



**Donche v Attorney General & 2 others (Cause 2596 of 2016)
[2022] KEELRC 3769 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3769 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2596 OF 2016
K OCHARO, J
JUNE 23, 2022**

BETWEEN

DAVID MULATO DONCHE CLAIMANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT 2ND RESPONDENT**

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein was appointed as a chief of Dakabaricha Location within Marsabit Central Sub-county on or about July 20, 2015, and a year into the employment his services were terminated. Holding that the termination was wrongful and unfair, he instituted the claim herein against the Respondents, through his memorandum of claim dated December 16, 2016, seeking for the following reliefs and orders.
 - i. The sum all moneys, salaries, allowances and benefits due to him from the time of the appointment to date.
 - ii. General, aggravated, exemplary and/or special damages whichever combination the court may deem just and expedient.
 - iii. Reinstatement as the Chief II – Dakabaricha Location, Central Ward, Marsabit.
 - iv. Costs of this suit.
 - v. Interest in [1] above.



- vi. Any other relief the Honourable Court may deem fit.
2. The statement of claim was filed contemporaneously with the Claimant's witness statement and documents that he intended to put reliance on to buttress his claim.
3. Upon being served with summons to enter appearance, the Respondent filed a reply to the memorandum of claim, the October 9, 2018, denying the Claimant's claim in toto.
4. With leave of the Court, the Claimant filed a fresh bundle of documents on the March 19, 2019, under a list of documents of the same date.
5. At the close of pleadings and with the consequential joinder of issues, the matter got destined for hearing on merit. The Claimant's case was heard on the August 13, 2021 and the Respondents' on the October 5, 2021.

The Claimant's case

6. It was the Claimant's case that on or about the December 1, 2014, he applied for employment for the position of Chief II Dakabaricha Location, Marsabit Central sub-county.
7. Through a letter dated 12th January, by the Deputy County Commissioner Marsabit Central Sub-County, he was invited to appear for interviews, which had been slated for the January 26, 2015.
8. The Claimant alleged that among those documents that were required of successful applicants for the job, was a certificate of Secondary Education, which he had lost although he had retained a copy of the original.
9. He stated that on or about the March 5, 2015, he reported the loss to the Deputy Principal of his former High School – Marsabit Secondary School, the Officer Commanding Station Marsabit and subsequently to the Assistant Chief Nyayo Road Sub-County.
10. The Claimant attended the interviews on the January 26, 2015. On this day of interview, he presented his copies of documents including that of the certificate, before the selection panel.
11. Subsequent to the interview, he on the July 16, 2015 received a letter of confirmation as Chief II for Dakabaricha Location and on the July 20, 2015 a letter of appointment as Chief II in the service of the Government of Kenya, with effect from 20th July 2015.
12. The Claimant contended that he subsequently filled in an employment form, and submitted certified copies of his KCSE certificate, result slip and leaving certificate as was required by the 2nd Respondent for authentication. The documents were certified by the Deputy County commissioner. He too submitted his curriculum vitae.
13. He stated that on the January 18, 2016, he submitted a certified copy of his KCSE certificate to the Ministry of Interior Co-ordination for confirmation.
14. On the January 18, 2016, the Ministry under cover of its letter Ref. 10255/2015/46 forwarded the copy to the Secretary Kenya National Examination Council for authentication.
15. It was his case that on the January 19, 2016, findings of the inquiry into the authenticity of the certificate were sent to the Principal Secretary, Ministry of Interior and Government Co-ordination, and that it was confirmed that his examination results tallied with those that were obtaining in the KNEC database for the year 1992.



