



**Musau v Kenya Power & Lighting Company Limited (Cause  
71 of 2021) [2022] KEELRC 1140 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1140 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 71 OF 2021  
B ONGAYA, J  
MAY 13, 2022**

**BETWEEN**

**PAUL NYAMAI MUSAU ..... CLAIMANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim on January 29, 2020 through Mutisya Mwanzia & Ondeng Advocates. The claimant's case was that he was employed by the respondent at all material time until dismissal by the letter of August 24, 2020 which he received on 26.08.2020. The claimant's case is that the dismissal was unlawful, unfair and in contravention of Articles 10, 47, and 50 of *the Constitution* of Kenya, 2010, the rules of natural justice, labour laws and fundamental international conventions and declarations as it was procedurally unfair and there was no substantive justification to terminate the claimant from employment. It is the claimant's case that the procedure adopted by the respondent in dismissing the claimant from employment was unfair and in contravention of the rules of natural justice particulars of which are as follows:
  - a. The claimant was terminated for reasons other than the reasons set out in the letter to show-cause.
  - b. The claimant was not granted chance to respond to the grounds upon which he was dismissed as the said grounds were not captured in the letter to show-cause.
  - c. The respondent terminated the claimant despite the respondent having found that there was no negligence of duty by the claimant as was set out in the letter to show-cause.
2. The claimant further pleaded particulars of unlawful and wrongful termination as follows:



- a. The procedure that was used to terminate the claimant was unfair and in contravention of rules of natural justice.
  - b. As at the time the alleged complaint was received by the respondent on July 29, 2020 at 2056hrs as stated in the show cause letter, the claimant had travelled to Mombasa to attend the Transformer Reduction Project training which was scheduled to take place on July 30, 2020 from 7.00am.
  - c. The nature of the complaint which was reported falls within the mandate of the Emergency Response Team as highlighted in the statement of claim and the claimant was not called with regard to any challenges in handling the complaints.
  - d. The claimant had delegated his duties to Raphael Njagi S/no. 17559, Customer Service In-charge, to coordinate all activities of Operation and Maintenance (O&M) since all other O&M supervisory staff in the County had also been directed to attend the training. The aforesaid employee was therefore answerable for whatever complaints that faced office during the period when the claimant was away from office.
3. The claimant's further case is that he received the letter of summary dismissal dated August 24, 2020 and he appealed against the dismissal by his letter dated September 3, 2020 and per the respondent's internal procedures. By the letter dated 21.01.2021 the respondent acknowledged receipt of the appeal letter and invited the claimant to the appeals committee hearing on January 25, 2021. On April 7, 2021 the claimant was informed the appeal decision was ready for deliver but on April 12, 2021 he was informed that the appeal decision would not be delivered because the matter had been referred for reinvestigation. By the letter dated June 7, 2021 he was notified that his appeal was not successful as it had been dismissed. It is the claimant's case that the respondent adopted unfair procedure in contravention of rules of natural justice in deciding the appeal particulars of whose unlawful and wrongful procedure were pleaded as follows:
- a. The respondent conducted a reinvestigation during the appeal to try and find a reason to terminate the claimant's employment as the respondent had found the claimant's appeal to be meritorious.
  - b. The respondent did not explain to the claimant why there was need for reinvestigation before delivery of the outcome of the appeal.
  - c. The respondent did not give the claimant a chance to defend himself when it received the report of reinvestigation before making a decision to dismiss the claimant based on the said report.
  - d. The respondent started conducting reinvestigation during the appeal yet it had already issued the claimant with a show-cause letter and proceeded to dismiss the clamant based on foreign issues which were not in the show-cause letter.
4. The claimant pleads that the dismissal offended provisions of Articles 10, 47 and 50 of *the Constitution* of Kenya, 2010; sections 18(4), 27, 28, 36, 41, 45, 49, 50, and 51 of the *Employment Act*, 2007; Article 23(1) of the *Universal Declaration of Human Rights*; and *Convention C158 (Termination of Employment Convention) International Labour Convention* as read together with Article 2(6) of *the Constitution* of Kenya, 2010.
5. The claimant claimed for and prayed for judgment against the respondent for:
- a. A declaration that the termination of the claimant was unfair and wrongful.



