



**Gatiti v Teachers Service Commission (Cause 759 of 2017)  
[2022] KEELRC 4157 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4157 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 759 OF 2017  
K OCHARO, J  
JUNE 16, 2022**

**BETWEEN**

**FELIX K GATITI ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. This suit was initiated through a memorandum of claim dated April 13, 2017, by the claimant against the respondent. alleging that the termination of his employment by the respondent, was unlawful, and wrongful, the claimant sought against the respondent the following reliefs and orders:
  - a. That the honourable court do find that the termination of the claimant's employment to be unfair and order the reinstatement of the claimant without loss of any benefits and instant payment of all accrued salaries and benefits
  - b. Alternatively;
    - i. Compensation for wrongful termination equivalent to (12) months gross salary remuneration for loss of employment.
    - ii. Terminal benefits in accordance with the *Employment Act* and the employment letter including total remuneration in lieu of the period of notice.

The claim works out as follows;

- i. Pending leave (17) days.....Kshs 27,465
- ii. 3months pay in lieu of notice ....Kshs 145,401



- iii. 12 months gross wages as compensation for wrongful termination.....Kshs 581,604
- Total.....Kshs 754,470

- c. Interest on (ii) above from March 1, 2016 at the courts rate until payment in full
- d. An order that the respondent do issue the claimant with a certificate of service
- e. Costs of the claim plus interest thereon from the date of termination until payment in full
- f. Any other relief that this honourable court may deem reasonable, fair and just to grant.

2. The respondent entered appearance on the May 10, 2017 and subsequently filed a memorandum of defence dated May 30, 2017. To the reply, the claimant did file a reply to the memorandum of defence dated July 18, 2017.

### **The Claimant's Case**

- 3. The claimant stated that he was employed by the respondent as a support staff scale 2 *vide* a letter dated June 9, 2010, a position he held until termination, he states that during the course of his employment he was diligent, loyal and a dedicated employee and there wasn't any complaint regarding his conduct or his performance of work.
- 4. His duties entailed cleaning of offices and transferring files from one office to the other. In the course of discharging these duties he wouldn't access the IT system of the respondent.
- 5. The claimant states that on or about the August 24, 2015 some unfounded allegations were made against him leading to his interdiction *vide* a letter dated September 18, 2015. He contended that on the February 2, 2016, he was grilled by the respondent but was not accorded an adequate opportunity to defend himself against the allegations that were being levelled against him.
- 6. In his testimony in court, the claimant stated that he was taken through a disciplinary hearing. The disciplinary committee comprised of three commissioners and one clerk. Further that there were three strangers in the meeting too. He was not represented by any person at the hearing.
- 7. At the hearing he was given very limited time to ask the witnesses questions. He was allowed to ask three questions only for each of the witnesses. Further that he had not met the strangers before the hearing.
- 8. After the dismissal he appealed, an appeal which was subsequently dismissed.
- 9. The claimant stated that on March 31, 2016 he received a dismissal letter from the respondent terminating his employment with effect from February 2, 2016, on the reasons that;

“(i) [i] On the June 6, 2015 you unlawfully solicited and received Kshs 150,000 in two instalments cash from one Patrick Murithi Mwambia TSC/5xxxx1 pretending that you could influence in facilitation of his employment as a teacher

- i. In the Month of July 2015, you unlawfully solicited and received cash Kshs 50,000 from Lenick Micheni Gitari and another Kshs 25000 through M-pesa



from one Dedan Kimathi Mutegi pretending that you could influence in facilitation of employment of Stella Gacheri as a teacher.”