16. Through its letter dated February 8, 2016, the 2nd Respondent wrote to the KNEC seeking to know whether at any time, the Claimant had replaced his KCSE certificate. The response by the Examination Council was in the negative.
17. The Claimant asserted that he served as the Chief II Dekabaricha Location from the time he was confirmed i.e. July 15, 2015 up to 15th September 2016, a period of 14 months without any salary pay.
18. He stated that on the 15th September 2016, his employment was unlawfully terminated through a letter dated 5th July 2016. Subsequently, through his letter dated 22nd September 2016, forwarded through the office of the Deputy County Commissioner, he appealed against the decision. The letter did not elicit any action or response.
19. The Claimant testified that on the 5th December 2016, he received another termination letter dated 5th July 2016 similar in content to the one he had received earlier. The only notable difference being the signature though both of them were purported to have been signed by same person.
20. He contends that the 2nd Respondent neither gave him an opportunity to be heard nor was he served with a written letter requiring him to show cause why his services should not be terminated, contrary to the Public Service Commission Regulations, 2005.
21. The allegation that he forged academic certificates, that formed a ground for his termination stood on loose sand, as the authenticity of his results had been confirmed by the relevant body.
22. Cross examined by counsel for the Respondent the Claimant confirmed that he was terminated on the ground that he had forged academic certificates.
23. Further that when he was applying for the job, he filled a Public Service Commission Form, and in the field of academic qualifications – item 6, he indicated, 2008 – 2010, Diploma in Bible Theology, and 1989 – 1992 O-Level Marsabit Boys Secondary School.
24. The Claimant asserted that at no time in the process leading to his employment did he indicate that he had a degree from the University of Nairobi.
25. He was not aware of any report from the Kenya National Examination Council to the Ministry of Interior and National Government Coordination implicating him of forgery. In fact, the letter dated 18th May 2016, gives a contrary position. Equally, he was not made aware of any report from the University of Nairobi.
26. The witness stated that in his appeal, he alleged that the member of parliament was behind his woes.
27. The Claimant contended that the ruling in respect of the application that he had filed herein for a conservatory order was in his favour.
28. In his evidence under cross examination the Claimant stated that his highest level of education was college. He never was at any time a student of Nairobi University.
29. When he lost his certificate, he immediately made a report to various offices. The Deputy Principal of his former school certified the photocopy of the certificate as a true copy of the original. He obtained police abstract for the loss.
30. He reiterated that he was never invited for any disciplinary hearing.



The Respondent's Case

31. In support of their defence, the Respondents presented one Eunice Mutio Kyungu, a Human Resource Officer, Appointment Section, in the 2nd Respondent Ministry, to testify. The witness urged the Court to adopt her witness statement herein filed, dated September 10, 2021 as part of her evidence in Chief.
32. She stated that 2nd Respondent in the year 2015 through its Marsabit office did invite and held interviews for the vacant positions of Chiefs and Assistant Chiefs in Marsabit County and among the vacant post was that for Dakabaricha Location, Central Ward Marsabit.
33. Upon successful completion of the interviews, the 2nd Respondent through its Marsabit office duly notified the Claimant of his appointment as Chief II Dakabaricha Location vide a letter dated 16th July, 2016.
34. The 2nd Respondent, as practice dictates, required successful applicants to submit copies of their Original documents and testimonials including Kenya Certificate of Secondary Education (K.C.S.E) certificate, Curriculum Vitae and also a Filled PSC.2 Form.
35. Subsequently, as a result of the said requirement, the Claimant herein submitted a copy of his K.C.S.E Certificate.
36. The witness stated that vide a letter dated 20.07.2015 the 2nd Respondent offered to appoint the Claimant for the position, an offer which the Claimant subsequently accepted.
37. The Claimant submitted a duly filled PSC .2 Form for purposes of formalization his employment as is the practice in the Public Service Commission.
38. She asserted that the Claimant was also required to submit duly filed copies of Declaration of the Official Secret Act, 1968, Certificate of Medical Examination & Next of Kin Form.
39. Upon submission of the above documents by the Claimant the same documents were subjected to a verification process to determine their authenticity before finalization of any appointment. The process was undertaken by a trained Document Examiner based at the 2nd Respondent's Office in Harambee House.
40. During the verification of the submitted documents suspicious alterations were noted by the Examiner on the Claimant's copy of Kenya Certificate of Secondary Education (K.C.S.E) certificate.
41. The noted anomaly and subsequent explanations by the Claimant prompted the 2nd Respondent to request the Kenya National Examination Council for the confirmation of the Claimant's Submitted results through a letter dated 8th February 2016.
42. The witness stated that as the verification process was going on, the 2nd Respondent herein requested the Directorate of Public Service Management for the Claimant's Personal Service Number to facilitate processing of his salary.
43. The witness further stated that before the Directorate of Public Service Management could finish processing the Claimant's Personal Service Number, the Kenya National Examination Council reverted with a Statement of Examination Report dated January 19, 2016 that essentially stated the true state of the Claimant's KCSE results.
44. The Kenya National Examination Council further forwarded a verification Report on the Claimant's Results vide a Report dated 18th February 2016.



