that the request for documents made by the claimant was no satisfied because the EACC report, Investigation Report, minutes of the meeting held on January 29, 2020 were none existent since no report had been made by EACC, neither was there any investigation to inform the compiling of a report by the respondent, therefore that the documents requested were not in the possession of the respondent and the respondent disciplinary committee did not use any of them during hearing. It was thus maintained that the process was up to par and done in accordance with the law. In support of their case the



respondent relied on the case of Reuben Ikatwa & 17 others V Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR where the court held that;

“Due process is a fundamental aspect of the rule of law. The right to a fair hearing is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is secured under section 41 of the Employment Act like the learned Judge (Makau, J), we find that the respondents followed the proper procedure right from the point of notifying the appellants of the charges against them up to the disciplinary hearings. Equally, we find that the respondent followed the proper procedure in the appeals. With regard to the attendance of Major Strudwick in the disciplinary hearing, unlike the learned Judge, we find that the same did not vitiate a fair hearing. This is because he appeared in his capacity as the presenting officer, that is, as the officer who had charged the appellants. In no way did he make a determination on the disciplinary hearing. As evidenced by the disciplinary proceedings determinations were made by the deciding officer, one Lt Col Jordan from the Royal Military Police who in our view was independent and impartial...30. It is not in dispute that the appellants were summoned by the 2<sup>nd</sup> respondent to attend what was termed as investigatory hearings and they refused to do so. As per regulation 903 of the regulations, the 2<sup>nd</sup> respondent is empowered to conduct inquiries into disciplinary matters or to take statements or evidence as part of the investigations. As such, the investigatory hearings were part and parcel of the investigations sought to be carried out by the 2<sup>nd</sup> respondent. Failure by the appellants to attend such hearings as rightly observed by the learned Judge amounted to non-compliance with lawful order/instructions by the employer. This went to the root of the contract of employment.”

41. The respondent in the upshot submitted that the termination of the claimant was fair and justified in the circumstances and urged this court to dismiss the claim with costs.
42. I have examined the evidence and submissions of the parties herein. The issues for this court’s determination are as follows;-
  1. Whether the respondents had a valid reason to terminate the services of the claimant.
  2. Whether due process was followed before claimant’s termination.
  3. Whether the claimant is entitled to the remedies sought.

### **Issue No. 1 Validity Of Reason**

43. The claimant was dismissed from employment *vide* a letter dated January 14, 2021 authored by dr Solomon JM Munyua Chairman of University Council.
44. The letter indicated that the claimant was dismissed for reason of gross misconduct which is consistent with neglect of duty, insubordination, absenteeism, abuse of office, financial impropriety and occasioning financial loss to Turkana University College.
45. Before the dismissal the claimant had been directed to proceed on compulsory leave *vide* a letter dated January 29, 2020. The letter intimated that the claimant had been sent on compulsory leave to pave way for the relevant government agencies to investigate allegations and/or possible actions on corruption and abuse of office at Turkana University College, gross insubordination and conflict of interest, financial impropriety and/or misappropriation and flouting of procurement procedures and



regulations contrary to the [Public Finance Management Act](#) 2012 and the Public Procurement & Asset Disposal Act 2015.

46. Vide a letter dated February 26, 2020 the claimant was issued with a NTSC letter. The letter stated as follows;

1. “You received allowances from the University College in the sum of kshs 88,200.00 to facilitate your attendance of a joint meeting at Nairobi scheduled to take place from the 27<sup>th</sup> – 29<sup>th</sup> January 2020 between the Turkana University College and the Kenya Industrial Property Institute (KIPI). However, the available evidence to the Council indicates that despite the employer having put you in funds to attend and participate in the said meeting for 3 days, you only attended on day 1 being the January 27, 2020 and absconded attendance on the subsequent 2 days being the January 28, 2020 and January 29, 2020. On the said dates the University College was unrepresented at the said meeting by its substantive principal. The council accordingly notes that your conduct constitutes gross misconduct on the following basis:-