10. The claimant states that he was wrongfully and unfairly terminated by the respondent who further failed to pay him his terminal benefits and outstanding dues. The allegations that formed basis for the dismissal were malicious, untrue, unfounded, baseless, and nothing but witch-hunting.
11. He contended further that the respondent failed to give him an adequate opportunity, and forum, to ventilate his appeal. The respondent failed to adhere to procedural fairness therefore.
12. The claimant avers that he has been unable to secure employment as the respondent has refused/neglected to furnish him with a certificate of service which has caused him financial strain and continues to suffer general loss.
13. Cross examined by the respondent’s counsel, the claimant testified that his duties were those of a messenger. Cleaning and transferring files from one office to the other. He had a supervisor, Mr Juma who wouldn’t allocate him any other duties, besides the above stated.
14. He stated that in the course of his duties, he wouldn’t interact with teachers’ employment forms or any other forms.
15. The claimant acknowledged that he was issued with the interdiction letter dated September 18, 2015, letter which clearly put forth the allegations that were levelled against him. The letter also indicated the specific regulation that it was said he had breached, regulation number 55/6 of the TSC staff. In the letter, he was granted 21 days to respond to the allegations. He made a response thereto.
16. Through a letter dated January 8, 2016, he was invited for a disciplinary committee hearing. He appeared before the committee on the February 2, 2016, almost 5 months after the interdiction.
17. Referred to an explanation he gave to the committee during the hearing, the claimant acknowledged that when he was asked about the procedure relating to employment of teachers, he gave details, and further that he admitted that he would come into contact with the employment forms as he moved them to the registry. However, when transferring the files, one cannot be able to pick details of the teachers, for instance the TSC. Number.
18. Prior to the hearing, he had not heard of the names of his accusers. He had never interacted with them.
19. He confirmed that the termination letter placed forth the reasons for his dismissal. In the letter, his right to appeal against the decision was granted. He exercised the right; however, the appeal became unsuccessful.
20. In his evidence under re-examination, he stated that he was a member of the vetting committee, and as such he would come into contact with teacher’s details.

### **Respondent’s Case**

21. The respondent’s case was heard on October 26, 2021. Four [4] witnesses testified on its behalf in defence against the claimant’s case. The 1<sup>st</sup> witness [RW1], was Patrick Mureithi Mwambia who testified that he received a phone call from a friend Evans Muriithi Kinyua who informed him that the respondent was offering employment and that he knew of an employee of the respondent commission who would assist him secure a job. The friend was to facilitate a meeting with the employee.
22. To enable him firm up on the meeting with the employee, his friend Evans sent him a mobile phone number 07xxxxxx08, that reflected one Kelvin Okanga as its subscriber. Through the number, the



- witness and “Kevin Okanga” had a conversation out of which it was agreed that he travels to Nairobi for a meeting on the June 5, 2015.
23. On the said date he met “Kelvin” at Jerry Westagate restaurant in the presence of one Lenick and Evans. It was agreed that the employment would be secured upon the witness giving out a sum of Kshs 150,000. The sum was to be given in two instalments, a deposit of Kshs 75,000 immediately, and a second one upon the employee, giving him an appointment letter. The witness gave out the first instalment on this day of their first meeting.
  24. He further stated that after three weeks the “Kevin Okanga” called him and informed him that his letter of appointment was ready for collection and his first county of work was to be Meru. On the June 27, 2015, at the same restaurant, the witness met the employee and upon receiving the letter he released the other instalment [Kshs75,000] to him. Evans [RW3], witnessed this.
  25. The witness stated that on the July 6, 2015, he made an enquiry with the respondent’s Meru County Director’s Office regarding whether they had a notification of his appointment and posting. To his surprise, he was informed that the same was not reflecting in the TSC system. This prompted him to call the “Kelvin Okanga” to establish reasons why. He got assured that all was well, only that there was a delay in the release of the letter and information to the County Director’s Office.
  26. Nothing came through. In the month of August, 2015, the witness got constrained, to visit the respondent’s Headquarters together with Lenick Micheni Gitari to check on what was happening. It is here that they learnt that he had been swindled of his money. The “Kelvin Okanga’ was actually Felix Kimani Gathii. His purported appointment was nowhere in the system of the respondent. The letter was not authentic. He and his friend Lenick were able to identify the swindler. He recorded a statement with the respondent’s security officers. On the February 2, 2016, he testified at a disciplinary hearing against the claimant.
  27. In his evidence under cross examination, the witness testified that, Evans [RW3] informed him that the person who was to facilitate the employment was demanding for Kshs 150,000 as a condition. He denied that he was aware that he was engaging himself in corruption activities. He paid because he needed a job.
  28. The person who was to help him get the job was “Kelvin Okanga”. The mobile phone number that he was given was registered in the names of the person. When he first met the parson, the parson was dawning a badge bearing the names Kelvin Okanga. He gave out the money on the June 5, 2015 and June 27, 2015.
  29. At the respondent’s Headquarters, they were taken round by the former’s security officers to identify the person he had given the money. They managed to identify the claimant. He asserted that Lenick and him identified the claimant at different times in the course of that day. Prior to this day, he had met him three times.
  30. On arrival at the Headquarters, he met Lenick, Mr musau and Felix [the claimant]. He stated that there were no investigations conducted by the respondent to ascertain whether or not there was a Mr Kelvin Okanga within the employment of the respondent. Reliance was placed on the identification.
  31. The 3<sup>rd</sup> witness [RW3], was Evans Murithi Kinyua testified that on the June 4, 2015 he received a message from friend one Lenick Micheni Gitari who is a teacher at Chogoria girls, who informed him that he knew of an officer at the TSC headquarters who was able to assist one secure employment with the respondent as a teacher.



