



**Kevin v Mohammed Ali Kassamali Madhani t/a Mohamed Madhani & Co. Advocates  
(Cause E294 of 2020) [2022] KEELRC 1299 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1299 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E294 OF 2020**

**J RIKA, J**

**JULY 7, 2022**

**BETWEEN**

**OICHOE HANS KEVIN ..... CLAIMANT**

**AND**

**MOHAMMED ALI KASSAMALI MADHANI T/A MOHAMED MADHANI &  
CO. ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is an Advocate of the High Court of Kenya. The Respondent is a Law Firm, which employed the Claimant on January 1, 2019, and summarily dismissed him a year later, on February 10, 2020.
2. He presented this Claim to Court on July 14, 2020. The Claim was amended on August 26, 2020. He states that summary dismissal was based on an unsubstantiated ground. The Respondent alleged that the Claimant was grossly negligent, in handling a Client's file, in Nairobi HCCC No. E196 of 2019, Robson Harris & Company Advocates v InvescoAssurance Company, Diamond Trust Bank & 2 others .
3. Details of gross negligence were: alleged failure to file a Notice of Appointment of Advocates; failure to file a Replying Affidavit; failure to diarize the hearing date; and failure to attend Court on the appointed date. Resulting from these failures, it was alleged that the Respondent's Client, Diamond Trust Bank, was compelled to pay Kshs. 6,380,000 by way of garnishment.
4. The Claimant states that he was never assigned the said file.
5. He was issued a letter to show cause why, disciplinary action should not be taken against him, dated January 31, 2020. He was subjected to a sham disciplinary hearing, on February 8, 2020. He was prejudged. He was not notified about the 2 witnesses, Counsel Sammy Njoka and David Janjo, who were called to testify against the Claimant. Disciplinary notice indicated hearing would be through



- written representations. He was not availed any written representations by the Respondent at any time. The disciplinary panel was made up of 2 persons- Jackson Kisinga and Julius Odhiambo. Kisinga was Claimant's supervisor and therefore, was an accuser and judge in the proceedings.
6. The Claimant was denied the opportunity to be accompanied by a colleague of his choice at the hearing. Kisinga sought to impose Njoka on the Claimant, as Claimant's colleague of choice. The Claimant chose Janjo as his colleague, but Janjo was hijacked, and made a witness for the Respondent.
  7. Njoka and Janjo gave contradictory evidence, which was relied on by the Respondent, in dismissing the Claimant. No reason was offered to the Claimant for dismissal. The letter of termination regurgitated the contents of the letter to show cause.
  8. The instruction e-mail, from Diamond Trust Bank was sent to the Claimant, Njoka and Janjo, and was copied to the Respondent's official e-mail, yet it was only the Claimant subjected to the disciplinary hearing. Njoka and Janjo admitted that they had seen the email from the Client, during the hearing. It was alleged that the Claimant failed to attend High Court at Nairobi on 28<sup>th</sup> January 2020. On this day, he was attending Court at Kisumu, instructed by the Respondent. The Respondent was buoyed by bias and malice, in dismissing the Claimant.
  9. The Claimant states that he endured loss and was exposed to professional infamy. His employability was injured. He prays the Court to declare that dismissal was unfair, and grant the following orders: -
    - a. Declaration as stated above.
    - b. Compensation for unfair termination equivalent of 12 months' salary at Kshs. 1,080,000.
    - c. Damages for violation of the Claimant's rights to fair administrative action and fair hearing at Kshs. 2,000,000.
    - d. Exemplary damages at Kshs. 1,000,000.
    - e. Interest.
    - f. Costs and any other suitable remedy.
  10. The Respondent filed its Statement of Response, dated March 15, 2021. It is not disputed that the Claimant was employed by the Respondent as an Advocate. Termination was based on fair and legal grounds. Due process was observed.
  11. The Respondent received instructions on December 20, 2019 via e-mail, from its Client Diamond Trust Bank, who had been joined in garnishee proceedings, at Nairobi HCCC No. E196 of 2019. Hearing of the garnishee application was slated for December 24, 2019.
  12. The Claimant was tasked with the filing of Notice of Appointment of Advocates and Replying Affidavit. He failed and or declined to act as instructed. The result was that on December 24, 2019, garnishee order issued, with the Respondent condemned to pay the Applicant the sum of Kshs. 6,380,000. The order issued, notwithstanding that the Respondent did not hold any funds on behalf of the Judgment-Debtor, a fact that was not brought to the attention of the Court, as a result of the Claimant's gross negligence.
  13. It is not true that the Claimant was not issued instructions to act for Diamond Trust in the matter. He acted in breach of his contract. He was fairly heard. He was advised on the reasons disciplinary process was initiated. He was granted adequate time to prepare for the hearing. He was afforded opportunity to have the company of a colleague at the hearing, and to make representations. He was granted the opportunity to cross-examine witnesses presented by the Respondent. The Respondent concluded