45. Upon receiving the Report from the Kenya National Examination Council which was to the effect that the certificate that the Claimant had presented was forged. The 2nd Respondent as a result to a position that the certificate was so presented with a view of getting employment. The 2nd Respondent convened a Ministerial Human Resource Management Advisory Committee (MHRMAC) on 20th April 2016 to hear and determine the disciplinary matter against the Claimant.
46. The witness testified that upon deliberations by the Ministerial Human Resource Management Advisory Committee (MHRMAC) it was recommended that the Claimant's appointment be revoked for presenting a forged academic certificate an offense which was criminal in nature and that the Claimant's forgery case be forwarded to the Director of Public Prosecution to institute criminal proceedings against him.
47. Subsequently, following the Ministerial Human Resource Management Advisory Committee recommendation the Claimant was issued with a Termination of Probation Letter on 5th July 2016.
48. Further, on basis of the MHRMAC recommendations, the 2nd Respondent forwarded a request letter to the Director of Public Prosecutions to prefer Criminal charges against the Claimant for forgery.
49. The Claimant's disciplinary matter also came up for deliberation before the Departmental Committee on Administration and National Security of National Assembly sometimes in November 2016, following a petition by residents of Dakabaricha Location Petitioned regarding the revocation of the appointment of a Claimant as chief. The Committee recommended that the Directorate of Criminal Investigation investigates the allegations levelled against the him, presenting forged certificate, and prosecute him if he was found to be culpable and also a recommendation of revocation of the Claimant's appointment as chief of Dakabaricha Location for violating Chapter Six of *the Constitution* of Kenya, 2010.
50. The Claimant lodged his Appeal way outside the stipulated time of 42 days for lodging Appeals as Per Public Service Commission's Regulations and more so, service of the Appeal was not proved by the Claimant.
51. It was argued that the Claimant is not entitled to any salary payment since he did not meet the requirements of Appointment. No one should benefit from an illegality.
52. The reliefs sought are against public interest and public policy and cannot issue as the Claimant committed illegalities with a view of being employed by the Government of Kenya.
53. Under cross examination the witness testified that she works in the 2nd Respondent's Human Resource Department. The witness stated that when the Claimant handed over the documents to the 2nd Respondent, the documents were not so handed to her personally but to the office.
54. Referred to the Respondent's documents No. 1 and No. 4, copy of the certificate and Application form for employment, the witness admitted that on them, there is not the County Commissioner's certification stamp. Referred to page 3 of the Application form the witness stated that there was no name against the signature obtaining at the foot of the page.
55. The witness confirmed that under the field 6 – Academic/Professional/Technical qualifications bullet 3 seems altered and superimposed. There was no counter signature against the alterations.
56. The witness asserted that after the interviews, the documents were forwarded to the office of the president not by the Claimant. One of the documents that was forwarded was a wealth declaration form though the Respondent did not present it to court. She did not mention it in her witness statement too.



57. According to the witness, the Grades on the Claimant's certificate as presented were not contested.
58. The Claimant was not asked to appear before the committee that made a decision against him. The witness confirmed that she was not a member of that committee.
59. The witness testified that the dismissal of the Claimant from employment became a national, and matter of discussion in Parliament. However, it was not clear to her under what law or, matters dismissal of employees would be a subject of discussion in Parliament.
60. According to her the termination letter was issued on 5th July 2016. A copy was sent in the month of December 2016, through the office of the County Commissioner. The County Commissioner was to convey the dismissal to the Claimant. She would not tell as to when the letter was served on the Claimant.
61. On the Respondent's exhibit 8, the witness stated that the curriculum vitae has three pages and that the final page was not signed. It did not have the County Commissioner's receipt stamp on it.
62. In her evidence under re-examination, the witness stated that the Claimant was ranked top in performance compared to all the interviewees. The office of the president would not have any interest to deprive him of the opportunity.
63. The witness asserted that the Claimant was not invited for a hearing because he was on probation. It was the Respondent's practice not to extend audience to persons on probation, in matters disciplinary.

Claimant's Submissions.

64. The Claimant distilled three issues for determination.
 - a. Whether the Claimant was under probation at the time of his termination.
 - b. Whether the termination of the Claimant's employment was unlawful and unfair.
 - c. Whether the Claimant is entitled to the remedies sought.
65. On the first issue the Claimant's counsel submitted that the Claimant executed his letter of appointment on July 21, 2015. As per the letter of appointment, he was to serve a probationary period of one [1] year.
66. He submitted that following his appointment he performed his duties until 15th September when he received a letter dated 5th July 2016 terminating his appointment.
67. The Claimant submits that he had served in the said position for a duration of 14 months without receiving any communication from the 2nd and 3rd Respondents regarding an intention to extend or terminate his probation as required by regulation 14(2) of the Public Service Commission regulation.
68. The Claimant submitted that at the end of his probation period he continued to perform his duties with the honest belief and legitimate expectation that his employment had been confirmed, and placed reliance on the holding by Hon. Justice Maureen Onyango in *Aysha Hafsa Musa v Computer Revolution Limited* [2021] eKLR while referring to the case of *Lear Shighadi Sinoya v Autech Systems Limited* thus;

“I agree with the finding above by Abuodha J. and that of Mbaru J. in the case of *Lear Shighadi Sinoya v Autech Systems Limited* as cited by the Claimant in her submissions. In that case Mbaru J. held that the probation period can only be extended by mutual agreement and that without extension, the employee's services are deemed confirmed by



operation of the law. Indeed, the duty is upon the employer to advise the employee when the probation period has lapsed. Where an employer allows the same to pass without any action, the employee stands confirmed. Section 42(2) is clear that the extension of a probationary contract is to be made “with the agreement of the employee”. In this case there is no agreement of the employee or a letter notifying the employee of the extension of the probationary period. I find that the Claimant was not on probation at the time of termination of her employment.