- b. An order directing the respondent to reinstate the claimant in the service of the respondent with effect from 26.08.2020 in the position held before the termination without break in service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation.
  - c. Consequential to the reinstatement, the respondent be directed to pay the claimant all withheld monthly salaries and allowances from August 26, 2020.
  - d. In the alternative, the claimant be awarded the maximum compensation for unfair dismissal and unlawful termination as per section 49 and 50 of the Employment Act, that is, Kshs. 252, 000.00 by 12 months thus Kshs 3, 024, 000.00.
  - e. The respondent be directed to issue the claimant a certificate of service.
  - f. Any further entitlement or order that the Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on his final filed submissions.
  - g. The respondent to pay the claimant's costs of the suit.
  - h. Interests on prayer (d) above from the date of filing the suit until payment in full.
6. The respondent entered appearance in person as signed by one Irene Walala and filed a memorandum of response on 24.08.2021. On September 30, 2021 the respondent appointed Namasaka & Kariuki Advocates to act in the suit. On January 5, 2022 the respondent filed amended memorandum of response and counterclaim. The respondent admitted that it employed the claimant on August 9, 2010 and the claimant rose through the ranks to the position of Feeder Based Business Unit (FBBU) In-charge stationed at Kwale/Ukunda earning a monthly salary of Kshs 252, 000.00. The respondent admitted that by an email dated July 27, 2020 the claimant and other employees of the respondent were requested to attend a training in Mombasa. The respondent denied that the claimant and other employees from Kwale station were directed to travel to Mombasa on July 29, 2020 so as not to be late for the training which was commencing at 07.00am on July 30, 2020 and, the respondent denied the claimant's pleading that he had travelled to Mombasa from Kwale starting around 4.00pm on July 29, 2020 to prepare for the training. The respondent denied the claimant's pleading that after training on July 30, 2020, a Thursday, July 31, 2020 was gazetted a public holiday so that the claimant was not to report on duty on July 31, 2020 but that he was to report on Monday 03.08.2020 as alleged. The respondent admitted that on August 5, 2020 it served the claimant a show-cause letter dated August 3, 2020 and admitted that the claimant replied the letter and attended the disciplinary hearing and, thereafter, a letter of summary dismissal issued.
7. The respondent denied that the summary dismissal was unlawful, wrongful, unfair and in contravention of the provisions of the Constitution and the Act as pleaded for the claimant. It was pleaded for the respondent that the summary dismissal was grounded in law, fair and valid. Further, the respondent denied the claimant's pleading that the respondent had an emergency team comprising of operator, field team and driver mandated to handle the danger complaint that was logged into the respondent's IMS system on July 29, 2020 but that the claimant's negligence of duty assigned to him by the respondent resulted in the loss of lives reported on July 29, 2020. the respondent also denied the claimant's case that the respondent had methods of reporting complaints by way of hot line numbers, Facebook, tweeter, office emergency line, emails, KPLC App and USSD and those logged in the Incident Management System (IMS). The respondent denied the claimant's averments on the shifts in place on July 29, 2020 and the persons the claimant averred were on duty during those shifts and further denied that during his absence on July 29, 2020, the claimant had delegated his roles to



one Raphael Njagi S/No 17559, Customer Service In-charge to coordinate all activities of O&M since all O&M supervisory staff had been directed to attend the training fixed for July 30, 2020 at Mombasa. The respondent denied the procedure it adopted to summarily dismiss the claimant and to decide his appeal had been wrongful, unfair, unlawful and in breach of natural justice – and the particulars. The respondent denied all the claimant’s claims and prayers and prayed that the claimant’s suit be dismissed with costs.