- after hearing the Claimant, that the Claimant was negligent. His contract was terminated. He was paid all terminal benefits.
14. In the alternative and without prejudice to the generality of the foregoing, the Respondent states that the Claimant admitted negligence during the disciplinary hearing. He was availed the right of appeal which he opted not to exhaust. He authored his own misfortune, and attempted, but failed, to scapegoat his colleagues. The Respondent suffered reputational prejudice. The Claimant remained unapologetic.
  15. The Respondent states that the Claimant does not merit the remedies claimed. It is proposed by the Respondent that the Claim is dismissed, with costs to the Respondent.
  16. The Claimant gave evidence on July 15, 2021, and November 5, 2021 when he rested the Claim. A partner in the Respondent Law Firm, Jackson Kisinga, gave evidence and rested the Response on February 16, 2022. The dispute was last mentioned in Court on April 1, 2022, when Parties confirmed the filing and exchange of their Final Arguments.
  17. The Claimant adopted his Statements of Claim and Witness on record, as well as his original and supplementary Documents.
  18. He restated that he was employed by the Respondent as an Advocate on January 1, 2019, on a salary of Kshs. 90,000 monthly. His contract was terminated unfairly as stated in his Pleadings. He detailed the particulars of the charges against him; the contents of the letter to show cause; his response; and, gave his recollection, and his views, of the disciplinary process.
  19. Jackson Kisinga was Claimant's Supervisor. He convened the disciplinary panel, chaired proceedings, interviewed witnesses, recorded minutes and wrote the resultant recommendation to the Respondent.
  20. After the Claimant handed in his reply to the letter to show cause to Jackson Kisinga, Kisinga told the Claimant to call Njoka as his colleague at the hearing. The Claimant said he would call Janjo. Janjo however, ended up being cross-examined by Kisinga.
  21. The Claimant was not notified that the Respondent would be calling a witness. The Claimant protested the conversion of Janjo as a witness for the Respondent. He was told by Kisinga that he had mentioned Janjo adversely. Janjo however confirmed that he had not been mentioned adversely by the Claimant.
  22. The Claimant was not supplied with the Respondent's witness statements.
  23. He denied that he acted negligently. He was not assigned the particular file, as alleged by the Respondent. The evidence of Janjo and Njoka was contradictory. Janjo said he took the file to the Claimant on January 6, 2020, while Njoka said he took the file to the Claimant on December 20, 2019. Janjo also referred to e-mail printouts and hardcopy instructions. He said that the Claimant was not at his desk, when the file was allegedly placed at his desk.
  24. Janjo and Njoka were not Claimant's seniors. Kisinga would assign the files to the 3 Advocates and they would request each other for assistance. Occasionally, Kisinga would assign the files through office clerks. The Claimant did not know why on this occasion, Kisinga reached the conclusion that the particular file was assigned to the Claimant.
  25. It was alleged that the Claimant failed to diarize the brief on December 24, 2019. The Respondent had skeleton staff, most of the staff having left for Christmas break. The Claimant was in office. The matter [Diamond Trust Bank] was not in the diary. The Claimant attended to other matters.



