



REPUBLIC OF KENYA



KENYA LAW
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**Amutavi v Kenya Electricity Transmission Company (Cause 858 of 2017)
[2022] KEELRC 4876 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4876 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 858 OF 2017
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

NICHOLAS SHIVAJI AMUTAVI CLAIMANT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY RESPONDENT

JUDGMENT

1. Through a statement of claim dated May 18, 2017, the claimant sued the respondent seeking the following reliefs: -
 - a. A declaration that the claimant's termination of employment was unfair, unprocedural, wrongful and illegal.
 - b. Reinstatement of the claimant into his former position of manager – project accounts or an equally similar position with the respondent with all his accrued salary arrears, allowances, benefits and any other legal dues made up as follows: -
 - i. Unpaid salary for the months of March, April and May 2014 totaling to Kshs 1,031,621.70
 - ii. Unpaid salary for 36 months from June 2014 to May 2017 totaling to Kshs 14,902,048.00.
 - iii. Annual leave pay amounting to Kshs 2,247,276.00.
 - iv. Medical allowance Kshs 10,600,000.00
 - v. Pension and NSSF contributions Kshs 890,782.00.
 - vi. Other benefits and entitlements Kshs 165,132.00.



vii. Interest on arrears and unpaid dues Kshs 77,371.473.00.

In the alternative;

- c. Three months' salary payment in lieu of notice totaling Kshs 566,322.00.
 - d. Three [3] months payment of house allowance totaling Kshs 165,000.00.
 - e. Unpaid salary for the months of March, April and May 2014, totaling to Kshs 1,031,021.70.
 - f. Unpaid salary for 36 months from June 2014 to May 2017 totaling to Kshs 14,902,048.00.
 - g. Annual leave pay amounting to Kshs 2,247,276.00.
 - h. Twelve [12] months' salary payment as compensation for unfair dismissal totaling Kshs 5,489,160.00.
 - i. Pension and NSSF contributions for the 12 months Kshs 292,608.00.
 - j. Medical allowance Kshs 10,600.00.00.
 - k. Interest on the above at prevailing court rates.
 - l. Costs of the suit.
2. Upon being served with summons to enter appearance, the respondent did on the June 13, 2017, and subsequently filed a response to the statement of claim on the June 30, 2017, denying the claimant's claim and his entitlement to the reliefs sought.
 3. At the close of pleadings, there was a joinder of issues and the matter got destined for hearing on merit. The claimant's case was heard on the August 11, 2021 while the respondent's was on the October 19, 2021.

The claimant's Case

4. At the hearing, the claimant adopted his witness statement dated July 12, 2017 as part of his evidence in chief, and urged the court to admit the documents that he had filed under the list of documents dated May 18, 2017 as his documentary evidence. The documents were so admitted by the court.
5. The claimant stated that he came into the employment of the respondent company as a project accountant on the November 10, 2010 on permanent and pensionable terms of service. In his position he was to be responsible for all matters relating to projects accounting and report to the head of finance.
6. Thanks to his exemplary performance, he rose through ranks of the respondent company such that on the December 5, 2013, he was confirmed into the position of manager, projects accounts in job group MG6 effective September 1, 2013.
7. In his new position, he now reported to chief manager, finance and accounts and was tasked with the overall responsibility of mobilizing funds for the respondent's projects by providing timely and reliable financial information as well as ensuring efficient and effective use of resources.
8. It was his case that his remuneration comprised of a basic salary of Kshs 188,000,774, house allowance of Kshs 55,000, commuter allowance of Kshs 73,400 and other allowances amounting to Kshs 26,500 per a month for the period of his employment. He enjoyed a medical cover of Kshs 2,650,000 per year.
9. The claimant stated that on the January 8, 2014, the respondent sent him on an indefinite investigatory compulsory leave. The investigations were on an alleged irregular payment to one Mr Antonia Mumo.