Having found that the Claimant was not under probation at the time of her termination, I will now proceed to consider whether the termination was unlawful and unfair.”

To suggest that by reason of the premise, the law deemed him as confirmed in employment.

69. On the second issue the Claimant relies on the provisions of section 45(5) of the *Employment Act*

‘In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider —

- a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- b. the conduct and capability of the employee up to the date of termination;
- c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- e. the existence of any previous warning letters issued to the employee.

70. The Claimant submitted that the Respondent’s actions were marred by malicious actions intended to frustrate him and bar him from an employment opportunity that he was rightfully entitled to and qualified.

71. The Claimant submitted that the alleged forgery was not proved. It was duty upon the Respondents to prove the same, as they are the ones alleging.

72. The Claimant submits that the report from the CID differs from that from KNEC and the fact that there is no issue raised on the result slip presented which is a replica of the certificate.

73. The Claimant further submits that the Respondent’s witness confirmed in cross-examination that she was not the one who received the Claimant’s documents for verification neither was she the one who presented them to KNEC. It’s the Claimant’s submissions that he presented genuine documents and the 2nd Respondent decided to prematurely terminate the Claimant from employment despite the glaring evidence affirming to the veracity of the documents submitted.

74. The Claimant submitted the Respondent did not have a valid reason for terminating his employment.



75. The Claimant submits that he was a hardworking and determined employee who had an exemplary record and was undeserving of the manner in which his employment was terminated which is not in line with the *Employment Act* or the Public Service Commission Regulation.

76. The Claimant relied on the provision of Regulation 14 of the Public Service Commission which states:

- “(1) Subject to regulation 9, where a public officer has been appointed on probation the authorised officer shall, not less than three months before the expiration of the probationary period, inform the commission whether in his opinion-
- a. the probationary period should be extended so as to afford the public officer further opportunity to pass any examination, the passing of which is a condition of the confirmation, his service otherwise being satisfactory; or
 - b. the probationary period should be extended to afford the public officer the opportunity of improvement in any respect in which his work or conduct has been adversely reported on; or
 - c. the public officer's appointment should be terminated.
- (2) The authorized officer shall not recommend the extension or termination of an appointment under subparagraph (b) or subparagraph (c) of paragraph (1) unless he has first, by letter, informed the public officer of his intention and of the right of the public officer to make representations thereon within a period to be specified in such letter and required the public officer to acknowledge receipt of such letter in writing within that period; the authorized officer shall attach copies of all such correspondence to his recommendation.
- (3) Notwithstanding paragraph (1) but subject to paragraph (2), the authorized officer may, at any time, recommend to the Commission that a probationary appointment be terminated.”

77. The Claimant submits that the manner in which he was terminated amounts to a gross violation of his right to a fair hearing which is protected under article 47 of *the Constitution* and amounts to the servitude which is unfair labour practice prohibited under article 41. It violated his right to a fair administrative action as guaranteed under article 47.

78. To bolster his argument that the process leading to his the termination of his employment was procedurally unfair, the Claimant placed reliance in *Republic v. National Police Service Commission Exparte Daniel Chacha Chacha* [2016] eKLR, where while deliberating on procedural fairness the court expressed itself;

“Procedural fairness is therefore now a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person is heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In *Judicial Service*



Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

The court went further and stated that;

“Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision-maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”

79. The Claimant submits that the proper procedure was not followed in the termination of his employment.
80. On the third issue the Claimant submits that he is entitled to the reliefs sought as provided under section 49 of the *Employment Act*, having established that the termination was unfair and wrongful.

Respondents Submissions.

81. The Respondent distilled 5 issues for determination being:
 - a. Whether the instant claim is premature and against the principle of ripeness;
 - b. Whether there was any reasonable cause for the Respondent to commence the disciplinary proceedings against the Claimant;
 - c. Whether the termination of the Claimant’s probation terms was lawful and justifiable;
 - d. Whether the termination of the Claimant’s probation contract was within legal confines then;
 - e. Whether the Claimant is entitled to the remedies sought;
82. On the first issue the 1st Respondent through the Attorney General submits that the instant claim is premature in nature for reason that the Claimant has not exhausted all the internal mechanisms within the Public Service Commission thus offending the legal principle of ripeness. After dismissal there are two more processes, appeal and review, and the Claimant’s matter is pending appeal at the public service commission having filed the same out of the stipulated time.



