



**Marenga v The Hon. Attorney General & another (Cause  
2609 of 2017) [2022] KEELRC 1680 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1680 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2609 OF 2017  
K OCHARO, J  
JUNE 30, 2022**

**BETWEEN**

**NOAH MWIROTSI MARENGA ..... CLAIMANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This suit was initiated by a statement of claim dated 19th December 2016 and filed on 20th December 2016, wherein the Claimant alleged that his employment had been constructively unfairly terminated and his professional career with the 2<sup>nd</sup> Respondents pre-maturely cut short without any justification. Consequently, he sought for the following reliefs against the Respondents, thus –
  - a. A declaration and or finding that the retirement of the Claimant in the Public Interest by the Respondents was contrary to Section R.23 of the Code of Regulations (Revised 2006), was unfair, unprocedural, wrongful and amounted to unfair employment practice and was therefore illegal termination of the Claimant's employment.
  - b. A declaration that the letters dated 13th April, 2015, 16th July, 2015, 3<sup>rd</sup> November, 2015 and 13th April, 2016 were issued unprocedurally and are therefore null and void.
  - c. A declaration that the Claimant's salaries, benefits and allowances were wrongfully withheld by the Respondents and that the same be released to him forthwith as computed in Paragraph (C) above with interest.
  - d. That the 1st & 2nd Respondents do, from the date of the delivery of Judgment, pay up and clear the amounts that will be outstanding as at that date with Barclays Bank on the Claimant's loan.



- e. That this Honourable Court be pleased to find and hold that the Claimant has suffered public embarrassment, ridicule and defamation of his character as a Public Officer and damages be assessed by the Court to compensate him for the same.
  - f. That the 1st & 2nd Respondents' do pay the Claimant twelve (12) months compensation as Damages for unfair and unlawful termination of employment.
  - g. That the Respondents do bear the Costs of this Claim.
  - h. That this Honourable Court do make such other and further orders that it deems fit to meet the ends of justice.
2. In response to the claim, the Respondents filed a Response to claim dated 1<sup>st</sup> September 2017, wherein they denied the Claimant's cause of action, and entitlement to the reliefs he has sought.

**Claimant's Case.**

3. The Claimant stated that he was employed by the 2<sup>nd</sup> Respondent on 12<sup>th</sup> November 1986 as a clerk, and subsequently worked in various departments within the Government in the same capacity. He states that his diligence and commitment in the discharge of his duties saw him rise to the position of Accountant II, Job Group J, with effect from 27<sup>th</sup> October, 2010, at a salary of KShs.21,304 per a month, through a letter dated 14<sup>th</sup> January, 2010. At this time, he was working under the Ministry of Justice, National Cohesion and Constitutional Affairs.
4. He stated that by an Internal Memo dated 5<sup>th</sup> November, 2010, he was subsequently deployed to the Public Complaints Standing Committee [PCSC], which was under the above stated ministry.
5. The Claimant avers that he carried out his duties well and to the satisfaction of his employer until 26<sup>th</sup> January 2011 when he received a letter from the Executive Director of the PCSC accusing him of absenteeism on various dates totaling to eight [8] days and poor performance of duty.
6. He states that he was able to explain where he had been on the dates of his alleged absence from work since his job description required him to work out of the office. That to the best of his knowledge, the matter had since been put to rest and he carried on with his duties.
7. The Claimant avows that shortly after, he was requested to proceed on a 20-day annual leave while awaiting deployment. He states that he duly proceeded on leave as requested on 11<sup>th</sup> March, 2011 and after the expiry of the 20 days he reported back to his work station, as he had not received any communication while he was away on his deployment or otherwise.
8. He states that upon return, he found that the Chief Accountant, who was his direct Supervisor, had been transferred to a new station and replaced with an Assistant Accountant General who informed him that his leave had not been approved as the former Chief Accountant had not handed over a record to him regarding the approval. The Claimant further avers that the Assistant Accountant General informed him that he had therefore written to the Assistant Director - Human Resource to the effect that he had absconded duty. The Claimant maintains that his application for leave was done procedurally and at the request of the Executive Director.
9. He states that as a result of the above, he proceeded to see the Assistant Director - Human Resource Manager (Assistant Director - HRM) who informed him that a letter requiring him to show cause why he had absconded duty had been sent to him through his personal Post Office.