10. On the same day he was sent on the compulsory leave, the respondent wrote to the banking fraud investigations department inviting them to investigate the suspicious payments in respect of compensation to persons affected by the building and operating of electricity transmission network of high voltage.
11. Due to a hostile and poisoned working environment, obtaining at the work place, he got constrained to tender his resignation on the January 22, 2014. However, for some malicious ulterior motive, the respondent declined to accept it citing the investigations that were ongoing.
12. He contended that on February 4, 2014, the respondent again wrote to the banking fraud investigations department calling upon them to investigate suspect compensation payments for “non-existent structures in unclear circumstances” during construction of Mumias- Rangala transmission line.
13. The claimant contended that the respondent having initiated external [police investigations], he expected that the respondent will be considerate enough to wait for their findings before taking any steps, but to his surprise it issued him with a letter dated March 21, 2014, letter which he received on the evening of March 25, 2014.
14. The letter placed him on suspension without basic salary, commuter, responsibility, utility and entertainment allowance during the period of suspension.
15. He was given 72 hours within which to show cause why disciplinary action should not be taken against him.
16. Despite the limited time accorded to him, he offered a detailed response to all allegations that were levelled against him. On the May 9, 2014, the respondent wrote back to him stating that his explanations were unsatisfactory and unacceptable. The respondent summoned him to appear before the staff and remuneration committee of the board on May 22, 2014.
17. The respondent did not disclose the reasons/grounds upon which it contemplated to terminate his employment, stating that they were to be given at the meeting. This denied him an opportunity to prepare for his defence adequately.
18. When he appeared before the committee, his request for an adjournment so as to enable him time to substantively respond to the accusations was declined and by the following day, he was terminated even though the termination letter was not received until May 30, 2014.
19. Later on, he was ultimately cleared of any wrong doing by the very independent government agencies that the respondent had entrusted with the investigations of the matter.
20. The outcome of the investigations was a pointer that the reason for the termination of his employment was not valid, and that the demand that he pays the funds lost on the Mumias–Rangala transmission line project totaling Kshs 4,685, 477.00 within one month failure of which civil proceedings be instituted against him stood on lose sand.
21. He contended that the termination of his employment was unfair procedurally and substantively.
22. In his evidence under cross examination, the claimant testified that in his position he was in charge facilitating payments for projects. However, he would only on those that had been approved.
23. At the material time the respondent was undertaking construction of the Nairobi-Mombasa transmission line, and on the project, people who were affected by the construction were being compensated.



24. Only those who were affected would be compensated, however, there was a case where four [4] people were paid despite them not being affected. One of them was one Antonina Mumo. She was arrested at the bank on suspicion of fraud. According to the letter dated March 21, 2014 she was paid Kshs 1,111,906.25, there were other three people who were paid a total of Kshs 4,863,608.5.
25. According to the same letter, Kshs4.6 million was lost on the 2nd project, Mumias-Rangala transmission line.
26. He testified that he was put on compulsory leave pending investigations, through a letter dated January 8, 2014. He resigned after receiving this letter, through his dated January 22, 2014. The respondent did not accept the resignation on account of the investigations that were ongoing.
27. The claimant further testified that the respondent gave him a letter dated March 21, 2014, seeking an explanation on some issues that had been raised concerning his work. He obliged through his dated March 22, 2014. Referred to the penultimate paragraph of the letter, the claimant acknowledged that he made some payments due to pressure, without thorough checks hence the loss.
28. He stated that in the said response letter, he expressed remorse for the incidents that gave an impression of him as an incompetent, dishonesty and one infested with laxity. He promised to improve.
29. In the letter dated May 21, 2014, he confirmed that he was to attend the meeting but expressed his misgivings.
30. In its letter dated May 9, 2014, the respondent expressly stated that reasons for the scheduled meeting were to be disclosed at the meeting. According to the claimant, the meeting was not a disciplinary hearing. There was no interview.
31. The claimant testified that he was not given the liberty to be accompanied by a colleague. He did not make any representations at the meeting.
32. He testified that his employment was determined by the respondent through its letter dated May 23, 2014. The letter cited the loss of money as the reason for the termination.
33. He further testified that in the said letter it was demanded that he pays Kshs 4,685,477, the money that was allegedly lost, failure of which, a civil suit was to ensue. He did not pay the money.
34. Upon clearance with the respondent, he was to be paid Kshs 337,946 as pending leave pay.
35. After filing the matter herein, he cleared from the respondent's. he collected his pension.
36. His claim for salary for the months of March, April and May 2014 is for the period when he was on suspension without pay.
37. His claim for salary for 36 months is for the period June 2014 – 2017. During this period the employer-employee relation was not in existent.
38. Medical allowance was not withdrawn. It would not be paid in cash. He had no prove that he expended Kshs 10,600,000 for any medical purposes. House allowance was never withdrawn but it was not paid. The last payment thereof was for the month of February 2014.
39. In his evidence in re-examination, the claimant testified that in his letter of March 28, 2014, he did not make any admission that he was involved in misappropriation of the respondent's funds. His expression of remorse in the said letter was informed by an advice by his immediate supervisor, who convinced him that that would help attract a favorable decision.