8. The respondent counterclaimed that it advanced the claimant a Domestic Appliance Loan and as at dismissal the claimant owed Kshs 92, 468.73 and the accrued leave days being Kshs 71, 274.17 used to set off part of the advance, the claimant owed Kshs 21, 194.56. The respondent prayed for that amount together with costs of the counterclaim and any other just relief.
9. The claimant testified to support his case. The respondent’s witness (RW) was Jasper Mureithi, a Senior Human Resource Officer. Final submissions were filed for the parties. The Court has considered all the material on record and makes pertinent findings as follows.
10. To answer the 1<sup>st</sup> issue, the Court returns that there is no dispute that the parties were in a contract of service. The claimant was employed by the respondent on August 9, 2010 and the claimant rose through the ranks to the position of Feeder Based Business Unit (FBBU) In-charge stationed at Kwale/ Ukunda earning a monthly salary of Kshs 252, 000.00.
11. To answer the 2<sup>nd</sup> issue, the Court returns that there is no dispute that the claimant was dismissed by the letter of dismissal dated 24.08.2020 on account thus, “That as the O&M Incharge Kwale County, you were responsible for O&M activities in the county and that you failed to create a culture of inserting all incidences in IMS and resolving them. As a result, the dangerous incident that led to a public fatality was missed. Further, staffs under you were not picking calls so other means to rely information did not work.”
12. The 3<sup>rd</sup> issue is whether the respondent followed due procedure or fair procedure in dismissing the claimant. The evidence is that the claimant received the letter to make an explanation dated August 3, 2020, he replied by his letter dated August 6, 2020; on August 7, 2020 he was invited to attend the disciplinary hearing; the hearing took place on August 14, 2020 and the claimant signed the minutes of the hearing on August 20, 2020; the dismissal letter dated August 24, 2020 issued; the claimant appealed by the letter dated September 3, 2020; he attended the hearing before the appeals committee held on January 25, 2021; and , by letter dated June 7, 2021 the respondent informed the claimant that the appeal was not successful.
13. The claimant says the procedure was unfair because the reason in the explanation letter dated August 5, 2020 was not the reason for dismissal in the dismissal letter dated August 24, 2020. The allegation in the explanation letter (the letter to show-cause) was thus, “It has been noted with great concern that on Wednesday July 29, 2020 a danger complaint was logged into our IMS system for substation number 6759. The given incidence number 5716073 was for a broken pole and conductors that had been lying on the ground for over a week. It was captured at 2056 hrs and reported via telephone no. 0735xxxxxx. The incidence remained unattended from Wednesday evening up until Thursday the whole day. The delayed response to this clearly marked danger complaint resulted into a public fatality at around 0800hrs on July 31, 2020, where an adult lady and child were electrocuted. It is further alleged that the fallen pole had been reported to you over the last two weeks and no action had been taken.”
14. As submitted for the claimant, the reason for termination was stated as the claimant’s failure to create a culture of inserting all incidences in IMS and resolving them, and, as a result, the dangerous incident that led to a public fatality was missed. Further, staffs under the claimant were not picking calls so other



means to rely information did not work. As submitted for the claimant, that reason in the dismissal letter is substantially different from the reason in the show cause notice or explanation letter which related to a specific incident as quoted above. The Court finds as valid lamentation by the claimant that he was dismissed on account of a reason that had not been in the letter inviting his explanation. To that extent, the Court upholds the submission by the claimant's counsel that the respondent had dismissed the claimant without a notice and a hearing per section 41 of the Employment Act, 2007 and the reason in the show-cause notice being at complete substantive variance to the one initiating the entire disciplinary process the claimant had been subjected to, the procedure leading to the letter of dismissal was indeed unfair. As will be found later in this judgment, the claimant exculpated himself of the allegations in the letter inviting his explanation and, the respondent, in a twist of events, invoked a completely new reason of dismissal in the dismissal letter, one that was strange to the entire disciplinary proceedings. That was unfair procedure in complete breach of the rules of natural justice. It cannot be found that in such twisted reason for imposition of dismissal, the respondent can be said to have invoked a fair procedure as envisaged in section 45 (2) (c) of the Act. It was unfair and the Court finds the claimant's concerns in that regard, on an objective or reasonableness test, valid and well founded.