83. Counsel relied in the holding in *Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 others* (2015) eKLR.

“.....therefore, an authority, where an alternative remedy exists. The applicant seeking an order of judicial review must disclose the existence of the alternative remedy and should demonstrate the exceptional circumstances if any under which judicial review is sought instead of the remedy provided by statute. Cortec had not done so and thus chosen the wrong forum to ventilate its grievance.”

84. It was further submitted that section 9(2) of the *Fair Administrative Actions Act* prohibits the intervention of courts, especially where internal mechanisms have not been exhausted.

85. On the 2nd issue counsel submitted that the Public Service Commission is established under article 234 of *the Constitution* of Kenya and its functions include exercise of disciplinary control over and remove persons holding or acting in those offices and to promote the values and principles mentioned in Article 10 and 232 through the public service.

Further that the *Public Service (Values and principles) Act* No. 1A of 2015 section 5(9) stipulates that every officer shall maintain high standards of professional ethics. In the current case, the 1st Respondent as the authorized officer had to act to safeguard public interest, National Values & principles.

86. On the third issue counsel submitted that the Respondents have demonstrated the reasons for termination of the Claimant’s probation contract, that the same was valid and occasioned by the Claimant’s misconduct of forging academic credentials like KCSE Certificate and a degree certificate from the University of Nairobi a fact confirmed by the two public institutions.

87. On the fourth issue it was submitted that by dint of the provisions of section 42(1) of the *Employment Act*, the provisions of section 41 that relate to procedural fairness is not applicable to matters termination of probationary contracts. The termination of the Claimant’s employment was therefore procedural notwithstanding that he was not heard.

88. On the fourth issue the holding in *Francis Munyoki Kilonzo & Another Vs Vincent Mutua Mutiso* (2013) where the court held as follows;

“The Maxim of Equity on the principle of Equity is Expressed as follows;

No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault..... a court of equity shall not assist a person in extricating himself or herself from the circumstances he or she has created...”

Was cited.

89. The Claimant is not entitled to any of the reliefs sought on the grounds that he should not benefit out of his acts of illegality as this would amount to unjust enrichment.

Determination

90. The following issues present themselves for determination by this court, thus:

- a. Whether at the time of termination of his employment the Claimant was under probation.
- b. Whether the termination of the Claimant’s employment was fair.
- c. Whether the Claimant is entitled to the reliefs sought.



Whether at the time of the termination of his employment, the Claimant was on probation.

91. The Respondent's position was that the Claimant was not, allowed an opportunity to defend himself or put in another way heard as he was at the time of the termination on probation. The Respondent's witness testified that then it was the 2nd Respondent's practice that in matters disciplinary, a person on probation was not entitled to a hearing. It is by reason of this premise that it becomes imperative to determine the status in employment of the termination from the onset as the determination will have an influence on this Court's determination on the other issues identified hereinabove.

92. There is no doubt that the Claimant was appointed as Chief II for Dakabaricha Location, through a letter of appointment dated July 20, 2015. His appointment was effective the same date. Clause 3 of the letter provided:

“3. The normal period of probation is one year but this may be extended or the appointment may be terminated before completion of that period.”

93. The letter of appointment was so scanty in content regarding the probation period and matters that are normally allied to such periods of an employment relationship. For instance, whether confirmation of the Claimant into employment was dependant on a successful completion of the probation period, how the performance of the Claimant during the probation period was to be determined and by what time.

94. This meant that one has to revert to the Public Service Commission Regulations to establish the matters. Regulations 14 of the Public Service Commission Regulations provided for probationary period, thus:

“1. Subject to Regulations 9 where a public officer has been appointed on a probation the authorised officer shall, not less than three months before the expiration of the probationary period, inform the Commission whether in his opinion –

- a. The probationary period should be extended so as to afford the Public Officer further opportunity to pass any examination, the passing of which is a condition of the confirmation, his service otherwise having been satisfactory.
- b. The probationary period should be extended to afford the Public Officer the opportunity of improvement in any respect which his work or conduct have been adversely reported on; or
- c. The public officer's appointment should be terminated.

2. The authorized officer shall not recommend the extension or termination of an appointment under sub-paragraph [b] or sub-paragraph.

- d. Of paragraph [1] unless he has first, by letter, informed the public officer of his intention and of the right of the public officer to make representations thereon within a period to be specified in such letter and required the public officer to acknowledge receipt of such letter in writing within the period; the authorized



officer shall attach copies of all such correspondences to his recommendation.”