- i. You neglected your main duties and responsibilities as embodied in your employment contract entered into on July 18, 2018, which obligated you to carry out the day-to-day business of the University College and acting as the principal spokesman of the University College.
- ii. You acted in breach of the provisions of sections 44 (4) (a) and (c) of the [Employment Act](#), 2007 by:-
- iii. Without leave and without any lawful cause absenting yourself from the place appointed for the performance of work being the Kenya Industrial Property Institute meeting.
- iv. Willfully neglecting to perform work, which it was your duty to perform under your contract; being the failure to attend the joint meeting at the Kenya Industrial Property Institute on the 28<sup>th</sup> – January 29, 2020.

2. You irregularly caused the acquisition of the motor vehicle KCT 16XY make Toyota Fortuner from funds drawn from the Turkana University College recurrent expenditure account in the sum of kshs 7,585,000.00. You thereafter proceeded to put the vehicle into your personal use as opposed to the University College’s work as is evident from the Turkana University College Transport – Daily Work Ticket No 036 between the October 3, 2019 to the November 8, 2019. At the same time you continued to be paid by the Turkana University College a monthly transport allowance of kshs 41,000.00, which is evident from your pay statements for October 2019 and November 2019. Further, your employment contract had provision for a monthly personal car allowance of kshs 41,000.00. The council accordingly, notes that your conduct constitutes gross misconduct on the following basis:-

- a. Being the accounting officer of the Turkana University College, you failed pursuant to sections 68 (1) (1) and (2) (a) and (e) of the [Public Finance Management Act](#), No 18 of 2012 to ensure that lawful and authorized expenditure was carried out in acquiring the vehicle. You also failed to ensure that all applicable accounting and financial controls, systems, standards, law and procedures were followed when procuring goods.
- b. You improperly performed the work of which it was your duty to perform in a careful and proper manner thus a breach of section 44 (4) (c) of the [Employment Act](#), 2007



by failing to observe the accounting requirements on public finance management in incurring expenditure and procurement.

- c. You failed to ensure compliance with the laws of the country, which was a fundamental duty and responsibility embodied in your employment contract.
- d. By receiving the allowance and still using the vehicle which was public property for your private transport, you breached the provisions of clause 8 (1), (2) and (3) of the Code of Conduct and Ethics for Public Universities, 2003, which forbids the misuse of the resources of a public university, require an officer to ensure that a public university resources under his charge are properly utilized and fully accounted for, and forbids the use of a public university resources to unjustly enrich oneself.”

47. The claimant responded to the above accusations as follows;

- 1) In response to receiving kshs 88,200/= to facilitate attending a meeting in Nairobi between 27<sup>th</sup> to 29<sup>th</sup> January 2020, he indicated that on 27/1/2020 he attended the meeting which covered a lot of ground. On 28/1/2020 he indicated that he excused himself to prepare for the special Council meeting on 29/1/2020 which he also attended.
  - 2) On use of transport, he indicated that he was entitled to use of official transport while on duty and so didn't violate any terms of contract.
  - 3) He also indicated that he was not aware of any audit that had been carried out by the office of the Auditor General.
48. Earlier on 16/9/2020, the claimant had been issued with another show cause letter where he was accused amongst other infractions of unlawful, illegal and irregular staff recruitment, insubordination of council by reinstating staff to the payroll and financial impropriety and misuse of TUC finances. He denied all the issues raised in this NTSC.
49. On December 11, 2020, the claimant was finally invited to a disciplinary committee of council for a hearing on December 23, 2020.
50. The notice indicated that he was going to be heard and consideration made regarding the NTSC letters.
51. The NTSC letters have been flagged out above and he contends thereto taken note of. The minutes of the disciplinary committee hearing held on December 23, 2020 have been produced before this court.
52. Before the meeting started the claimant through his council indicated that there were some documents that they had asked for which had not been provided for because the council indicated that they were privileged documents.
53. They also indicated they were insisting that the said documents be provided. They also sought to be provided with the list of witnesses and that Mr Wambutura recuse himself from the proceedings.
54. The Chairman of committee indicated that they were going to provide what they had and handed them a letter dated January 8, 2020 directive letter dated January 29, 2020 and PS Ministry of Education letter dated April 30, 2020.
55. The Chairman also indicated that the committee was properly constituted and so they were going to proceed as such.
56. On issue of witness statements, the Chairman indicated that the hearing was not adversarial but an inquiry and that there were no witness statements.