15. The Court has considered the respondent's submissions on the issue of procedural fairness and returns that the respondent has not specifically addressed the claimant's concerns about the substantive variance of the initial allegations in the letter to explain and the reason for termination in the dismissal letter. The respondent merely addressed the formal steps that the respondent subjected the claimant to in the disciplinary process and without focusing on the content of those steps. Had the respondent kept fidelity to the content of the steps, it should be obvious that the entire disciplinary process amounted to a pretended due process in which the root cause of the inquiry, the initial allegations, had no continuous chain of relevance and proximity to the ensuing purported reason for termination as expressed in the dismissal letter. Thus, once again the Court finds that looking at the stated reason for dismissal which was strange and did not germinate at all from the initial allegations, the claimant had not been subjected to a fair procedure consistent with rules of natural justice prior to the dismissal decision as was conveyed in the dismissal letter.
16. The claimant's further procedural concern is that at the appeal stage, the appeal decision was delayed pending a reinvestigation of the case levelled against him. The claimant urges that once a reinvestigation report was ready, he was not given chance to be heard in that regard. The Court finds that the claimant has not exhibited the alleged reinvestigation report and the letter conveying the appeal decision dated June 7, 2021 does not refer to such reinvestigation report. The claimant's procedural concerns in that respect are found unjustified and not established at all.
17. The Court returns that for the findings already made, the respondent failed to accord the claimant due procedure consistent with rules of natural justice and sections 41 and 45 (2) (c) of the Act.
18. To answer the 4<sup>th</sup> issue, the Court returns that the respondent has failed to establish that the reason invoked in dismissing the claimant was a fair reason per section 45 of the Act and that the reason existed as valid and genuine as at the time of the dismissal as envisaged section 43 of the Act.
19. The Court has already found that the reason stated in the dismissal letter was substantively at variance and different from the one in the show cause notice or letter inviting the claimant to make an explanation. Thus, without due disciplinary process to establish the reason in the show cause notice, it cannot be found that the reason in the dismissal letter existed as valid as at the time of the dismissal.
20. The allegation in the letter inviting claimant's explanation was thus, "It has been noted with great concern that on Wednesday 29<sup>th</sup> July, 2020 a danger complaint was logged into our IMS system for substation number 6759. The given incidence number 5716073 was for a broken pole and conductors



that had been lying on the ground for over a week. It was captured at 2056 hrs and reported via telephone no. 0735xxxxxx. The incidence remained unattended from Wednesday evening up until Thursday the whole day. The delayed response to this clearly marked danger complaint resulted into a public fatality at around 0800hrs on July 31, 2020, where an adult lady and child were electrocuted. It is further alleged that the fallen pole had been reported to you over the last two weeks and no action had been taken.”

21. The mutual evidence by the claimant and RW is that the claimant had a mandatory directive from his superiors to attend an official training in Mombasa on July 30, 2020. The further evidence is that the claimant made the best possible arrangements for continued performance of his role while at the training and he travelled on July 29, 2020 to Mombasa for the mandatory training fixed for full day on 30.07.2020. In particular, the claimant’s unrebutted evidence was that he had locally delegated his duties to one Raphael Njagi S/No 17559, Customer Service Incharge, to coordinate all the activities of O&M given that all other supervisory staff in the county were also away attending the same training.
22. The Court has considered the claimant’s testimony against the Kombani Fatal Accident Investigation Report No. EPRA 017-2019/2020 dated 04.08.2020 and being the report on the incident in issue. It was prepared by Benjamin Kilonzo, the Safety Engineer, Coast and Checked by Hicks Waswa, Regional Manager, Coast. It is reported that a 34-year-old lady by the name Mwaka Dziwe Mwachenda was electrocuted together with her three-month old child (Jumaa Rashid) after they stepped on energized low voltage conductors which were lying on the ground at Bowa Village, Kombani Sublocation, Kwale County. The time of the accident is recorded as July 31, 2020 at around 0730 hrs. The report shows that investigations were carried out on August 1, 2020. The report made, amongst others, observations as follows:
  - a. The complaint of a broken pole and conductor on the ground was reported by a member of the public on July 29, 2020 at 2056 hours vide complaint No.5716073.
  - b. Cliff Nyambuga S/No 18530 who was on duty at the Emergency Desk Ukunda on July 29, 2020 as from 1500hrs to 2300hrs did not forward the incident to Emergency O&M for action.
  - c. Nathaniel Kamunde S/No. 18631 who was on duty on July 30, 2020 at 0700hrs Emergency Desk indicated that he was not able to review complaints made in the earlier shift as the system was down and he could not get assistance from his supervisors all of whom had travelled to Mombasa for the training – and he only handled reports of that day from customers.
  - d. Elyas Marshel the Supervisor at Emergency Desk had left on the evening of July 29, 2020 for the training in Mombasa. Similarly, George Mwambusa the CBM Kwale County and Paul Musau County O&M Engineer Kwale had travelled for the same training.
  - e. The LV line where the accident occurred was over a distance of 1022M with a transformer rating of 50kva and yet LV line length should not exceed 880M. The LV fuses on the transformer in issue were 63A, 63A and 125A but only one 63A fuses was healthy upon testing. The relevant HT earth was okay but no LV earth on one span away pole, PMEs after every four spans on the LV line was missing.
23. The report prescribed the following actions to prevent re-occurrence and to improve performance:
  - a. Take disciplinary action against Mr. Cliff Nyambuga S/No 18530 for failing to forward complaint No 5716073 on broken pole and conductors lying on the ground reported at 2056hrs on July 29, 2020.