10. The Claimant stated that he did not receive any such letter from the Respondents either personally or through his postal address and he informed the Assistant Director - HRM as much. The latter insisted that the letter had been dispatched. He states that he proceeded to his Post Office to confirm whether the postmaster had received any letter from the Respondents but had erroneously mixed it up with others, but the said letter could not be traced.
11. He began making frequent visits to the above officer to find out the status of the alleged dispatched Show cause letter and that during one of these visits, he was informed by the Assistant Director - HRM that a Dismissal letter had also been sent through the same Postal address. He denied having received the same and upon demand to see a copy from his file, the Assistant Director - HRM declined to show him one.
12. The Claimant avers that to date, he is yet to receive the dismissal letter despite a host of visits to the employer's central and secret registry. On 22<sup>nd</sup> July 2013, two years after the letters were allegedly sent, the Registrar-in-charge admitted that they could not trace how and when the letters were sent neither did they have a copy of the same.
13. The Claimant further stated that sighting mischief in how his matter was being handled, he wrote a letter dated 27<sup>th</sup> July, 2013 to the 2<sup>nd</sup> Respondent's Chairman seeking his intervention and praying that he be reinstated to employment. However, the letter didn't attract any response, instead, on 10<sup>th</sup> March, 2014 he received a letter from the 1<sup>st</sup> Respondent informing him that the 2<sup>nd</sup> Respondent had disallowed his appeal against the dismissal from service.
14. He states that he promptly applied for Review of the decision to dismiss him from service to the Secretary of the 2<sup>nd</sup> Respondent on 18<sup>th</sup> March, 2014 explaining why he felt that the dismissal was unfair and citing personal differences between himself and the then Executive Director of the PCSC.
15. On 23<sup>rd</sup> June, 2014 he received a letter from the Solicitor-General, possibly in response to his letter, informing him that his application for review had been allowed on grounds that the show cause letter was sent to a wrong address. The letter further stated that it had been decided that the Claimant be retired from the service in the Public interest as he had poor record of performance and was a regular absentee.
16. He maintains that no complaint of poor performance and absenteeism had ever been made against him by the 1<sup>st</sup> Respondent and he was therefore a stranger to the said allegations. That despite this, on 7<sup>th</sup> July, 2014 he responded to the 1<sup>st</sup> Respondent's dismissal letter.
17. His request for review was considered by the 2<sup>nd</sup> Respondent who through a letter dated 7<sup>th</sup> October 2014 informed the 1<sup>st</sup> Respondent that they had allowed the application, but decided that he would be called upon to show cause why he should not be retired from service on public interest.
18. He states that despite the above letter, the 2<sup>nd</sup> Respondent took no action. That after five (5) months of silence from the 1<sup>st</sup> Respondent, he approached the Office of the Ombudsman for assistance. The Ombudsman wrote a letter dated 18<sup>th</sup> March, 2015 to the 1<sup>st</sup> Respondent requesting for an indication on steps that they had taken, if any, to address his case.
19. The letter did not elicit any response. However, after a period of almost six (6) months, the 1<sup>st</sup> Respondent wrote to the Claimant on 13<sup>th</sup> April, 2015 asking him to Show Cause why disciplinary action should not be taken against him on grounds of desertion of duty.
20. The Claimant stated that he once again responded to the Show Cause letter, vide a letter dated 24<sup>th</sup> April, 2015 setting out his good record of employment and requesting for reinstatement. He did



- not receive any further communication from the 1<sup>st</sup> Respondent until two (2) months later when he received a letter dated 16<sup>th</sup> July, 2015 suspending him from official duties with effect from 10<sup>th</sup> January, 2011.
21. The letter of 16<sup>th</sup> July, 2015 also required the Claimant to Show Cause why he should not be retired from the Service in the Public Interest. It further stated "Please treat our earlier letter Ref. No. CONF/1986112445 (28) dated 13<sup>th</sup> April, 2015 as cancelled."
  22. The Claimant avers that he responded to the 1<sup>st</sup> Respondent's Show Cause letter on 22<sup>nd</sup> July, 2015. On 3<sup>rd</sup> November, 2015 the 1<sup>st</sup> Respondent wrote a letter to him informing him of the recommendation of the Ministerial Human Resource Management Advisory Committee to retire him from the Service with effect from 6<sup>th</sup> August, 2015 on public interest in accordance with Section R.23 of the Code of Regulations (Revised 2006) for poor record of performance and regular absenteeism.
  23. The Claimant avers that he was not aware of the said meeting of the Ministerial Human Resource Management Advisory Committee that allegedly took place on 6<sup>th</sup> August, 2015 to deliberate on his case and neither was he invited to the said meeting by the 1<sup>st</sup> Respondent to defend himself against the allegations that were presented therein. He was therefore condemned unheard.
  24. The Claimant avers that the decision to force him to retire was without due regard to the provisions of *the Constitution* of Kenya 2010, the *Employment Act* 2007 and the rules of Natural Justice and/ or acceptable labour practices.
  25. He states that despite efforts to reach the 1<sup>st</sup> Respondent through numerous letters seeking guidance and payment of his final dues, there was no forthcoming response. That on 11<sup>th</sup> July 2016, he applied for review to the 2<sup>nd</sup> Respondent, following advice from the 1<sup>st</sup> Respondent, setting out the twists and turns of his case and also questioning his position with the service.
  26. That 3 [three] months later, he received a letter from the 1<sup>st</sup> Respondent dated 31<sup>st</sup> October 2016 informing him that his application for review had been disallowed by the 2<sup>nd</sup> Respondent and that it was decided that his case be closed. He also maintains that he has to date not paid his final dues.
  27. Under his evidence under cross examination the Claimant asserted that the decision to retire him was made without him being heard. He however acknowledged that there were constant communications over the matter as between him and the Respondents.
  28. The Claimant stated that the nature of his duties would not allow him to be in the office throughout. It entailed him sometimes leaving the office to visit other offices, for instance when taking vouchers to those other offices. Whenever he left the office, he would inform his manager verbally. If he had to be absent from duty, then it was in his line of duty.
  29. Shown the Respondent's documents and more specifically, the Internal Memo of 10<sup>th</sup> January 2011, the letter dated 26<sup>th</sup> January 2011 and the letter dated 7<sup>th</sup> February, 2011, the Claimant admitted that all of them spoke to his absenteeism.
  30. The leave form dated 27<sup>th</sup> January 2011, was only forwarded for approval, it was not approved. There was only a recommendation for approval on it. He had applied for 10 days leave and from the face of the form, it was to commence on the 28<sup>th</sup> November, 2011. He was allowed to proceed for the leave, it was therefore approved.
  31. His first correspondence to the Respondent was that of 27<sup>th</sup> July 2013. He asserted that between 27<sup>th</sup> January 2011 to 27<sup>th</sup> July 2013, he would go to the office, get, no duties allocated to him, and Assistant