32. The witness testified that he contacted his friend Patrick Muriithi who was unemployed and they agreed to meet the officer Kevin Okanga on the June 5, 2015 and on different dates they gave him Kshs 150,000 for purposes of facilitating employment of Patrick.
33. The witness further stated that they later learnt that the said officer's actual name was Felix Kimani Gatiti. Too, that Patrick had been defrauded of the money. His friend Patrick Muriithi and him consequently recorded a statement and attended disciplinary hearing, against the claimant. At the hearing he testified in support of the charge[s] that the claimant was facing.
34. The 2<sup>nd</sup> witness [RW2], was Lenick Micheri Gitari a teacher at Chogoria Girls Primary school.  
The witness stated that in the month of May 2015, he received a phone call from a person who identified himself as a staffing officer in TSC. The person indicated to him that he was able to facilitate employment of a teacher. The call was from a number, 07xxxxxx80. Through a transaction [Mpesa] that he initiated, the witness learnt that the number was registered under the name, Kelvin Okanga. He informed RW3, who in turn informed RW1 of the possibility of employment through the caller.
35. On the June 6, 2015, RW1, RW3[ Evans], and him travelled to Nairobi, to meet 'Kelvin'. When they met, an agreement was struck. Kelvin was to facilitate the employment of RW1, at a cost of Kshs 150,000, an amount which was to be paid in two instalments. The 1<sup>st</sup> instalment was paid immediately, and the second, on the June 27, 2015, when he released the letter of appointment to RW1. He witnessed the payment.
36. Later on, it was discovered that the letter wasn't genuine. Th person who had purported to be with authority to employ didn't have such an authority. He later on travelled to the respondent's Headquarters to identify the person who had received the money from RW1. He identified the claimant. He was surprised to learn that they had been dealing with a person whose true name was Felix Gatiti Kimani, not Kelvin Okanga.
37. In his evidence under cross examination, the witness stated that he is the one who introduced RW3, into the matter. The persistent calls by the claimant and the indication that he was the one dealing with the witness's employment file, attracted the witness to believe that the claimant was in a position to assist as per his representation.
38. It didn't occur to him at all that he was engaging himself in a corruption activity.
39. After the "transaction" between " Kelvin" and RW1, this witness introduced one Dan Kimanathi to "kelvin" for same purpose as was in respect of RW1. Mr Kimathi gave the witness Kshs 50,000 for onward transmission to Kelvin, money which he gave out as was agreed. The witness testified further that later on, Mr. Kimathi sent the Kshs 25,000 by Mpesa to Kelvin.
40. However, in his testimony during the disciplinary hearing, he didn't lead evidence regarding the Kshs 50,000, and that the issue didn't arise. Mr Kimathi was not called to testify.
41. When RW3 informed him that it had been discovered that the letter was fake, he decided to travel to the respondent's Headquarter to look for Kelvin. When he presented his issue at the reception, he was directed to the security office. Consequently, he was interrogated. He recorded a statement the following day.
42. In his evidence in chief, the witness testified that he was taken to several offices to try identify the person who had conned them. He finally managed to identify the claimant. It is after identifying him that he came to know that his true name was Felix. Patrick [RW1] was equally able to identify him.