26. On January 28, 2020, Kisinga had instructed the Claimant to attend to 3 other matters at Kisumu. The Claimant did so. The Claimant did not know who attended to Diamond Trust Bank from the inception. The Claimant worked for the Respondent for 1 year. He ventured into law practice on his own, after termination.
27. He emphasized that there was malice and bias against him. The email instructing the Respondent was copied to Janjo, Njoka and the Claimant. It was only the Claimant who was asked to show cause why, disciplinary action should not be taken against him. He was not in Nairobi on January 14, 2020. His colleagues were in Nairobi, and had access to the e-mail. The Claimant had instructions to attend to other matters at Homa Bay on January 14, 2020. Hearing was rescheduled to January 15, 2020. He was instructed by Kisinga to stay and attend Court at Homa Bay on January 15, 2020. Hearing at Nairobi was on January 17, 2020. The Claimant did not, and could not see the hearing notice which accompanied the e-mail.
28. His colleagues Janjo and Njoka did not act on the email of January 17, 2020. The master diary printout, shows the matters the Claimant was involved in at Homa Bay. Janjo conceded that he had seen the client's e-mail on January 6, 2020. Njoka was said to have seen the e-mail, printed it out and placed it on the Claimant's desk on December 20, 2019. The 2 colleagues said they placed instructions on the Claimant's desk, because he was handling a series of similar matters, where the Law Firm of Robson Harris was on the other side. The Claimant stated however, that he was only assigned 1 file, not a series of files. Njoka told the disciplinary panel that he saw the e-mail of December 20, 2020, and did not follow up.
29. The Claimant was asked to sign the disciplinary meeting minutes. He requested to read them. He realized there were anomalies. He requested for correction which was not done. He did not appeal against the decision to terminate his contract. Termination letter was given by Kisinga. The Claimant asked Kisinga if the Respondent had a Human Resource Manual to guide the process. Appeal was supposed to be lodged with Madhani, who owned the Respondent Law Firm. The Claimant felt he could not appeal to Madhani, and preferred the Claim to Court.
30. Cross-examined, the Claimant told the Court that he joined the Respondent in January 2019. He was admitted to the bar on February 13, 2019. He did pupillage with the Law Firm of Waweru Gatonye. He did probation with the Respondent, which was extended for 2 months, before confirmation. Janjo and Njoka similarly underwent extended probation before confirmation.
31. The Claimant did not have instructions to open the disputed file. On December 20, 2019, Respondent's staff had office lunch. It ended at around 3.00 p.m. It was discussed after lunch, who would remain in office during the Christmas break. The Claimant, Janjo, and a pupil Esther Wanja remained. Njoka was proceeding on leave.
32. Janjo told the disciplinary panel that he was not aware who was to attend Court on December 24, 2019. He said that he informed the Claimant about the hearing, scheduled for December 27, 2019. The Claimant did not recall if he was in office on December 24, 2019, but recalled he was, on December 27, 2019.
33. The Claimant told the disciplinary panel that he called Robson Harris in December 2019, and was advised that the matter was due for mention on January 17, 2020. The Claimant did not inform anyone about 17<sup>th</sup> January 2020. He did not diarize the January 17, 2020. Njoka was assigned file number E197 of 2019. The Claimant dealt with file number E181 of 2019. File number E197 of 2019 had an application.



34. The Claimant did not recall how many garnishee proceedings were involved. They were quite a number. It was not a single Advocate who dealt with Robson Harris. Kisinga did not instruct the Claimant to deal with the disputed file.
35. The Claimant did not see the e-mail from the Client, notifying the Firm, that hearing was on December 24, 2019. Janjo was aware of the orders issued against the Respondent's Client. He called the Claimant, while the Claimant was in Kisumu. When the Claimant returned to Nairobi, he found Kisinga going through the files at the Claimant's shelf. The Claimant was curious. He received the letter to show cause later in the same day.
36. He was required to respond to the letter to show cause, which he did the same day. He was invited for hearing. He was not supplied written statements of Janjo and Njoka. They gave oral evidence. This evidence was contradictory. Janjo said he placed instructions on the Claimant's desk, on January 6, 2020, while Njoka stated he did so on December 20, 2019. Janjo stated that printout was on December 20, 2019. Njoka was on leave between December 24, 2019 and January 1, 2020. The Claimant did not know if Njoka made the printout, before he went on leave.
37. Janjo was specific that the Claimant was not at his desk, when instructions was placed on his desk. Janjo alleged that the documents were handed to the Claimant personally.
38. The Claimant was given the disciplinary meeting minutes to sign. He asked for time to read the minutes. Kisinga said the minutes were correct, and the Claimant just signed. The Claimant did not appeal. Madhani, owner of the Respondent Law Firm, wrote the letter of termination. The Claimant could not appeal to Madhani.
39. The Claimant's contract contained a grievance procedure. The aggrieved Employee would go through his supervisor, or duly authorized administrative officer. The Claimant wrote to Madhani on February 14, 2020 asking for certain documents. He did not bypass Kisinga. Madhani responded, extending the period of appeal by 7 days. The Claimant did not appeal. He denied that he preferred litigation, over internal dispute resolution mechanism.
40. He was paid terminal dues. He does not have a problem with what was paid. Termination left a bitter taste in his mouth. The words used by the Respondent affected his employability. He was told that he was untrustworthy and lacked good judgment. His professional reputation was injured. The letter was not a public document. The Claimant would have to think, and make a decision on whether he was defamed. He was issued a Certificate of Service, in accordance with the [\*Employment Act\*](#).
41. Redirected, the Claimant told the Court that Kisinga did not give him instructions on the disputed file. It could not be assumed that because the Client copied the e-mail to the Claimant, he was to act on the matter. Any Associate who was copied could act. He was not given written statements from his colleagues. They only gave oral evidence. The Claimant did not have a chance to cross-examine. He was tried by ambush. Hearing notice to attend the disciplinary hearing, advised that the Claimant could be accompanied by a colleague of his choice. Njoka and Janjo gave contradictory evidence. Recommendation to terminate the Claimant's contract was based on this evidence. Kisinga was Claimant's supervisor. He issued the letter to show cause, chaired the disciplinary hearing, and took the minutes. The Claimant lodged a notice of appeal against the decision of the disciplinary panel. He applied for typed minutes. He was advised that he already had been supplied the handwritten minutes from Kisinga.