- Director's instructions to go home and wait for a communication from them. He visited the director's office severally.
32. After his leave, he reported back to work immediately. The Respondents' allegation that he wouldn't be traced was untrue.
  33. The Claimant stated that he wrote a letter dated 27<sup>th</sup> July 2013, explaining where he was. He appealed against the Respondents' decision; he was subsequently informed that the appeal was disallowed. Information that he was to be retired on public interest was brought to his attention.
  34. He asserted that he never received the show cause and dismissal letters. His request for copies of the same yielded no fruits.
  35. Justifying his claim for Commuter allowance, the Claimant asserted that after his leave expired, he used to report for duty.
  36. He contended that he had a personal difference with the Executive Director, and that he verbally brought this to the attention of the Assistant Director General. The Executive Director was demanding for money for every recruitment.
  37. He denied having received any payments from the Respondent as the latter was alleging.

#### **Respondents' Case.**

38. Anne Mburu Mutua – the 1<sup>st</sup> Respondent's Human Resource Management and Development Officer, testified on behalf of the Respondents. She adopted the contents of her witness statement dated 2<sup>nd</sup> June 2020, and the further witness statement dated 24<sup>th</sup> September as her evidence in chief.
39. The Respondents contend that the Claimant was dismissed on grounds of desertion of duty and poor performance. That the dismissal was according to the law, it was fair and justifiable, and that due procedure was followed.
40. The witness stated that the Claimant was first employed in the civil service on the 17<sup>th</sup> November 1986 as a Clerical Officer, Job Group D. He rose through the ranks and was appointed Accountant II with effect 27<sup>th</sup> October 2010.
41. On or about the 1<sup>st</sup> September 2008, he was deployed to serve under the Anti- Corruption Steering Committee, [NASCC], where he served until the 14<sup>th</sup> October 2010 when he was deployed to the Kenya Law Reform Commission [KLRC].
42. On the 14<sup>th</sup> October, 2010, the Secretary KLRC requested for redeployment and requested for replacement of the Claimant on account that his performance was perennially below the set targets. He was reporting to duty late, and sometimes absenting himself from duty without authority and or proper reasons. His manner of work, couldn't fit in the robust standards that the Commission had set.
43. The witness stated that consequently the Claimant was redeployed to the Public Complaints Standing Committee with effect 5<sup>th</sup> November 2010. By the letters dated 10<sup>th</sup> January 2011 and 26<sup>th</sup> January 2011 it was complained of the Claimant that he had absented himself from work and that his performance was wanting.
44. It was stated that the Public Complaints Standing committee's efforts to reach the Claimant failed as his phone was off throughout. During this period the Claimant had an imprest of Kshs. 100,000 [One Hundred Thousand] which was meant for office running. This was deemed theft of public funds.



45. On 7<sup>th</sup> April 2011 a show cause letter was issued to the Claimant, posted through his last known address. In the letter he was required to show cause within 21 days why his employment couldn't be terminated on account of absenteeism.
46. At the lapse of the 21 days, there was no response from the Claimant and on the 17<sup>th</sup> October 2011, in its meeting, the MHRMAC Committee deliberated on his case and recommended that he be dismissed from service with effect from 10<sup>th</sup> January 2011 on grounds of desertion of duty and that any government liability be followed up from him as a public debt.
47. He avers that the Human Resource department issued a letter of dismissal which was sent through the Assistant Accountant General by registered mail and through the Claimant's last known address.
48. The witness stated that the Claimant, through a letter dated 3<sup>rd</sup> September 2013 appealed to the Public Service Commission and sought to be reinstated. The 2<sup>nd</sup> Respondent in turn requested the 1st Respondent for advice on the Claimant's request and on 19<sup>th</sup> September 2013, the 1st Respondent responded urging that the dismissal be sustained.
49. The witness stated that on 12<sup>th</sup> February 2014, the 2<sup>nd</sup> Respondent informed the Claimant that the appeal had been disallowed but brought to his attention his right of application for review. The appeal was disallowed on the following grounds that;
  - [a] the Claimant was warned severally about his habit of absencing himself without authority.
  - [b] he left office before his leave was approved and failed to resume duty.
  - [c] he failed to respond to the show cause letter, and his whereabouts.
50. The Claimant applied for a review on 21<sup>st</sup> March 2014 and through a letter dated 11<sup>th</sup> June 2014, the 2<sup>nd</sup> Respondent allowed the application and ruled that the Claimant be retired from service in public interest citing poor performance and absenteeism.
51. The witness stated that the Claimant challenged the above decision through his letter dated 7<sup>th</sup> July 2014. The 2<sup>nd</sup> Respondent allowed the appeal citing the fact that the show cause letter was sent to a wrong postal address. It directed that a notice to show cause be issued afresh, calling the Claimant to show cause why he shouldn't be retired in public interest.
52. On the 16<sup>th</sup> July 2015 the 1<sup>st</sup> Respondent issued a show cause letter to the Claimant on why he shouldn't be retired in public interest on account of poor performance and regular absenteeism. The Claimant responded through a letter dated 22<sup>nd</sup> July 2015.
53. Subsequently, the matter was placed before the MHRMAC and in its meeting of 6<sup>th</sup> August 2015, it recommended that the Claimant be retired in public interest on account of poor performance and regular absenteeism. As a consequence, thereof, the 2<sup>nd</sup> Respondent made a decision that he be retired in public interest, and that the period between 10<sup>th</sup> January 2011 and 22<sup>nd</sup> March 2016 be treated as leave without pay.
54. The Claimant made an application for review of the decision to retire him in public interest, which application was disallowed as it didn't raise any sufficient ground to attract the review.
55. The Respondent contended that the Claimant was duly paid his dues in the sum of Kshs. 256,290.40 through his Equity Bank Account Numbers 0470164575411.