95. The Claimant contended that he performed his duties as Chief of the above stated location till September 15, 2016 when he received the termination letter dated July 5, 2016. The Respondent’s witness under cross examination testified that she was not able to state when the decision of termination of the Claimant’s employment which was supposed to be conveyed by the officer of the County Commissioner was conveyed. In essence, there was no evidence controverting the Claimant’s evidence that he worked up to September 15, 2016, and that the termination letter was received on this day.
96. Further still, looking at the termination letter, it is clear that it has an indication that it was forwarded on the September 15, 2016, by the County Commissioner’s office.
97. It is my view that a termination in circumstances like were in this case, where disciplinary proceeding was conducted against the Claimant [employee] without his involvement and or knowledge, takes effect from the date the decision is received by the employee. Consequently, I find that the termination of the Claimant’s employment came into effect on the September 15, 2016.
98. The above stated stipulations Regulation 14 provided clearly what the authorized officer was supposed to do and within what period of the Claimant’s probationary period, if it was his view, of course upon basis of consideration of the performance and conduct of the Claimant.
99. The Claimant worked beyond the appointed date for the lapse of the probationary period, without the Respondent’s authorised officer making a recommendation for extensions of the period or termination of the Claimant’s appointment as provided for by the Regulations hereinabove cited, allowing the Claimant to continue discharging his duties. By their conduct of failure to extend the probationary period or have a recommendation for termination of the appointment of the Claimant’s employment as per the stipulations of the Public Service Commission Regulations, and their silence on the extension or termination, the Respondents are deemed to have confirmed the Claimant in employment. I am consequently in agreement with the court’s holding in *Aysha Hafza Musa v. Computer Revolution Limited* [2021] eKLR, thus:

“I agree with the finding above by Abuodha J. and that of mbaru J. In the case of Lear Shighachi Sinoya v. Autech Systems Limited as cited by the Claimant in her submissions. In that case Mbaru J. held that the probation period can only be extended by mutual agreement and without extension, the employee’s services are deemed confirmed by operation of the law. Indeed, the duty is upon the employer to advise the employee when the probation period has lapsed. Where an employer allows the same to pass without any action, the employee stands confirmed. Section 42 [2] is clear that the extension of a probationary contract is to be made “with the agreement of the employee.” In this case there is no agreement of the employee or a letter notifying the employee of the extension of the probationary period. I find that the Claimant was not on probation at the time of termination of her employment

”
100. By reason of the foregoing premises, this Court comes to an inescapable conclusion that as at the time of the termination, 15th September 2016, the Claimant was not on probation. This leads me to turn to considering whether the termination was fair.



Whether the termination was fair.

101. One thing is not in doubt, that before the termination of the Claimant's employment, he was neither notified of the Respondent's intention to have the employment determined nor invited to make a representation on the intention and the grounds stirring that contemplated action. This much, the Respondent's witness confirmed in her evidence in chief.
102. The Respondent's witness contended and their counsel submitted in support, that the Claimant was not entitled to the process for at the time of the termination he was an employee who was under probation. I find this position taken by the Respondent's and their counsel as standing on quick stand for two reasons – First, I have hereinabove found that at the time of the termination the Claimant was not on probation, his employment stood confirmed by conduct of the Respondent's and therefore by operation of the law. Second, the same is in ignorance of the obtaining jurisprudence on the area, and the place of Employment and Labour Rights in the current Constitutional dispensation.
103. The Respondent's line of thought is expressed to flow from the provisions of section 42 [1] of the Employment Act, which provides:

“ 42. Termination of probationary contracts.

[1]. The provisions of section 41 shall not where a termination of employment terminates a probationary period.”

This provision of the Act was declared unconstitutional by a 3 Judge Bench of this Court in ELRC Pet. 94 of 2016 – Monica Munira Kibuchi & 6 others v. Mount Kenya University [eKLR]. The decision is one that this court entirely agrees with. On this premise, I find that even if I were to agree with the Respondent for a moment that the Claimant was on probation at the time of termination, I'd still find that the mandatory procedural fairness requirements under section 41 of the Act, applied to the relationship that was between the 2nd Respondent and the Claimant. A termination wouldn't be procedurally fair, without the Respondent's adherence to the procedure.