## Respondent's Evidence.

42. Partner Kisinga, adopted his Statement of Witness and Documents filed by the Respondent, in his evidence.
43. He joined the Respondent in 2013. He was a Senior Associate. He was promoted to Head of Litigation and Dispute Resolution. He was involved in the panel that recruited Advocates and Pupils at the Law Firm. He dealt with disciplinary matters.
44. He was involved in the recruitment of the Claimant. The Claimant was taken in, on a holding-over basis in December 2018. He had done his pupillage at the Law Firm of Waweru Gatonye. The Respondent hired him in January 2019. He executed a contract as an Associate in litigation. He was placed on probation of 3 months, which was extended for 2 months. His salary was Kshs. 60,000 monthly, which was reviewed to Kshs. 90,000 monthly, upon confirmation. Confirmation was effective from July 1, 2019.
45. The Respondent received instructions on December 20, 2019, to enter appearance for its client Diamond Trust Bank in garnishee proceedings, in Nairobi HCCC No. E196 of 2019, Robson Harris & Company Advocates v. Invesco Assurance Company Limited & Diamond Trust Bank Kenya Limited & 2 others.
46. Instructions were communicated via e-mail. The matter was scheduled for mention on December 24, 2019. The Respondent was on Christmas break from December 20, 2019, but retained in office a skeleton staff. They included the Claimant and a Pupil Esther. The Claimant's fellow Associates, Janjo and Njoka had proceeded on leave.
47. The Claimant did not attend Court on December 24, 2019. Kisinga was informed about this default by the Client. He contacted the Claimant and advised him to deal with the matter personally.
48. January 28, 2020, the Respondent received the garnishee order absolute. Kisinga followed up, and learnt that the matter was scheduled for hearing on January 17, 2020. There was no one from the Respondent at the Court for hearing, on January 17, 2020. Hearing was pushed to January 28, 2020. The order absolute in the sum of Kshs. 6,380,000, issued on January 28, 2020. The Respondent was compelled to apply for stay of execution.
49. Letter to show cause issued. The Claimant replied on February 3, 2020. He was heard on February 8, 2020. Kisinga handwrote the proceedings. It was recommended that the Claimant's contract be terminated. His conduct caused the Respondent and its Client severe prejudice. The Claimant was unapologetic and lacked good judgment.
50. He was issued a letter of termination. He was paid terminal dues including notice and salary for days worked. Certificate of Service issued. He was granted 7 days to appeal. He wrote to the Respondent, asking for copies of proceedings. It was confirmed that the Claimant already had the proceedings. The appeal window was extended by the Respondent. The Claimant did not file any appeal. Fair procedure was followed in accordance with the *Employment Act* and *the Constitution*. The Claimant was impervious to the prejudice occasioned to the Respondent, and its Client.
51. The panel was constituted by Madhani. Kisinga was not the only panellist. There 2 senior Associates. It was a corporate panel.
52. The Claimant was advised of all his procedural rights. He chose a colleague to accompany him to the hearing. Janjo and Njoka were on leave on December 24, 2019. On January 14, 2020, Kisinga followed up the matter with specific instructions to the Claimant, after the Client complained. It was



undisputed that the Claimant had contacted Robson Harris, and was informed of the hearing, slated for January 17, 2020.