- b. The IMS system could be upgraded to be able to escalate danger complaints to supervisors and superiors if not resolved in a given time frame.
  - c. All supervisors should not be called from a depot or county at the same time. Some supervisors should be left in the work place all the time and trainings could be done in shifts.
  - d. Check all O/D LV lines for Kwale County in FDB, re-design and construct to the required length.
  - e. Ensure use of correct transformer LV fuse sizes.
  - f. Install LV Earths in all pole mounted transformers i.e substations and PMEs in Kwale County.
24. The Court has considered the report and finds that indeed, on July 29, 2020 the claimant had travelled to Mombasa for the training that was scheduled for July 30, 2020. There was no evidence that the claimant had authority to redesign or in any manner oppose the directive that all supervisors attend the training. The evidence is that the report identified the officer who was culpable of the ensuing fatal accident and it was not the claimant. It was also not that the report had not been entered in the respondent's IMS system as purported in the dismissal letter but that the officer on duty had not acted on it as expected. The Court considers that the claimant as the Engineer Incharge or O&M Incharge for the time being though designated as FBBU In-charge, he had taken appropriate measures to ensure continued service delivery to the respondent's customers making emergency reports. The court upholds its opinion in *Edward Juma Masakha v National Environment Management Authority* [2014] eKLR thus, "While making the finding, the court further holds that it would be unfair labour practice for an employer to terminate a manager or other senior officer on account of obvious breach of trust by an officer working under the manager because managers are entitled to trust those who work under them and an employer's service delivery would be impossible if such trust relationship is not protected and respected."
25. Further, the report identified deficiencies in the respondent's operational systems, designs and devices that largely contributed to the accident. The deficiencies included design of LV lines with excessive lengths; releasing all supervisors from the station to attend the training; use of incorrect or unhealthy transformer LV fuse sizes; IMS system that could not escalate the danger complaints to supervisors if unresolved within time to be specified; and failure to install LV Earths in all pole mounted transformers. Such are deficient operational systems, designs, policies and devices by the respondent which the Court finds not attributable to the claimant's conduct, capacity, compatibility or breach of the respondent's operational requirements. In any event, the Court finds that the respondent has not established a reason attributable to its operational requirements and breached by the claimant that would justify the dismissal decision. Thus the Court returns that the reason for termination cannot be described as valid or fair in terms of section 45(2) (a) and (b) of the Act. The Court further finds that in the circumstances, it was unfair for the respondent to dismiss the claimant whereas the accident occurred and was largely attributable to its own internal deficient operational systems and policies within which, the claimant as an employee was struggling to do his best in the respondent's best interest. The Court upholds its opinion in *Grace Gacheri Muriithi v Kenya Literature Bureau* [2012] eKLR thus,

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems.



The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of *the Constitution* that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”

26. The Court therefore returns that the respondent has failed to show that the reason for termination was valid and exited as at termination as per section 43 of the Act and has further failed to discharge the burden of justifying the grounds for the dismissal as per section 47(5) of the Act.
27. While making that finding, the Court has considered the evidence and finds that by the letter dated November 17, 2016 the claimant was appointed 3<sup>rd</sup> Engineer in Regional Coordination Division, O&M Function, Coast Region, Kwale. By the letter dated 18.06.2018 he was appointed and transferred as the FBBU In-charge Kwale/Ukunda FBBU, Coast Region, Ukunda. While such changes in his service were effected, there is no reason to doubt RW's evidence that the kind of duties related to the accident in issue fell under the claimant as the FBBU, Kwale/Ukunda and within an emerging re-alignment of functions in the respondent's establishment but which re-alignment had not been fully implemented. Indeed, throughout the disciplinary proceedings the claimant had never urged that the matters under consideration fell outside his official duties and urging as much before Court is found to have been an unjustified afterthought. In any event, the findings on unfairness of the dismissal do not turn upon that issue of the proper official claimant's roles in the respondent's establishment and the claimant testified he had made arrangements to have the emergency reports handled while he was away for the training.
28. The 5<sup>th</sup> issue is whether the claimant is entitled to the remedies as prayed for. The claimant seeks an order of reinstatement and in alternative payment for unfair and unjustified dismissal under section 49 (1) (c) of the *Employment Act*, 2007. Section 12 (3) (vii) of the *Employment and Labour Relations Court Act*, 2011 empowers the Court to make an order of reinstatement of any employee within three years of dismissal, subject to such conditions as the Court deems fit to impose under circumstances contemplated under any written law. The factors to consider in granting the remedy of reinstatement or compensatory payment are spelt out in section 49(4) of the *Employment Act*, 2007. Section 49(4) (c) and (d) thereof provide for consideration of practicability of reinstatement, and, the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.
29. The Court has carefully revisited the circumstances of the present case and the submissions made for the parties. For the claimant it has been submitted that the factors in section 49(4) (a) to (m) of the Act apply and which have been enumerated in the submissions. It is submitted that the claimant's case satisfies all the enumerated statutory factors as follows:
  - a. The claimant wishes to be reinstated.
  - b. The prayer for reinstatement has been made within the stipulated statutory time frame.
  - c. The termination of the claimant was based on no valid or justifiable reasons and the procedure adopted for termination was unfair.