43. The 4<sup>th</sup> witness [RW4], was Catherine Morogo Kertich an employee at the Teachers Service Commission serving as a Deputy Director in the Discipline Department.
44. The witness stated that on the August 27, 2015 the Commission received complaints against the claimant to the effect that he had solicited and received a bribe of Kshs 150,000 from Patrick Murithi Mwambia TSC No 5xxxx1 to facilitate his employment as a P1 teacher and Kshs 50,000 from Lenick Micheni Gitari and Kshs 25,000 from Dedan Kimathi Mutege to facilitate the employment of Stella Gacheri.
45. The respondent commenced investigations to ascertain the veracity of the allegations. The complainants positively identified the claimant as the person who solicited for money from them disguising himself as Mr Kelvin Okanga.
46. The witness stated that the said allegations were serious and amounted to grave violation of both code of regulations for the secretariat and the Teachers Service Commission code of conduct and ethics.
47. The claimant was interdicted. The respondent invited him to make a statement on the accusations.
48. The claimant was subsequently invited to appear before the disciplinary panel on the February 2, 2016. He attended the hearing and was given an opportunity to defend himself against the allegations that had been levelled against him. Considering the material that was placed before it, the panel reached a decision to dismiss the claimant from the teaching service *vide* a letter dated March 31, 2016.
49. The witness contended that the termination of the claimant's employment was procedurally fair, and substantively justified. The claimant's conduct eroded the trust that the respondent as an employer had in him.
50. The witness stated that there was evidence of Mpesa transactions showing that an exchange of money between the claimant and Dedan Kimathi.
51. The witness asserted that in its proceedings, the respondent leverages on evidence collected by agencies during investigations. However, in this matter, though the respondent used information by, NSIS, the same wasn't placed before this court.
52. The three witnesses were able to demonstrate that the claimant received the Kshs 150,000 in two instalments.
53. The security team carries out investigations, and the integrity department compiles a report thereof inform of a brief internal memo.
54. The witness contended that as regards the misconduct that led to the dismissal of the claimant, there were investigations conducted by the respondent's secretariat.
55. The disciplinary panel confirmed that the number through which the complainants allegedly sent the money, was registered under the names of Kelvin Okanga. That the number that was registered under the names of the claimant, did not have any Mpesa transaction[s] that could connect him to the complainants.
56. There are no prescribed number of questions to be put across to the respondent's witnesses by an officer during a disciplinary hearing. The claimant never requested for the witness statement[s] before the hearing or at any time or at all.
57. The commission's decision that the mobile phone number under the names Kelvin Okanga was the claimant's, was upon basis of the information by NSIS.



## The Claimant's Submissions

58. The claimant distilled four issues for determination thus;
- i. Did the claimant receive the bribes as alleged?
  - ii. Whether the disciplinary tribunal were justified in finding the claimant guilty of the charges before them
  - iii. Whether the claimant was unfairly dismissed/terminated from employment.
  - iv. Is the claimant entitled to the prayers sought?
  - v. Who bears the cost of the suit?
59. On the first issue, counsel submitted that the claimant all through maintained that he never received any bribes from anyone as he was only employed as a messenger whose work was to move files from one office to the other and never held any position of influence. Therefore, it was not possible that he could solicit and receive bribes.
60. On the 2<sup>nd</sup> issue the claimant's counsel submitted that the disciplinary tribunal was not justified in finding the claimant guilty of the charges as there was no sufficient evidence to warrant the finding.
61. It was argued that the respondent's contention that the claimant never challenged the evidence of its witnesses at the disciplinary hearing lacked merit. At the hearing, the claimant was not supplied with the witness statements, depriving him of an opportunity to adequately prepare for the hearing.
62. Counsel further submitted that during the disciplinary hearing the claimant was only given a chance to ask each of the respondent's witnesses a maximum of three questions, a limitation which did not allow him to challenge the evidence of the witnesses, sufficiently.
63. Counsel also submitted that the claimant appealed against the disciplinary panel's decision, through his letter dated May 11, 2016, however, the respondent did not consider the same.
64. On the third issue, the claimant's counsel submitted that the claimant was wrongfully and unfairly dismissed from employment as there was no valid reason[s] for the dismissal. Also lacking was sufficient evidence in support of the allegations.
65. Section 43 of the *Employment Act, 2007* provides that;
- l. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