53. In Janjo's evidence at the disciplinary proceedings, it was indicated that Esther or the Claimant would attend Court. Esther was a Pupil. Only the Claimant could attend Court.

Njoka was on leave. There was no contradiction in the evidence of Janjo and Njoka.

54. The Claimant conceded, on receiving information from Robson Harris that the matter had been reserved for hearing on January 17, 2020, he did not capture the date on the master diary. He stated further that it was not for him, to supervise other Advocates. The Respondent expected the Claimant to at the very least, diarize. Kisinga did not act in the disciplinary process as an individual. It was a corporate undertaking. Madhani alone, could deal with the appeal. The Respondent has other senior Associates. It employed 18 Associates at the time.

55. On cross-examination, Kisinga told the Court that he had administrative duties. The Client contacted Kisinga on January 14, 2020. The letter to show cause does not disclose that Kisinga instructed the Claimant to follow up the matter personally, on 14<sup>th</sup> January 2020.

56. The disciplinary proceedings alluded to Code of Conduct. Kisinga did not have the Code in Court. He was not privy to the Claimant's contract. The Claimant had indicated that he would be accompanied by Janjo to the hearing. Kisinga did not suggest to the Claimant, that he calls Njoka instead. The panel comprised Julius Odhiambo from the commercial department, and Kisinga. Madhani did not issue the panel written instructions. Janjo and Njoka did not give written statements. The Claimant was required to respond to the letter to show cause in writing. The disciplinary panel stated that the Claimant was untrustworthy and lacked judgment. The Respondent relied on the evidence of Janjo and Njoka, as well as the Claimant's own concessions. It is correct that the file was entrusted to the Claimant. He was instructed thrice to attend to the file.

57. Kisinga could not confirm that on January 15, 2020, the Claimant was at the Court in Homa Bay. Documents availed to the Court by the Claimant, show that he was indeed at Homa Bay.

58. It was humanly possible for Janjo and Njoka to place the documents at the Claimant's desk, on different dates. The email from the Client was copied to the Claimant, Njoka, Janjo and Kisinga. It was only the Claimant issued with the letter to show cause. It was alleged that the Claimant failed to attend Court, on 28<sup>th</sup> January 2020. It is true that Kisinga had approved his itinerary to Kisumu. The Respondent had a provision for 2 written warnings, before termination. The Claimant was not given the benefit of warnings. Madhani signed the termination letter. It was his decision to terminate. There was no Human Resource Manual showing where the Claimant could appeal. The conclusion that the Claimant lacked good judgment, and was untrustworthy, could affect his employability.

59. Redirected, Kisinga told the Court that Janjo and Njoka gave evidence by way of interview. There were no written statements. The Claimant cross-examined them. There was no ambush. Parties were familiar with the issues in dispute. The Claimant was always aware, that he was to deal with Diamond Trust brief. He should have taken action. He says he called Robson Harris and was therefore aware of the date on January 17, 2020. Kisinga conceded that he did not see the Claimant on 14<sup>th</sup> January 2020, but did so on January 16, 2020. Appeal procedure was internal, not a court process requiring the Claimant to have typed proceedings. All disciplinary communication was private- between the Claimant and the Respondent, and was not broadcast to 3<sup>rd</sup> Parties.

60. The issues as understood by the Court are: whether termination was procedurally fair; whether it was substantively fair; whether the Claimant's Statutory and Constitutional protections were infringed;



and whether he merits the remedies pleaded, at paragraph 9 of this Judgment. In addition, it must be asked whether the Claimant exhausted the internal dispute resolution mechanisms.