56. The witness contended that during the time of the termination of the Claimant's employment, it wasn't mandatory that an employee appears before the committee for hearing of his/ her disciplinary matter. His/ her written response to the show cause letter sufficed for consideration.
57. As regards performance of employees, the witness asserted that performance appraisal on employees was a continuous exercise, it was done day to day. One needed to seat with his/her supervisor at the end on the year to know how his performance was rated.
58. Cross examined by Counsel for the Claimant, the witness reiterated that performance appraisal was a continuous exercise as exemplified by the internal memo dated 11<sup>th</sup> January 2011, the Claimant's exhibit Number 3.
59. The witness asserted that the letters dated 10<sup>th</sup> January, 2011, 26<sup>th</sup> January 2011 and 7<sup>th</sup> February 2011 amounted to show cause letters though they didn't require the Claimant expressly, to explain his absence from work.
60. The witness testified that the Respondents had no document to prove that an effort was made to trace the Claimant with no success.
61. The letter dated 7<sup>th</sup> April 2011 accused the Claimant of being absent from duty for 8 days without authority. The period between 28<sup>th</sup> January to 7<sup>th</sup> April 2011, the letter was written after a period of more than two months. The witness confirmed that the Claimant made an application for leave on the 27<sup>th</sup> January 2014, but he proceeded thereto before the same would be approved.
62. The address on the leave application form is different from that on the notice to show cause letter, and the dismissal letter.
63. She stated that the Claimant was never granted an opportunity to appear before the committee that decided that his retirement. The meeting took place on the 31<sup>st</sup> October 2011.
64. The 1<sup>st</sup> Respondent issued the Claimant with a letter dated 16<sup>th</sup> July 2015, retiring him from the service, with an indication that the effective date was January 2011, a period of over four years since the time the allegations of poor performance and absenteeism were first raised against him.
65. On the alleged payment of the Claimant's final dues by the Respondent, specifically House and medical allowance, the witness admitted that the payment voucher didn't bear the Claimant's account, and that though under her letter dated 29<sup>th</sup> November 2016, she forwarded the Claimant's file to the National Treasury for processing of his pension, she didn't have proof that receipt of the same was acknowledged.
66. In her evidence under re-examination, the witness contended that she placed before this court transfer of funds documents, which documents bear the Claimant's account number.

## **Submissions**

### Claimant's Submissions.

67. The Claimant listed the following issues for determination:
  - a. Whether the 1<sup>st</sup> Respondent had valid and justifiable reasons to terminate/retire the Claimant on public interest.
  - b. Whether the Claimant was unfairly terminated from service.
  - c. Whether the Claimant is entitled to the reliefs sought.



68. The Claimant's Counsel submitted that the Claimant worked with the PSCS from 5<sup>th</sup> November 2010 to January, 2011. As at the time he was deployed to work as an accountant with the 1<sup>st</sup> Respondent on 5<sup>th</sup> November 2010, his performance targets for the year 2010/2011 were to be assessed at the end of the said period of one year so as to facilitate performance appraisal. However, with ill motive, the 1<sup>st</sup> Respondent through its letter dated 26<sup>th</sup> January 2011, decided to redeploy him and replace him with another employee.
69. It was further submitted that the 1<sup>st</sup> Respondent did not provide any evidence of performance appraisals, warning letter or minutes of disciplinary proceedings to support its allegations that while at the KLRC, his performance was below expectation.
70. Further that the 1<sup>st</sup> Respondent had equally not tendered any evidence to show that the 1<sup>st</sup> Respondent did have the Claimant advised, counselled and assisted in any manner to mend his ways and improve on his performance before the action brought forth in the letter dated 26<sup>th</sup> January, 2011 was undertaken. Reliance was placed on the case of *D.K Njagi Marete -Vs- Teachers Service Commission* [2013] eKLR, where the court held;

“There must be shown valid reasons amounting to public interest, to justify termination. The employer would be expected to show adherence to fair termination procedure, before arriving at the decision. If the allegation against the employee is non-performance, the employer must at the onset advise, counsel, and assist the public servant to mend his ways. In case there is no change, the employer should call for special appraisal. At the end of these procedural steps, the employer would have material with which to confront the employee and justify retirement on public interest. If public employers are allowed to merely invoke public interest in retiring employees, without giving elaboration of the circumstances giving rise to the infringement of public interest, the employment protection given under the *Employment Act* 2007 would be meaningless to public servants.”