57. There was some exchanges in the meetings with claimants insisting they couldn't proceed without the documents provided.
58. The chairperson of the committee indicated that the documents not provided with were either not available or were privileged.
59. The claimant then refused to participate in the meeting because of lack of documents and the committee decided to proceed in his absence.
60. From the minutes of the proceedings thereafter the respondents called 8 witnesses and concluded the meeting.
61. What is wanting here is the fact that the respondents had indicated that there were no witness statements available. They declined to grant the claimant the requested statements. The witnesses then resurfaced eight in number who proceeded to testify before the committee in the absence of the claimant.
62. The 2<sup>nd</sup> witness confirmed that he was with claimant in the meeting in Nairobi between 27<sup>th</sup> to 29<sup>th</sup> January 2020.
63. The 3<sup>rd</sup> witness indicated that motor vehicle KCT 16XY was purchased properly by the respondent whilst following procurement processes. He also indicated that the claimant was also paid commuter allowance of 41,000/=.
64. The 4<sup>th</sup> witness indicated that motor vehicle KCT was bought properly but he didn't know whether there were approvals from council. He also indicated that the vehicle was always driven on authorization.
65. The 5<sup>th</sup> witness a driver indicated that he drove motor vehicle KCT 16XY from October 2019 and he used to drive the claimant. The 6<sup>th</sup> witness intimated that the claimant had a commuter allowance but was also being driven in the motor vehicle which he was authorizing while on compulsory leave.
66. All these witnesses testified but produced no documents to prove their evidence eg No 8 who talked about recruitment of tutorial fellows. He indicated that some staff who was not shortlisted was interviewed. The list of shortlisting and those interviewed was not produced before the panel.
67. From the proceedings before this court the claimant had indicated that the documents he had sought from the respondent and which were never given to him were – audit report from office of Auditor General, minutes of the meeting which recommended he be sent on compulsory leave, investigation report and recommendation which were to form the basis of the disciplinary report.
68. When the respondents testified the RW1 indicated that investigations were done against the claimant. He also indicated that the HR Manual at section D (5) (3) indicated that investigation must be done by 3 officers and summons to the accused. He also indicated that in case of the claimant, it was a committee of council that did the investigations. The report was also not produced before court.
69. The RW2 indicated that investigation report was not provided nor minutes of 29/1/2020 that sent claimant on compulsory leave.
70. She agreed that all documents requested were not provided. From the above analysis of evidence, it is clear that some of the allegations raised against the claimant were never proved.
71. The complaint of earning DSA and not attending a meeting was disputed by the witness called by the respondent. The issue of being absent from office was not supported by any documents or evidence.



72. The issue of financial impropriety was also not proved. The witnesses who testified indicated that the items were bought following due process. No audit report or investigation report was also produced to prove allegations made.
73. Section 43 of the *Employment Act* 2007 states as follows;-



<p>“43.</p>	<p>Proof of reason for termination</p> <table border="1"> <tr> <td data-bbox="858 271 1123 837">(1)</td> <td data-bbox="1123 271 1390 837"> <p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p> </td> </tr> <tr> <td data-bbox="858 837 1123 1404">(2)</td> <td data-bbox="1123 837 1390 1404"> <p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.</p> </td> </tr> </table>	(1)	<p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p>	(2)	<p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.</p>
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74. For an employee to be found culpable, the reasons assigned to the dismissal must be valid. In my view, the charges against the claimant have not been discharged fully.
75. I therefore find that there were not proved valid reasons to warrant dismissal of the claimant.