### **The Court Finds:**

61. The history of the Claimant's employment, and his terms and conditions of employment with the Respondent Law Firm, are not contested.
62. He was recruited by the Respondent in a holding-over arrangement, in December 2018. He was issued a contract on January 1, 2019, to work as an Associate, on probation of 3 months. He had worked for the Law Firm of Waweru Gatonye on attachment. The Respondent, extended Claimant's probation for 2 months from March 2019 to May 2019. In July 2019, the Respondent confirmed the Claimant as an Associate. His monthly salary was reviewed from Kshs. 60,000 to Kshs. 90,000.
63. It is common ground that the Respondent issued a letter to show cause why, disciplinary action should not be taken against the Claimant. The Respondent alleged that the Claimant failed to file a Replying Affidavit, and Notice of Appointment of Advocates, in Nairobi HCCC No. E196 of 2019, upon instructions issued by Respondent's Client, Diamond Trust Bank. Secondly it was stated that the Claimant failed to diarize the dates given for hearing of the garnishee Application –December 24, 2019 and January 28, 2020– and failed to attend Court.
64. The Claimant responded on January 3, 2020. [The correct date should be February 3, 2020, the letter to show cause being dated January 31, 2020]. It is not contested that he was invited to a disciplinary hearing on February 8, 2020, was heard and advised of the decision to terminate his contract, through a notice dated February 10, 2020, signed by Madhani.
65. Other uncontested facts include that the Claimant expressed his intention to appeal against the decision to Madhani, through a letter dated 14<sup>th</sup> February 2020. He asked for typed proceedings, findings and recommendations of the disciplinary panel, and the hearing notice forwarded by the Client, Diamond Trust Bank to the Respondent.
66. Madhani wrote to the Claimant on February 20, 2020, forwarding a copy of a letter from the Respondent containing findings and recommendations of the disciplinary panel. It was the advice of Madhani that the Claimant already had the handwritten and signed proceedings of the disciplinary panel, which was adequate for purposes of appealing. On the hearing notice, the advice from Madhani was that the notice comprised privileged communication between the Respondent and its Client, and that in any event, all documents had been shared at the hearing.
67. The Claimant did not pursue the Appeal.
68. Certificate of Service dated February 12, 2020 issued. The Claimant was paid terminal benefits, in 2 separate cheques of Kshs. 68,604 and Kshs. 22,868.

### **Procedure**

69. The Court has not been persuaded by the Claimant, from the uncontested facts on procedure summarized above, that the Respondent significantly deviated from the minimum statutory standards of procedural fairness, under Sections 41 and 45 of the *Employment Act*.
70. The Claimant complains that he was not supplied written statements from Janjo and Njoka. No such witness statements were shown by the Claimant to have been a requirement, under any workplace human resource instrument, the Claimant's contract, or relevant statute.



71. He complains that he had intended Janjo would accompany him as a colleague of his choice, at the hearing, and that Kisinga advised the Claimant to go with Njoka instead. The Claimant was not bound to take the advice of Kisinga. In the end both of his Associates gave evidence as Respondent's witnesses, in accordance with their recollection of the events of December 2019 and January 2020. There is no evidence that either Janjo or Njoka were compelled to testify for the Respondent, or not to attend disciplinary hearing on the side of the Claimant.
72. It is unlikely that either of these Associates, would vouch for the Claimant, considering his stance that they should all have been slammed with letters to show cause, having in his view, all received instructions from the Client, and having failed to act on those instructions.
73. Other complaints of a procedural nature, include the participation of Kisinga in the disciplinary panel. The Claimant argued that Kisinga was his supervisor, chaired the proceedings, recorded proceedings and made recommendation for termination of the Claimant's contract.
74. Ideally, a supervisor who investigates disciplinary offences, which become the subject matter of a disciplinary hearing, ought to pave way for another senior officer, to preside over the disciplinary hearing. Kisinga was the Claimant's supervisor, and a key witness in the allegations made against the Claimant. He was the investigator. He ought to have come in as a witness, and not the chair of the panel, its secretary and adjudicator. Kisinga told the Court that the Respondent employed no fewer than 18 Associates. What was the hurdle in a big Law Firm such as Madhani, constituting an independent panel, from this pool of Associates? At the very least, why did the Respondent not entrust Julius Odhiambo, a senior Associate who was not involved with the investigations, to chair the panel with the assistance of other Associates available at the Law Firm?
75. Objectivity was not sustained, by having Kisinga investigate, preside over the hearing, record proceedings, and make findings and recommendations.
76. This Court has in the past expressed the view, that it is not inappropriate for supervisors or other senior Management Employees, to preside over disciplinary matters which they have investigated. This is permissible however, in small workplaces, where it is not possible to compose a panel comprising staff who have no association with the preceding investigations. In workplaces with adequate staff such as the Respondent Law Firm, it is advisable to select panellists who have no familiarity with the investigations.
77. The Claimant complained that he could not proceed with the intended Appeal because Madhani, the Firm owner, signed the letter of termination. But what was Madhani's involvement in the disciplinary hearing beyond selecting the panellists and signing the letter of termination? The Claimant addressed Madhani in his intention to appeal. He was aware Madhani was the person seized with the internal appellate jurisdiction. The Claimant states that he asked for a Human Resource Manual to guide him on appeal but was provided none. He had proceeded with the disciplinary hearing without the Human Resource Manual and initiated the process of appeal, without one. The Court does not think that the Claimant was denied his procedural protections on appeal.
78. In the end the Claimant was issued a letter of termination, which clearly states the reasons for the decision. It is not true, that the Claimant was not told why the Respondent terminated his contract.
79. Procedure, save for the participation of Kisinga in the disciplinary panel, was fair.