Section 45 (2) of the Act provides that:

2. A termination of employment by an employer is unfair if the employer fails to prove -
  - a. that the reason for the termination is valid;
  - b. that the reason for the termination is a fair reason -
    - i. related to the employee's conduct, capacity or compatibility; or



- ii. based on the operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure
66. The claimants counsel relied on the holding in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the court stated;
- “...for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness”.
67. It was submitted that since the termination of the claimant’s employment was wrongful and unfair, this court should order for his reinstatement or re-engagement as contemplated under section 49 (3) (a) and (b) of the *Employment Act*. In the alternative the maximum allowed compensation being 12 months pursuant to section 49[1][c].

**Respondent’s Submissions.**

68. The respondent identified three issues for determination;
- i. Whether the respondent had valid and/or justifiable reason to dismiss the claimant
  - ii. Whether the claimant was accorded a fair hearing
  - iii. Whether or not the claimant is entitled to the prayers sought.
69. The respondents submit that the claimant was dismissed based on a valid reason and due process followed.
70. It was submitted that upon receiving the allegations of bribery against the claimant, the respondent commenced independent investigations into the allegations, and upon evaluation of the facts, and the investigation reports, it was convinced that the claimant had breached its regulations and decided to dismiss him from the service.
71. The respondent relied in the holding in Mombasa Cause No I 892 of 2016: *Alice Nvandungo Omwancha v Kenya Industrial Estates Limited* [2019] eKLR, Justice Onesmus Makau held: -
- “After careful consideration of the evidence and submissions presented by both parties, this court finds that the respondent has proved on a balance of probability that the claimant solicited for a bribe from Grace Mwaka on diverse dates in April 2012 and that on April 23, 2012, she indeed received from Grace Mwaka, Kshs 30,000 as a bribe to induce her to secure permanent appointment in the position of administrative assistant.
- The said offence amounted to gross misconduct under the *Employment Act* section 44 (4) (g) and the respondent’s HR Policy on discipline and as clearly explained in the dismissal letter above. Consequently, I return that the respondent has proved that she had a valid and fair reason that justified the summary dismissal of the claimant as required by section 43 and 45 (2) (a) and (b) of the Act”
72. The court was urged to take into consideration the values and the principles of the public service espoused in article 232 of the *Constitution* that focuses on transparency, accountability, integrity and honesty in public service.



73. On the second issue counsel for the respondent submitted that the Code of Regulations for the secretariat staff (COR) sets out the procedure to follow in disciplining officers, which the respondent faithfully adhered to before dismissing the claimant.
74. Its submitted the claimant responded to the charges and a hearing was conducted and the respondent arrived at the decision to dismiss him for gross misconduct pursuant to regulation 57(2)[C] of the COR
30. The respondent's counsel submitted that the claimant was subjected to a fair, procedural and lawful disciplinary process and relies on the holding in *Bett Francis Barngetuny & Another v Teachers Service Commission and Another* (2015) eKLR where it was held;
- “The general principles that: should guide statutory, domestic or administrative tribunals sitting in a quasi' judicial capacity.... are incorporated in the regulations... accusing an employee of misconduct by way of query and allowing an employee to answer the query before a decision is taken satisfies the requirement of fair hearing or natural justice. The claimant was given a fair hearing since he answered the queries before he was dismissed... If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings.”
75. On the third issue the respondent's counsel submitted that the claimant is not entitled to the prayers sought as his dismissal was on established and justified grounds. It also submits that the claimant was given adequate notice vide the interdiction letter therefore not entitled to notice pay.
76. It was submitted further that the claimant did not demonstrate or lay any basis for the claim for leave days as such the same is vague and unproven.
77. The respondent submitted that the claimant is entitled to a certificate of service pursuant to section 51 of the *employment Act* which it indicted has been processed and is ready for collection.
78. The respondent urges the court to dismiss the claim with costs.