71. As regards absenteeism, it was argued that though the 1<sup>st</sup> Respondent contended that efforts were made to trace the Claimant, with no success as his phone was switched off, it didn't place any material before the court in prove of this.
72. It was further submitted that the law placed a burden on the 1<sup>st</sup> Respondent to prove that the reasons that attracted the termination of the Claimant's employment and that the reasons were justified and valid. To buttress this submission, reliance was placed on the case of *Kizito M. Lubano -Vs- Kemri Board of Management & 8 Others* [2015] eKLR. Where the Court expressed itself thus;

“The clarity of Section 43 of the *Employment Act* in this case is that, whether an employee is in the public or private employment, these provisions are mandatory. The termination of any contract of employment must meet a set threshold. There must be genuine reasons to terminate a contract of employment; such a reason or reasons must be proved; and where there are no reasons or the reasons are found not to be genuine, any resulting termination of an employment contract is unfair. The duty is vested upon an employer to prove the reasons for termination of an employment contract. In *DK Njagi Marete* case the court went further and stated that the employer must show objective and demonstrable grounds warranting termination of an employment contract. In this case, the employer who relied on the reason of public interest had to go a step further and show that such a reason was driven by public policy objective. Therefore, without such ingredients, to pick a reason such as the one given



to the petitioner without setting out the principles outlined above rendered the same void. It had no legitimacy as it lacked justification.”

73. Submitting on the second issue, procedural fairness, The Claimant’s Counsel submitted that Rule 22 [2] of the Public Commission Regulations denotes that the stipulations of the Regulations shouldn’t be read in isolation from other relevant provisions of the law. As such in discharging the Claimant from service, the Respondents were bound to adhere to procedural fairness, make the decision with substantive justification. In support of this point, the decisions in John Benson Githinji -Vs- Attorney General & 4 Others [2014] eKLR, And Kizito-vs- Kemri Board of Management & 8 Others (Supra), were cited.
74. The Respondents failed to prove to the requisite standard that the termination was on valid and fair grounds. They didn’t accord the Claimant an opportunity to be heard in breach of his constitutional right under Article 50 of *the Constitution* of Kenya ,2010.
75. On whether he is entitled to the reliefs sought, the Claimant submitted that having proved that the discharge from service was unfair, he is entitled to the reliefs sought in his pleadings.

### **Respondents’ Submissions.**

76. The Respondents identified the following issues for determination:
  - a. Whether there was valid reason for dismissing and subsequently arriving at a decision to retire the Claimant on public interest?
  - b. Whether the employer followed due process in terminating the Claimant's contract, and subsequently arriving at a decision to retire him.
  - c. Whether the Claimant has received from the Respondent an amount of Kshs. 326,910 less statutory deductions
  - d. Whether the Claimant is entitled to Compensation.
  - e. Whether the Claimant had any record of misconduct and or had previously been warned over poor performance and gross misconduct.
77. The Respondents submitted that Claimant was summarily dismissed from employment on account of absenteeism. That he disappeared from duty for a period of two years and ten months, period running from 27<sup>th</sup> January 2011 when he applied for annual leave which leave was not approved to 27<sup>th</sup> July 2013. The Respondents were justified to summarily dismiss him due to gross misconduct as envisaged under the provisions of Section 44(4)(c) of the *Employment Act*. They made reference to the courts’ holdings on absconding duty by employees in the cases of Gideon Akwera vs Board of Governors Church on the Rock Academy (2015) eKLR, Simon Ngugi Kamau vs Silpack Industries Limited (2015) eKLR and Naftali Priva Kitau vs Jitegeme Sacco Society Ltd (2019) eKLR.
78. On due process, the Respondents submitted that the Claimant was offered a fair hearing, before he was retired on public interest. They argued that a fair hearing does not necessarily have to be an oral hearing. There were a host of correspondences between the Respondents and the Claimant on the grounds that attracted the sanction of being retired. In this respect, they cited the Court of Appeal decisions in the cases of Kenya Revenue Authority vs Menginya Salim Murgani, Civil Appeal 108 of 2009 and Judicial Service Commission vs Gladys Boss Shollei & another (2014) eKLR.



79. They concluded that the Claimant had not adduced any evidence to support his claim as to the reason of his constant absenteeism and poor work performance during his tenure hence the decision to retire him on public interest was justified.
80. The Respondents submitted that the Claimant was indeed paid Kshs. 326,290.04 into his Equity Bank account through a payment voucher as is the practice in government. They relied on the Court of Appeal decision in *Abdi Ali Dere vs Firoz Hussein Tundal & 2 others* (2013) eKLR.
81. They urged the court to dismiss the Claimant's claim of compensation of unpaid salary for 62 months. An award of the same would amount to sanctioning an unjust enrichment. The computations by the Claimant in his claim have no basis and are erroneous. They should be ignored.