## Substance.

80. It is clear that on January 28, 2020 when the Claimant was said to have failed to attend the Court in Nairobi for garnishee proceedings, he was at the High Court in Kisumu, attending to 3 matters, on the instructions of the Respondent.
81. It also appears to the Court that the Claimant was in the High Court at Homa Bay, between 12<sup>th</sup> and 15<sup>th</sup> January 2020. It is unlikely that Kisinga met the Claimant on 14<sup>th</sup> January 2020, and impressed upon the Claimant to pursue the Diamond Trust brief personally, after Diamond Trust made the complaint to Kisinga.
82. But beside the charge of failing to attend Court in the Diamond Trust brief, the Claimant was charged with failure to diarize relevant dates.
83. On December 24, 2019 when the matter came up for mention, the Claimant and a pupil, Esther Wanja, were the only Lawyers in office. Esther could not attend Court. There was an e-mail copied to the Claimant, Janjo and Njoka, from the Client, bringing the matter to the attention of the Law Firm. Instructions issued on December 20, 2019. The other Advocates were not in chambers on 24<sup>th</sup> December 2019. On cross-examination, the Claimant stated that the one person in office, would handle business. He stated further, and rather unconvincingly, that he did not recall if he was in office on December 24, 2019, but recalled he was in, on December 27, 2019. The Claimant ought to have taken charge as he was the only qualified Advocate left in chambers. He did not persuade the Court that the brief was not assigned to him. Even if it was meant to be dealt with by Janjo or Njoka, the presumption would be that the initial action would be taken by the Advocate who was left in the Respondent's chambers. There would be no purpose in retaining a skeleton staff over the Christmas holiday, if the retained staff were to select matters to attend to, while rejecting others, on the ground that those other matters were to be dealt with by staff who were on break. The Claimant was aware of the brief, the e-mail having been copied to him. It is unhelpful to argue that letter to show cause ought to have issued to all Associates who were copied the e-mail. The other Associates were on Christmas break, a fact known to the Claimant.
84. Furthermore, there is evidence to show that the Claimant made enquiries about the series of garnishee proceedings brought against Diamond Trust Bank, through Robson Harris. To his credit, he called Robson Harris, and was advised that the matter was deferred to January 17, 2020. He inexplicably, did not diarize the matter in the master diary, instead taking the stance that it was not his brief, and it was not in his position to supervise and patronize colleagues.
85. Even if he was engrossed in other briefs at Homa Bay between January 14, 2020 to January 17, 2020, ought he not to have diarized January 17, 2020, or alerted his supervisor and Associates about the information he received from Robson Harris?
86. On January 17, 2020, the Court deferred hearing/ ruling date to January 28, 2020. The Claimant was in Kisumu on January 28, 2020, and could therefore not be in Court at Nairobi, on January 28, 2020.
87. The Court is however persuaded that the Claimant was negligent in failing to diarize relevant and crucial dates, in the garnishee proceedings. The result was that the Client was exposed to pay a sum of Kshs. 6,380,000. The Respondent was exposed to reputational damage. All this exposure would have been avoided if the Claimant took charge, as the vacation duty Advocate, and acted on December 20, 2019 and December 24, 2019; and subsequently, taken the necessary steps such as taking note in the master diary, of the dates given for Court attendance in the new year- January 17, 2020 and January 28, 2020. He need not have attended Court in January 2020 in the particular brief, but should have



ensured the dates were in the master diary. Garnishee proceedings originated in December 2019, when the Claimant was the vacation duty Advocate, in charge of Respondent's chambers. It is difficult to absolve him from the circumstances leading to default garnishee proceedings, and professional exposure sustained by the Respondent.