### **Analysis and Determination.**

79. The following broad issues present themselves for determination in this matter:
- a. Whether the dismissal of the claimant from employment was procedurally fair.
  - b. Whether the dismissal of the claimant from employment was substantively fair.
  - c. Whether the claimant is entitled to the reliefs sought or any of them.
  - d. Who should bear the costs of this suit?

### **Whether the dismissal of the Claimant from employment was procedurally fair.**

80. There is now firm jurisprudence on what constitutes a fair procedure within the Kenya situation. This court has stated before that section 41 of the *Employment Act* which provision is mandatory provides the answer as regards what fair procedure is in matters termination of an employee's employment.



81. In the case of Anthony Mwala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR, cited by the counsel for the respondent, the court expressed itself on procedural fairness, as follows:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges it is contemplating to dismiss the employee. .... Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has right to a proper opportunity to prepare and be heard, and present/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

82. In the pleadings paragraph 3.4 & 3.5 the claimant stated:

“3.4 Claimant avers that the respondent failed to comply with the provisions of section 41 [2] and section 43 [1] of the Employment Act and in particular failure to give the claimant the opportunity to defend himself and/or argue his appeal and failed to prove the reasons for termination of the claimant’s employment even after the claimant appealed *vide* a letter dated May 11, 2016.”

3.5 The claimant also contends that the respondent is guilty of breach of the provisions of Section 43 and 41 of the Employment Act in that the claimant’s dismissal was unfair and inequitable.”

83. Through its letter dated September 18, 2015, letter of interdiction, the respondent wrote to the claimant, informing him that it had been alleged against him, that he had breached regulation 55/6 of the code of regulation for TSC secretariate staff in that:

(i) On June 6, 2015 and June 27, 2015 he solicited and received Kshs 150,000 cash money in two instalments of Kshs 75,000 each from Patrick Muriithi Mwambia – TSC/5xxxx1 pretending that he could influence in facilitation of his employment as a P1 teacher.

[ii] In the same month of July 2015, he solicited and received cash Kshs 50,000 from Lenick Mucheni Gitai and Kshs 25,000 through Mpesa from Dedan Kimathi Mutegi pretending that he could influence in facilitation of employment of Stella Gachuri as a teacher.

In the letter the respondent required him to make a statement to it in writing within 21 days from the date of the letter, and assured him of an oral hearing before any final decision on the matter could be made.

84. Through his letter dated September 28, 2015, the claimant responded to the respondent’s afore-stated letter in detail. Subsequently, through its letter dated January 8, 2016, the Respondent invited the claimant for a disciplinary hearing that was slated for the 2nd February 2016.

85. On the February 2, 2016, as can be discerned from the minutes that were placed before this court, the claimant appeared before the disciplinary panel, was asked questions connected to the allegations that had been levelled against him, and allowed to cross-examine his accusers. The panel considered his representations and made a decision to dismiss him.

86. By reason of these premises, I am not persuaded that the procedure that was engaged by the respondent was unfair. I am prepared to agree with the respondent, that the process leading to the claimant’s



dismissal was procedurally fair. It was in accord with section 41 of the *Employment Act*, article 50 of the *Constitution* and the tenets of natural justice.

87. In the Nigerian Supreme Court decision in *BA Imonikbe v Unity Bank Plc* SC 68 of 2001 cited by the Court of Appeal. In *Bett Francis Bargentuny & Another v Teachers Service Commission & Another* [2015] eKLR, the court held:

“Accusing an employee of misconduct, by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”

88. The claimant contended in his testimony in court that he was not allowed to cross examine his accusers adequately. He was limited in the number of questions he was to ask and did ask, the respondent’s witnesses at the disciplinary hearing. I have carefully considered the minutes of the disciplinary hearing, I am unable to pick an impression therefrom that the claimant was constrained in any manner, or in the manner he alleged, in cross examining the witnesses.

89. In the upshot, I am inclined to find as I hereby do that the dismissal was procedurally fair.

#### **Whether dismissal was substantively fair.**

90. Section 43 of the *Employment Act* places upon an employer a legal burden to prove the reason or reasons for termination of an employee’s employment whenever the termination is in dispute. From the letter of interdiction, at the disciplinary hearing and in the dismissal letter, the respondent was express on the grounds that; it was intending to premise a disciplinary action on; the claimant was asked to defend himself against; the dismissal was based on. Considering the material placed before me in its totality, I am of the view that the respondent discharged the burden under section 43 of the *Employment Act*.