104. Counsel for the Respondents has urged this court not to be persuaded by the above mentioned three judge Bench. In his submissions which I find considerable difficult to understand, he suggests that the principle[s] against retrospectivity of law operates against applicability of the decision in this matter. As at the time the procedurally unfair termination occurred, the constitutionally and equity spirited provisions of the Employment and Labour Relations Laws were in place, the right to fair administrative action was entrenched in the Bill of Rights, and the 3rd Respondent's Regulations had a provision for fair process. I am unable to see the applicability of the Canadian decision of Attorney General of Canada vs. George Hislop and 4 others cited by counsel.
105. Section 41 of the Employment Act, which I have before held should not be read in isolation from the provisions of Articles 50 [fair hearing] and 47 [right to fair administrative actions] which required the Respondents to have the Claimant informed of the contemplated action to terminate his employment, accord him an opportunity to make representations on the ground[s] prompting the contemplation, and consider the representation before making the decision to terminate. This procedure was not adhered to.
106. The 3rd Respondent's Regulations cited hereinbefore, are clearly structured in a manner that is in sync with the constitutional dictates on fair hearing and right to fair administrative actions, and the prescripts of section 41 of the Act. There was no evidence by the Respondent that the procedure by the Regulations was adhered to.



107. In the upshot, I find that the termination of the Claimant’s employment was procedurally unfair.
108. In a matter where the court has been charged with the task to determine fairness or otherwise of termination of an employee’s contract of service, the court has to consider the aspects, procedural fairness in the process leading to the termination and the substantive justification of the decision to terminate.
109. Having made a determination as I have hereinabove on the procedural fairness aspect, I now turn to the substantive fairness aspect of the decision.
110. Section 43 of the *Employment Act* 2007, places an obligation upon an employer to in a matter where termination of an employee is in dispute prove the reasons for the termination. In essence, a termination has to be for a cause. If the employer defaults in proving the reasons for the termination, the same shall be deemed unfair pursuant to the provisions of section 45 [2] of the Act.
111. Closely allied to the obligation placed upon an employer by the aforesaid provision are the twin legal burdens too placed on him or her by dint of the provisions of section 45 [2] and 47 [5] of the Act, to prove that the reason[s] for the termination was fair and valid, and establish a justification for the termination, respectively.
112. It is common cause that the Claimant’s service was terminated on an account of forgery of academic certificate[s].
113. It was the Respondent’s case that the Claimant as a requirement submitted his documents among them his copy of the Kenya Certificate of Secondary Education [K.C.S.E] certificate, to the 2nd Respondent for authentication before finalization of his appointment. That during the verification process, the 2nd Respondent’s document examiner noted suspicious alterations on the certificate.
114. The court notes that the 2nd Respondent through its letter dated 8th February 2016 wrote a letter to the Kenya National Examination Council, the letter which read in part:
- “Before his appointment could be finalized, it was noted that her documents did not been crucial features found in genuine & academic document issued by your institution. He claims to have lost his original KCSE certificate and had replaced the same around March, 2015 [copies attached for ease of reference].
- The purpose of this letter, therefore, is to request you to establish if the said document was replaced at your institution for our further action.
115. Through its letter dated February 18, 2016, in response to the 2nd Respondent’s above stated letter, the Council wrote:
- “David Murato Donche applied for replacement certificate on 9th March 2015,
- 1.0 upon verification, it was established that the copy of certificate submitted to the KNEC was tampered with where subject grades had been re-written manually. As a result of this, the replacement certificate request was rejected.
- 2.0. On 18th January 2016, the candidate applied for confirmation of examination results through the office of the President in a letter Ref. 1025/2015/46 dated 18th January 2016. The client attached a copy of his 1992 KCSE examination results slip. After verification, all the details of expenses including the names and the subject grades and mean grade tallied with the KNEC database for 1992 KCSE examination for Marsabit Secondary School.



.....”

3.0 After verification of the purported copy replacement certificate, it was established that the Kenya National Examinations Council never replaced a certificate for David Mulan Douche, Marsabit secondary School: Index Number 35001034. His request for replacement of certificate dated 9th March was rejected as indicated in clause 1.0 above.

3.2 The alleged replacement certificate does not bear any of the features for replacement certificates from the Kenya National Examinations Council [KNEC].

Therefore, the purported replacement certificate for the year 1992 KCSE Examination presented to KNEC for verification purposes was obtained from a forged document.”

116. The Respondent tendered as evidence a report by the National Assembly Departmental Committee on Administration and National Security. The report was on a petition that had been tabled before the house on the September 30, 2015, by Hon. Col. [Rtd] Dido Ali Rasso, MP on behalf of the residents of Dakabaricha Location regarding the removal and revocation of the appointment of the Claimant as Chief of Dakabaricha location, Saku Constituency, Marsabit County.