88. There is adequate evidence to establish that the Claimant was negligent, which is an employment offence under Section 44 [4] [c] of the *Employment Act*, warranting summary dismissal.

### **Remedies.**

89. The remedies pleaded by the Claimant are not merited. Even had he established that his constitutional and statutory rights were violated by the Respondent, the Court does not think that he would merit 12 months' salary in compensation for unfair termination at Kshs. 1,080,000; damages for constitutional violations at Kshs. 2,000,000; and punitive damages at another Kshs. 1,000,000. He had worked for about 1 year, half of which was probationary. He was confirmed in July 2019. Compensation and damages such as pleaded by the Claimant, would appear to the Court way out of line with his period of service.
90. The words used in describing the Claimant's omission – untrustworthy and lacking in good judgment – do not seem to the Court, to have been made out of turn. The Claimant failed to alert his colleagues about the matter scheduled for January 17, 2020, explaining instead that it was not in his position to supervise and patronize colleagues. He prejudiced his Law Firm and its Client. The Respondent cannot be faulted for feeling that the Claimant did not discharge his duty with trust and good judgment. It was not shown that the Claimant's stock in trade was diminished by the Respondent's choice of words. The Claimant was able to move on in his legal practice. His employability was not injured. His practicing certificate was not recalled. The words were used between the Claimant and the Respondent, and not broadcast to the legal fraternity. No adverse reference is alleged to have been given by the Respondent to potential Employers against the Claimant. The Claimant did not give evidence showing that he made an application for a job with any Law Firm after his dismissal, and was told he could not be employed, due to any adverse reference made by the Respondent. The Court is not persuaded that the Claimant's employability was damaged.

### **Appeal.**

91. Lastly, the Court was told that the Claim is bad in law, because the Claimant did not exhaust the internal dispute settlement mechanism, available at the workplace.
92. The Court would agree with this submission. Parties agree that there was a provision for an internal appeal. The Claimant expressed his intention to appeal. He told the Court that he filed a notice of appeal. He asked for certain documents to enable him appeal. He was supplied with some documents and advised on the Respondent's position, in respect of other documents.
93. The Claimant did not appeal. He was given an additional 7 days within which to file an appeal. He did not file any.
94. Courts have held that, where recourse to internal dispute resolution mechanism is not exhausted, the Claim is rendered irreceivable before the Court.
95. A Claim is not receivable unless the impugned decision is final. The Claimant could not of his own initiative, evade the requirement that internal remedies be exhausted, before he filed his Claim. He initiated the appeal process and ought to have waited for that process to culminate in a final decision



made by Madhani. What he challenges in this Court is not the final decision of the Respondent; it is the first decision made at the disciplinary hearing level.

96. The Claimant's argument that there was no Human Resource Manual to guide him, has been faulted by the Court at paragraph 76 of this Judgment. The substance of his argument for non-completion of the appellate process, did not provide a basis to obviate the appellate process. Madhani did not refuse to hear the Claimant on appeal. He facilitated hearing as requested by the Claimant. The Respondent did not fail to provide an avenue for appeal. The appellate procedure was not shown to be inadequate, to correct any failures of the disciplinary hearing, including failures attributed to Kisinga's involvement. The appeal may well have resulted in quashing of the termination decision, reinstatement of the Claimant, or reactivation of the dispute, making it unnecessary for the Claimant to come to Court. The Court does not think that the internal appellate process was a useless gesture, which could not reasonably redress any shortcomings the Claimant had with the disciplinary panel.
97. This position on exhaustion of internal remedies, has support in Kenya Court of Appeal decision, *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, where it was held that, exhaustion doctrine applies even where, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. There is always the right of approaching the Courts after exhaustion of internal dispute resolution mechanisms. It was concluded by the Court of Appeal in this decision that, "Courts ought to be the last fora of last resort, and not the first port of call..." The position is reiterated in other persuasive decisions of this Court in *Feroz Ali Omar v ECU Worldwide Limited* [2018] eKLR and *Jackson Butiya v Eastern Produce Limited* [ Cause No. 335 of 2011].
98. The Court finds for these reasons, that the Claim is without merit.

It is ordered: -

- a. The Claim is declined.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT CHAKA, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 7<sup>TH</sup> DAY OF JULY, 2022.**

**JAMES RIKA**

**JUDGE**