### **Issue No ii – Due Process**

76. The claimant has raised his concern on the process of discipline he was subjected to. The claimant pointed out that under clause D.5.3. of the respondent's HRM provided that before a person was disciplined an investigation was done by the HR Committee of council but RW2 denied conducting such investigation. No investigation report was produced before court.
77. According to the HR Manual the investigation was to form the basis of the disciplinary process. It is indeed true that no investigation was ever conducted and therefore the claimant missed out on a vital process that could have aided him in the disciplinary process.
78. Before the claimant appeared before the disciplinary committee, he requested for some documents from the respondents. The respondents RW1 and RW2 indicated that not all the documents requested for were supplied because they were not available or were privileged.
79. The documents sought included an audit report, investigation report and the minutes of a council meeting. The respondents declined to grant these documents explained above. It is not clear which document among these was privileged and how.
80. In any case some of the documents requested were provided at the start of the disciplinary process.
81. This in effect denied the claimant an opportunity to prepare for his case and defend himself.
82. This in essence breached provision of the *Fair Administrative Action Act* at section 4 which states as follows;
  - “ 4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
  - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
    - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
    - (b) an opportunity to be heard and to make representations in that regard;
    - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
    - (d) a statement of reasons pursuant to section 6;
    - (e) notice of the right to legal representation, where applicable;
    - (f) notice of the right to cross-examine or where applicable; or
    - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.



(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

- (a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in article 41 of the Constitution, the administrator may act in accordance with that different procedure.

83. There is evidence that the claimant was not given the documents he wished to rely on and make his defence, some documents were supplied late and then the respondents insisted on proceeding with the disciplinary hearing in the claimant's absence.
84. The witness statements were never recorded nor supplied to the claimant. It is therefore true that the disciplinary process was plagued with many flaws and was therefore in contravention of section 41 of the Employment Act 2007 which states as follows;



<p>“41.</p>	<p>Notification and hearing before termination on grounds of misconduct</p> <table border="1"> <tr> <td data-bbox="858 309 1123 1368">(1)</td> <td data-bbox="1123 309 1390 1368"> <p>Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.</p> </td> </tr> <tr> <td data-bbox="858 1368 1123 1995">(2)</td> <td data-bbox="1123 1368 1390 1995"> <p>Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or</p> </td> </tr> </table>	(1)	<p>Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.</p>	(2)	<p>Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or</p>
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85. It is therefore my finding that the dismissal of the claimant was unfair and unjustified and I declare it so as provided for under section 45(2) of the [Employment Act](#) 2007 which states as follows;

“ 45. (1).....

(2) A termination of employment 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”.

**Issue No. Iii Remedies**

86. Having found the dismissal of the claimant unfair I turn to the remedies. The claimant sought to be reinstated to his position as principal of the respondent.



87. In the alternative, the claimant sought to be paid compensation for the unfair and unlawful termination. The claimant was employed on a five year contract with effect from June 2018 and this contract is set to end in June 2023.
88. Given that the unfairness meted against the claimant that derailed his life and career, reinstatement would have been the best remedy to compensate him.
89. However given the circumstances under which the dismissal took place and especially the altercation between the claimant and respondent during the disciplinary hearing, bad blood definitely developed between them and reinstatement is therefore not practically possible.
90. I will therefore decline to reinstate the claimant and order as follows;
1. The claimant be paid 1 month salary in lieu of notice = 832,891/=
  2. Given the injustice meted against him and the delay in hearing him and the fact that his 5year contract has been wasted I find maximum compensation equivalent to 12 months salary is adequate =  $12 \times 832,891 = 9,994,692/=$   
Total Awarded = 10,827,583/=  
Less statutory deductions
  3. I also award claimant an order on issuance of a certificate of service.
  4. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24<sup>TH</sup> DAY OF MAY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Matunda for claimant – present

Odongo for respondent – present

Court Assistant - Fredrick