### **Analysis and Determination**

82. From the pleadings by the parties, the evidence that they have placed before this Court, and the submissions by their respective counsel, the following issue commend themselves for determination, thus;
  - [i] Whether the decision to retire the Claimant from service was procedurally fair.
  - [ii] Whether the decision to retire the Claimant from service on public interest was substantively justified.
  - [iii] Whether the Claimant is entitled to the reliefs sought.

### **Whether the decision to retire the Claimant was procedurally fair.**

83. From the onset, it is imperative to state this matter had its own turns and twists. Decisions, appeals, and applications for review characterized the events, pre-court. The evidence by the parties as hereinbefore elaborately brought forth is testament to this. The disciplinary process that was commenced and proceeded with, a process which took almost 5 [five] years to be completed, had two verdicts. The first verdict against the Claimant was a summary dismissal that was contained in the letter by 15<sup>th</sup> December 2011. The second one being that of retirement of the Claimant on public interest. The latter being a verdict that was born out of a process that was undertaken after the dismissal was set aside by the 2<sup>nd</sup> Respondent.
84. Having stated as I have herein above, this court shall in its decision herein dwell on this latter process, and the decision thereof, the retirement of the Claimant in public interest.
85. Retirement in public interest is a form of termination at the instance of an employer. It is therefore an involuntary termination. In character being so, then it is not difficult for one to conclude that whenever an employer decides to terminate an employee's employment on public interest, he or she must have adherence to procedural fairness. This court has in the past expressed itself that Section 41 of the *Employment Act*, 2007 provides the structure for procedural fairness. Further that however, the provision shouldn't be read in isolation from the, provisions of *the Constitution*, the tenets of natural justice, and the provisions of the Fair Administrative Actions Act.
86. It is a duty upon the employer to prove that fair procedure was present in the process that led to the decision to have an employee get retired on public interest. The three components of fair procedure, namely; notice/ information; hearing; and consideration must be demonstrated to have been there, if the process is to be considered fair.



87. The Claimant contended that he was not heard by the committee that recommended his retirement in public interest. That this was in breach of, what the law expected of the Respondents, his right to fair hearing under Article 50 of *the Constitution*, and the tenets of natural justice. The Respondents' position on the issue was to the contrary. They contended that the Claimant was served with a show cause letter dated 16<sup>th</sup> July 2015, and responded through his dated 22<sup>nd</sup> July 2015. That the MHRMAC considered the Response before arriving at the decision for him to be retired in public interest as he had a record of poor performance and was a regular absentee.
88. In fact, according to the Respondents' witness, at the material time, oral hearings were not necessary. She therefore confirmed that the Claimant was not accorded any opportunity to appear before the Committee to explain himself against the accusations of poor performance and regular absenteeism. In support of this position the Respondents cited the case of Kenya Revenue Authority v Menginya Salim Murgani, Civil Appeal 108 of 2009, where the Court held;
- “However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and where are satisfied that it was a fair hearing.”
89. In my view, the above stated holding does not in any manner diminish the protection and right accorded by Section 41 of the *Employment Act* to employees. It didn't give employers an absolute license to avoid oral hearings at their convenience. Whether a hearing is to be by way of correspondences or an oral one highly depends on the circumstances of each matter. However, a keen consideration of Section 41 of the *Employment Act* in its entirety reveals that it contemplates an oral hearing, reason why it encompasses an employee's accompaniment right, in the manner it has.
90. Having stated this, I am of the view that opting for a hearing in a manner that is not oral is an exception to the hearing mode contemplated under the above cited provision of the law, therefore leaving an employer so opting with a duty to establish that the circumstances of the matter justified the opting, whenever there is a contest over whether the failure to have an oral hearing was procedurally fair or not. It is not enough for an employer to state that we opted for the correspondence mode, because then to us an oral hearing was not necessary, as was the case in this matter.
91. I have carefully considered the allegations the subject matter of the disciplinary action that was taken by the Respondents, the turns and twists alluded to hereinabove that characterized the disciplinary process, and come to a conclusion that in this matter an oral hearing was necessary for a fair and just interrogation of the facts and documents that formed the basis for the allegations and consequent disciplinary action.
92. I am persuaded by the holding in the case of Kizito M. Lubano vs- Kemri Board of Management & 8others [2015] eKLR, thus;

“97..... Due process is paramount. Before a termination of an employment contract, whatever the public interest that may exist to suggest that such an officer should be retired and their contract terminated, due process must be given a chance. Such an officer must be given notice and a chance to be heard in his defence.

In the proceeding against the petitioner held on the 4<sup>th</sup> April 2014 or any other day, none relate to any notice of retirement in the public interest. To therefore apply the same in his dismissal was arbitrary, unilateral and influenced by extraordinary motives not disclosed to the petitioner or the court.”



93. In the upshot I am persuaded to find that the termination of the Claimant's employment in public interest was procedurally unfair.