117. The Court has carefully studied the report, and paragraph 3.3 & 3.4, of the same, captioned Evidence from Mr. David Mulato Donche has caught its eyes. The paragraph read in part:

“The Committee received written submissions from Mr. David Mulato on Thursday 12th November 2015 [emphasis mine]. The submissions contained the following documents: -

(c) A curriculum vitae indicating that he was born in 1974 in Marsabit and held a Bachelor of Science in Food and Nutrition and dietetics degree certificate from the University of Nairobi and a Diploma in Bible and Theology from Ephatha of Africa School of Bible,

3. Evidence from the Registrar [Examinations] University of
4 Nairobi.

The Senior Assistant Registrar [Examination] University of Nairobi in a letter dated August 12th, 2016 indicated that the Bachelor of Science in Food and Nutrition and Dietics Degree Certificate from the University of Nairobi allegedly presented by Mr. David Mulato Donche to secure the position of chief, Dakabaricha location is not authentic. The name Mr. David Mulato Donche does not appear in any of the University’s Graduation booklets.”

118. It might be argued that the petition was presented to Parliament, placed before the committee and the committee made a report, sometime after the 2nd Respondent had terminated the services of the Claimant and therefore the report is of no value as regards the termination, as the material of same did not influence the decision to terminate the Claimant’s employment or at all. Yes, that might be true but the court got interested in the report, and its contents for two reasons: first the Claimant in his evidence gave an impression that he was not aware of the Parliamentary deliberations; second, the report was tendered as evidence, the Claimant did not in any manner assail or attempt to assail its contents and



more specifically that he presented a written submission, to the committee, submission which inter alia indicated that he had a degree from the University of Nairobi.

119. The Court has not lost sight of the fact that the Claimant did testify that his highest level of education was college level and not a university level. He was at no time a student of Nairobi University.
120. All the foregoing premises go towards demonstration that the Claimant was uncandid, and not credit-worthy in his representation on matters qualification and the documents that he placed forth before the interviews panel.
121. In a matter like this where the Court is asked to determine the appropriateness of the reason to terminate an employee's service, and the termination itself, the test is, would a reasonable employer in the circumstances of the matter have decided to terminate? This is the test that Denning MR. enunciated in *British Leyland UK Limited vs. Swift* [1981] 1 KLR 91 at 931 thus:

“Was it reasonable for the employer to dismiss [the employee]? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.”
122. In the case of *Evans Kamadi Misango vs. Barclays Branch Kenya Limited* [2015] eKLR the Court stated:

“To my mind, the burden placed on the employer by selection 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee
123. I have considered the circumstances of the matter and more specifically the report from the examining body on the certificate that was purported to have been issued by it, and the verdict therein that the certificate was forged, and hold that any reasonable employer would have terminated an employee's employment in the circumstances.
124. Consequently, I find that the termination of the Claimant's employment was substantively justified.

Of the reliefs

125. The Claimant claimed inter alia, the salaries allowances and benefits due to him from the time of appointment to date. The Respondent did not challenge the Claimant's case that for all that time from the date of his appointment till the date when the termination decision was communicated to him, 15th September 2016, he was not paid his salary. I see no justification why this Honourable Court will shy off from directing that he be paid his salary for the period he rendered services, 14 [fourteen] months. He is consequently awarded Kshs. 270,522. Keenly looking at the termination letter, there is no suggestion that it was the intention of the 2nd Respondent that he be deprived of the earnings that had accrued to him during the period.
126. Having found that the termination was substantively justified, there cannot be any basis for this Court to direct payment of the salary for any period beyond the 14 months that he rendered his serves as chief.
127. Having found that the termination was procedurally unfair and considering that the Respondent inexplicably deviated from Regulations that were designed to guide them, and the law regarding procedural fairness, and that the charges against the Respondent were so grave that any reasonable employer would be expected to give to an employee accused as the Claimant was, an opportunity to explain himself, but the 2nd Respondent didn't and the length of time he was in the service and award



him a compensatory relief of three months' salary pursuant to the provisions of section 49 [1] [c] of the *Employment Act*.

128. The Court cannot avail an order for reinstatement in favour of the Claimant, having found that the termination of his employment was substantively justified.

129. In the upshot, I enter judgment in favour of the Claimant in the following terms:

- a. A declaration that the termination of the Claimant's employment was procedurally unfair.
- b. Unpaid salary for 14 months, Kshs. 270,522.
- c. Compensation pursuant to the provisions of section 49 [1] [c] of the *employment Act*, three months' gross salary, Kshs. 57,969.
- d. Interest at court rates, from the date of filing this suit till full payment.
- e. Costs of this suit.

READ, DELIVERED SIGNED AND DATED THIS 23RD DAY OF JUNE 2022.

OCHARO KEBIRA

JUDGE

In presence of:

Ms Kamau holding brief for Swaka for the Claimant.

No appearance for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

OCHARO KEBIRA

JUDGE