91. However, it is not enough for an employer to provide and prove the reason[s] for the dismissal, he or she must move further to discharge the burden under section 45 [2], proving that the reason for the termination was valid and fair. This provision speaks to substantive fairness.

92. In order to determine whether there was substantive justification in the dismissal, it is important from the onset to state that the same has to be done under the lens that the Court of Appeal provided in the case of *Bett Francis Bargentuny & Another* [supra] thus:

“47. If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer’s findings. In the South African case *Nampak Corrugated Wadeville V Khoza* [JA 14/98] [1998] ZALACK 24, it was held that:

“A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”



93. Section 44 of the *Employment Act, 2007* stipulates when summary dismissal can occur, thus:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by a statutory provision or contract term.

(2) .....

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employer has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.

94. No doubt, the claimant was summarily dismissed, however, whether or not the misconduct that the claimant was accused, was of one that fundamentally breached his obligations under the contract, I shall delve into shortly hereinafter.

95. Section 44 [4] of Act provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal of that employee. However, it is imperative to state that the list therein is not exhaustive. An employer may summarily dismiss an employee on an account outside those in the catalogue for as long as the account has the characteristic such as I will demonstrate shortly hereinafter.

96. It was the respondent’s case that the claimant’s acts that were in issue, during the investigations, the show cause level, and disciplinary hearing amounted to grounds that justifiably attracted the dismissal.

97. In *Laws v London Chronicle Limited* [1959] 2 ALL LR 285, the English Court of Appeal stated:

“Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of contract of service.”

98. In *Mckinley v BC Tel*, [2001] 2 SCR 161, 2001 SCC 38 [CAN LII], the Supreme Court of Canada stated:

“29. When examining whether an employee’s misconduct justifies his or her dismissal, courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not by itself, give rise to a just cause, rather, the question to be addressed is whether in the circumstances, the behaviour was such that the employment could no longer subsist.”

39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee’s behaviour. In this respect, courts have held that factors such as the nature and degree of the misconduct, and whether it violated the “essential conditions” of the employment contract or breaches an employer’s faith in an employee, must be considered in drawing a factual conclusion as to the existence of a just cause.”

99. The court has carefully considered the evidence by the respondent’s witnesses, noted the consistence in the same and the collaborative nature that comes out therefrom on the fulcrum point of the matter –



that the claimant solicited for and received bribes, and that he was identified positively by his accusers, and come to a conclusion that the respondent did on a balance of probabilities establish the claimant's misconduct.

100. The claimant's counsel submitted that the respondent did not demonstrate that claimant was involved in any manner, in the matters that were complained of, since the respondent's witnesses stated that they all through dealt with one Kelvin Okanga. With due respect, this position taken by counsel is as a result of looking at the evidence that was placed before the court superficially. The evidence by the respondent's witnesses was deeper, they later on discovered that all through they had been duped to believe that they were dealing with one Kelvin Okanga, while in the real sense they were with the claimant. That all of them managed to positively identify the claimant as the person they had been dealing with, was in the estimation of this court not shaken.
101. This court is not persuaded that the respondent acted unfairly and unreasonably in imposing the sanction, in the circumstances of the matter.
102. The dismissal was substantively fair, the actions of the claimant were in the nature that could erode trust and faith of any reasonable employer in an employee. His employment would no longer subsist.
103. Consequently, this court concludes that the respondent did discharge the burden under section 45 [2] and 47 [5] of the Act, it proved that the reason[s] for the dismissal were valid and fair, and justified.

#### **Of the reliefs**

104. The reliefs sought by the claimant are all of them not independent of the claim for unfair termination. Consequently, having found that the dismissal was fair, the court grants none of the reliefs.
105. In the upshot, the claimant's case is hereby found to be without merit. It is hereby dismissed with costs.

**READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In presence of

Mr. Kimani holding brief for Wachanga for the Claimant.

Mr. Langat holding brief for Anywor 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 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**