**Whether the termination was substantively fair**

94. Section 43 of the Employment Act places an obligation upon an employer to prove reason[s] for the termination of an employee's employment whenever there is a dispute regarding the termination. However, it is not enough to establish the reason[s], there is a further obligation placed upon the employer to discharge, prove that the reason[s] was valid, and fair, under Section 45 of the Act, and that the reason[s] was justified, Section 47[5]. In the case of Kizito M. Lubano [supra], the Court aptly captured it, thus;

“The clarity of Section 43 of the Employment Act in this case is that, whether an employee is in private or public employment, these provisions are mandatory. The termination of any contract of employment must meet a set threshold. There must be genuine reasons to terminate a contract of employment; such reason or reasons must be proved; and where there are no reasons or the reasons are found not to be genuine, any resulting termination of an employment contract is unfair. The duty is vested upon the employer to prove the reasons for the termination of an employment contract. In DK Merete case the Court went further and stated that the employer must show objective and demonstrable grounds warranting termination of an employment contract. In this case the employer who relied on the reason of public interest had to go a step further and show that such a reason was driven by public policy objective.....”

95. The letter dated 13<sup>th</sup> April, 2016 by the 1<sup>st</sup> Respondent addressed to the Claimant read in part;

“Reference is made to the Public Service Commission of Kenya's letter Ref. No. D/MA/994[35] 23<sup>rd</sup> dated March, 2016 regarding the above-mentioned subject.

This is to inform you that it was recommended you be retired from the service in public interest with effect from 23<sup>rd</sup> March 2016.

The period between 10<sup>th</sup> January, 2011, and 22<sup>nd</sup> March 2016 will be treated as leave without pay. You are also informed of your right of application for Review accordingly.”

96. Section 45 of the Act provides:

1. No employer shall terminate the employment of an employee unfairly.
2. A termination 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 and compatibility; or
    - c. Based on the occupational requirements of the employer.”



97. Judicial attention has been given severally on the duty imposed on the employer under this provision. In the case of Janet Nyandiko v. Kenya Commercial Bank Limited [2017] eKLR the Court of Appeal expressed itself, thus:

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In the terms of the said Section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was fair reason and the same related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity .....”

98. It is not in dispute that the Claimant’s employment was terminated on what the Respondent termed “in the interest of public interest due to his poor performance and absenteeism.” In order for an employer to successfully discharge his or her burden under Section 45 [2] where he or she is contending that the termination of the employee’s employment was due to his poor performance, he or she must satisfy a number of conditions. Addressing the conditions, the Court of Appeal in National Bank of Kenya vs. Anthony Njue John [2019] eKLR cited with approval the decision in Jane Samba Mukala v. Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010, the Court stated;

“The reason advanced by the Bank for terminating the Respondent’s employment was poor performance. In Jane Samba Mukala v. Ol Tukai Lodge Limited Industrial Cause Number 823 of 2020; [2010] LLR 251 [KIC] [September 2013], the Court observed as follows:

- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined by Section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy of evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

99. In a bid to discharge its burden the Respondents’ witness baldly asserted that the performance appraisal of the 1<sup>st</sup> Respondent’s employees was done continuously and on a day-to-day basis. The Respondents did not at all through their witness or in any allowable form put before me any document from which



this would be discerned. Yet it was really imperative that the same be tendered as evidence in the circumstances of the matter.

100. The Respondent's witness sketchily testified to the fact that the Claimant perpetually performed below expectation. The witness however did not put before the Court any material showing that on various dates the Claimant was evaluated and that the results therefrom indicated an unsatisfactory performance.
101. It has not escaped the Court's mind that the Claimant was shifted from one department to another, it was necessary therefore that appraisals for various times from the various departments be placed before the Court, this was not done.
102. The Respondents did not place any evidence before this Court demonstrating that the poor performance was brought to the attention of the Claimant, that he was given a chance to improve on it. It is clear from the evidence of the witness that the Claimant was not given a chance to defend himself on the alleged poor performance. Here it is not difficult to conclude that the Respondents did not act with justice and equity.
103. In the letter dated 23<sup>rd</sup> March, 2016, hereinabove mentioned it was inter alia stated that the Claimant was being retired on public interest as the records indicated that his performance and conduct were poor. It was imperative that the record be placed before this Court for interrogation if at all it did exist. In fact, the Respondents' witness did not at all refer to the record in her testimony.
104. The retirement of the Claimant was further based on the ground that he was a regular absentee. I have carefully considered the material before me regarding the alleged habit of, and regular absenteeism, and note the following: that the Claimant's evidence that he dully explained to his supervisor that his job entailed sometimes visiting other offices in the course of his official duties was not challenged; that therefore he duly explained the absence from office on the 8 days that were put on the letter dated 26<sup>th</sup> January 2011 by the executive director PCSC, too.
105. In the circumstances of the matter, it was therefore imperative that a record be placed before the Court demonstrating the Claimant was not out of the office for the 8 days as a result of him visiting other offices. In the course of that period.
106. The court notes that the Respondents' Counsel has submitted that the Claimant deserted duty when he proceeded on an unapproved leave on 28<sup>th</sup> January 2011, not to report to work thereafter. That the Respondents therefore had a valid reason to terminate his employment. I note that in the letter of termination, flowing from the decision the Committee, the period after this day was considered a period when the Claimant was on leave but without pay. The Respondents cannot be heard to rely on this period as a period of desertion. They cannot reprobate and approbate.
107. All the above premises speak to lack of validity in the reason for termination, lack of justification and equity, and lastly lack fairness in the termination.
108. I have not lost sight of the fact that the termination was alleged to be in public interest. It was not enough for the Respondents to pronounce public interest. It befell on the them therefore to go a step further to show that the reasons above stated were driven by public policy objective.
109. In the case of D.K. Njagi Marete [supra], the Court held, and I am persuaded with the holding, that;  