- d. The position which the claimant held is still available as the respondent has not demonstrated any reasons why the claimant cannot be reinstated to the position he was before the termination.
- e. The claimant has established a good case for reinstatement because his termination was unfair and he has not been able to secure alternative form of employment due to the manner in which he was terminated.
30. It was submitted that reinstatement with consequential order for back payment should issue as claimed and prayed for. In alternative, it was submitted for the claimant that in view of factors in section 49(4) (a) to (m), the claimant had faithfully worked for the respondent for a fairly long period of 10 years; he wished to be reinstated and to continue in employment; the dismissal was not based upon a valid reason; and the procedure was not fair. It was therefore submitted that he had established a case for maximum 12 months' compensation.
31. For the respondent it was submitted that the Court should find that there were good and valid reasons for summary dismissal of the claimant one of which was the claimant's wilful negligence in performing his responsibilities and therefore, the claimant's claim be dismissed. The respondent did not submit on the remedies in terms and view of the factors in section 49 of the Act.
32. The Court has considered the submissions and finds that the respondent is a large public body with a network of work stations and branches or regional establishment spread across the country. The Court finds that the claimant's professional services and the respondent's country-wide establishment diminishes personalised interaction in the employment relationship. The Court finds that in such circumstances there exist no established bar to practicability of reinstatement, especially in view of the undisputed submissions made for the claimant. The submissions made for the claimant are therefore upheld and the Court finds that the claimant has established a case for an order for reinstatement. As submitted, the claimant has satisfied the statutory time frame and factors for grant of reinstatement.
33. The Court has considered *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, where Mbaru J held thus, "50. The termination of an employee is a penalty with serious consequences that must be done with outmost regard and notice to the affected employee, who should be granted a reasonable opportunity to give a defence. Based on submissions and documents on record, I find there was no proper enquiry on the part of the respondent in this case. The termination was therefore done without observance of the respondents' rules of procedure, contrary to public interest that the respondent officers are bound to protect and the guidelines on disciplinary procedures for public officers." The Court has also considered the Court of Appeal decision in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017]eKLR (Waki, Karanja, & Kiage JJA) where in holding that matters in section 49(4) (a) to (m) must be seriously considered before granting the remedy of reinstatement, the Court stated, "A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a judge ought to set out factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute."