“The Respondent had the onus to show objective and demonstrable grounds warranting retirement of Marete. When a public employer justifies the premature termination of a contract of employment, on grounds of public interest, such an employer must show its



decision is driven by public policy objective, and that the decision taken is legitimate and justifiable. It is not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest has been made. There must be shown valid reasons amounting to public interest, to justify termination. The employer would be expected to show adherence to fair termination procedure, before arriving at the decision ..... If public employers were allowed to invoke public interest in retiring employees, without giving elaboration of the circumstances giving rise to the infringement of public interest, the employment protections given under the Employment Act 2007 would be meaningless to public servants.”

Carefully considering the material placed before this Court by the Respondents, I am not able to see any that was geared towards establishing the ingredient, public interest.

110. In the upshot, I find that the termination of the Claimant’s employment on public interest substantively unfair.

**Whether the Claimant is entitled to the reliefs sought.**

111. From the onset it is imperative to state that the reliefs sought by the Claimant are over split. Limb [a] and [b] of the reliefs’ section of the statement of claim can be dealt with by the Court declaring, as it hereby does that the termination was both procedurally and substantively unfair.
112. The Claimant seeks that he be awarded unpaid salary for the period 10<sup>th</sup> January, 2015 to 30<sup>th</sup> December 2016, [62 months]. During this time the Claimant did not render any service. At some point in his evidence he attempted to state that he used to report to work. However, looking at his evidence in its totality it comes out clearly that the converse is true. He never worked at during that period.
113. The Court notes that the Respondents made a decision to treat the period as one of an unpaid leave. The Claimant did not challenge this aspect of the Respondents’ decision.
114. To award the Claimant any salary for this period would amount to unjustifiably enriching the Claimant. The Court is reluctant to so do.
115. By reason of the foregoing premises, the Court declines to award the Claimant the reliefs sought under the head unpaid salary increments [1<sup>st</sup> October, 2011 – 30<sup>th</sup> December, 2016] and commuter allowance of Kshs. 99,100 and 86,800 respectively. Besides the premises, these reliefs were not proved by way of any evidence.
116. The Claimant claimed for medical allowance and House allowance, Kshs. 61,380.00 and 372,000 respectively. The Respondents took a position that the amounts were paid. This position amounted to an admission of the Claimant’s entitlement to the relief. The only thing that remains for the Court to determine is whether indeed the funds were paid into the account of the Claimant as alleged. The Claimant denied the money having ever reached his account.
117. In her further witness statement dated 24<sup>th</sup> September 2021 the Respondent’s witness stated:

“In addition to my witness statement and further witness statement dated 29<sup>th</sup> July 2021, further statement dated 10<sup>th</sup> September 2021 I wish to state as follows:

- i. That I have attached herein evidence to show the Claimant was paid on the 29<sup>th</sup> October 2015 a total amount of Kshs. 326,910 less statutory deductions thus receiving cash amount of Kshs. 256,296.40 through his Equity Bank Account Numbers xxxxxxxxxx, Moi Avenue.



ii. Attached herein is a copy of evidence from IFMIS to confirm the same.”

118. I have carefully considered the “IFMIS document”, it does not have the Claimant’s account number. Equally the payment voucher does not, in her evidence under cross examination the Respondent’s witness accepted this.
119. If indeed the money was wired to the Claimant’s account as alleged, which I say there is no document to show clearly that it was, nothing would have been easier for the 1<sup>st</sup> Respondent to get evidence from the bank to disabuse the Claimant’s evidence.
120. By reason of the premises, I hold that the Respondents failed to prove that the money was paid as alleged and order that the Claimant be paid the Kshs. 326,910.
121. Having found that the termination was unfair both procedurally and substantively, considering the length of time that the Claimant was in the public service and his legitimate expectation that he was to work till retirement age but which never came true, I am convinced that the Claimant is entitled to a compensatory relief under the provisions of Section 49 [1] [c] of the Employment Act, 2007, to an extent of 8 months gross salary, Kshs. 207,160.
122. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms; -
- a. A declaration that the retirement of the Claimant in public interest by the Respondents was unfair.
  - b. Compensation pursuant to Section 49 [1] [c] of the Employment Act, Kshs. 207,160.
  - c. Unpaid House allowance and Medical allowance as computed by the 1st Respondent, Kshs. 326,910.
  - d. Interest on [b] above at Court rates from the date of this Judgment till full payment.
  - e. Interest on [c] above at Court rates from the date of termination 23rd March 2016 till full payment.
  - f. Costs of this suit.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of

Ms. Mercy Kinyua holding brief for Mr. Oyugi for the Respondents.

Mr. Muhizi for Lutta for the Claimant.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the



provisions of **Section 1B** of the **Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

**OCHARO KEBIRA**

**JUDGE**