34. The claimant testified that he had invested heavily in his profession of engineering and an order of reinstatement should be granted to protect and enable him to ground his career as an Engineer. There is no reason for the Court to disregard those claimant's concerns and the Court returns that the same amounts to exceptional circumstance to grant reinstatement in the instant case. The Court considers that the grounding of his career flowing from his long-time of service with the respondent and resource investment is something in specie which the claimant would not otherwise be fully compensated even if granted the maximum 12 months' statutory compensation and which by his submissions has shown would otherwise be available. The Court follows its holding in *Jadiab M. Mwarania v Kenya Reinsurance Corporation* [2018] eKLR, thus, "The Court further returns that it would be unfair for the claimant to suffer loss of his hard earned professional reputation and employment in circumstances that are linked to his actions in discharge of official duty." In the instant case, the claimant appears to have properly performed his official duty to his best capacity but within the respondent's operational deficiencies, the fatal accident occurred. The Court considers that the occurrence of the fatal accident was obviously such a very sad and disturbing incident that likely brought the respondent's integrity to great public disrepute and admonition. However, the respondent has not established the same to be attributable to the claimant as to justify the sudden end of the claimant's professional investment over many years in the respondent's service.
35. The Court has found that the claimant has prayed for reinstatement but has as well established a case for maximum compensation under section 49 of the *Employment Act*, 2007 and as urged for him. The Court is alert that reinstatement is not always expected to be a pleasant thing every time the employer is visited with such an order. In that consideration the Court may seek to offer an optional breather window by way of granting compensation in alternative to an order of reinstatement. Thus, an employer who may have serious antagonism and which may be unforeseeable to the Court when the order is made, but apparently comes up when the employer is implementing an order for reinstatement, may justify an employer to legitimately opt not to keep the employee. In that way, the Court considers that the employer may in a proper case be allowed to have a last optional say on whether to keep the employee or to separate but, without undermining the employee's entitlement to compensation towards purging an established unfair termination.
36. The Court considers that in the instant case the claimant when reinstated should be able to perform satisfactorily and his immediate supervisors will think of him favourably or neutrally. The respondent is a public body and after reinstatement the Court does not consider that the claimant will suffer systematic actions and omissions of persecution or victimisation from the respondent by itself or by its agents, managers and directors. In any event, the Court does not envisage the respondent would engage in such persecutions or victimisation of the claimant after the reinstatement order especially in view of the respect ordinarily expected to be shown to Court orders. The Court has highlighted these considerations to demonstrate practicability and suitability of an order of reinstatement in the instant case.
37. Nevertheless, in the current case the claimant has prayed for and established a case for award of maximum compensation. Accordingly, the Court will let the respondent have the last optional say on whether to pay the maximum compensation or to implement reinstatement. Thus, in alternative to reinstatement and in default of deployment by the due date as will be ordered in this judgment, the claimant is awarded the maximum compensation for unfair dismissal and unlawful termination as per section 49 and 50 of the *Employment Act*, that is, Kshs 252, 000.00 by 12 months thus Kshs 3, 024, 000.00.
38. The claimant confirmed he had received the certificate of service and in any event, the remedy does not arise in view of the order of reinstatement to be issued and, if implemented accordingly.



39. To answer the 5<sup>th</sup> issue, the Court finds that on a balance of probability, the respondent has established the counterclaim of Kshs 21, 194,56. The Court considers that the same should be recoverable from the payment due to the claimant flowing from the order of reinstatement or compensation, as the case will be found appropriate by the respondent. As urged for the respondent, the claimant never objected to the computation of the amount in the counterclaim as had been set out in the impugned dismissal letter. In any event the claimant testified thus, “I see Domestic Appliance Loan Kshs 92, 468.73. I did not challenge that amount at all. During employment I used to take loans.”
40. The Court has considered the successful counterclaim and that otherwise, the claimant had received a certificate of service. The Court has further considered that the claimant has succeeded in his claim and consequential to the order of reinstatement, when implemented, parties should foster good employment relationship. In the circumstances, the respondent will pay only 75% claimant’s costs of the entire proceedings.
41. In conclusion judgment is hereby entered for parties with orders:
- a. The declaration that the termination of the claimant was unfair and wrongful.
  - b. The order hereby issued directing the respondent to reinstate the claimant in the service of the respondent with effect from August 26, 2020 in the position held before the termination without break in service and with full prevailing benefits and, to continue in that service until the due date of retirement or lawful separation; and in that regard, the respondent to deploy the claimant not later than August 1, 2022.
  - c. Consequential to the order of reinstatement in (b) above, the respondent is hereby directed to pay the claimant all withheld monthly salaries and allowances from 26.08.2020 to the date of deployment in order (b) above.
  - d. In alternative to reinstatement order in (b) above and in default of deployment by 01.08.2022, the respondent to pay the claimant a sum of Kshs. 3, 024, 000.00 (less PAYE) by 01.09.2022 failing, interest to run thereon at Court rates from the date of this judgment till full payment.
  - e. The respondent to recover a sum of Kshs. 21, 194.56 from the payment in order (c) or (d) above.
  - f. The respondent to pay only 75% claimant’s costs of the entire proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13<sup>TH</sup> MAY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