40. The process of compensation was detailed one. It started with a land economist and a surveyor, who would map the area to be affected, take photos of land and value, the same. This would done in a report form. The report would then be forwarded to the Project Manager. The Manager then forwards the same to the Head of Technical services for approval of payments. Upon approval, the managing director forwards the same to the head of finance marking it for payment. The head of finance then would forward the same to him for payment.
41. Where approvals have been made, he did not have the liberty to change anything, his was to pay.
42. Those people who had been paid unjustifiably under the Mombasa-Nairobi line project, refunded the money.
43. He contended that he did not make any payment without approval from the management.
44. The letter dated May 9, 2014 did not invite him for a disciplinary hearing. He appeared before the staff and remuneration committee whose responsibility was confined to staff welfare matters.
45. In the meeting, he sought for time to enable him prepare adequately for his defence, the respondent declined the request.
46. By the time the police investigation report, report which exonerated him, came out, he had already been dismissed.

The respondent's Case.

47. The respondent presented two witnesses who testified in support of its defence against the claimant's case. The first witness was Nancy Mwikali Mumu [RW1], its human capital welfare manager. The witness moved this Court to adopt her witness statement herein dated December 6, 2018 as her evidence in chief and the documents that the respondent filed in this matter under two lists of documents of various dates as its documentary evidence.
48. The witness stated that the claimant was appointed as a manager, project accounts through a letter dated December 5, 2013, with effect September 1, 2013.
49. Flowing from a suspected fraud, investigations were commenced against the claimant. Consequently, he was sent on compulsory leave through a letter dated January 8, 2014 so as to preserve the integrity of the process and avoid a situation where he would temper with records or compromise witnesses.
50. On the January 22, 2014, the claimant tendered his resignation ostensibly to allow him concentrate on handling pressing family matters and pursue other interests in life. Convinced that it was imperative for the investigatory process to be allowed to run its course, the respondent declined the resignation. The respondent's decision to that effect was conveyed through its letter dated January 30, 2014.
51. The respondent's Internal Audit Division presented a report that implicated the claimant. As a result, thereof, the respondent suspended him through a letter dated March 21, 2014. The letter outlined the gross misconduct that he was being accused of, that he;
 - i. Paid Kshs 4,863, 608.75 to persons who were not affected by the Mombasa-Nairobi transmission line.
 - ii. Facilitated payment of Kshs 4,685,477 to various local administrators along Mumias -Rangala transmission line knowing very well that they were not entitled to any payment.
 - iii. He asked the local administrators to withdraw money allegedly paid by mistake and deposit the same in his personal account.



- iv. He accepted Kshs 200,000 and 210,000 paid to his personal accounts held at KCB, Serem and Equity Bank of Mumias, respectively.
52. The witness stated that under the stated letter, the claimant was required to show cause why disciplinary action could not be taken against him. He responded through his letter dated March 28, 2014, denying any wrong doing, alleging that it was by his efforts that the money that was wrongly paid under the Mombasa-Nairobi project was refunded. With respect to the Mumias -Rangala project, he asserted that the Kshs 410,000 that was deposited into his was so deposited for purposes of securing business opportunities for the local administrators in the soda distribution and Mpesa services which the administrators had wanted to engage in.
53. The witness contended that after considering the evidence placed before it, the board committee found the claimant and another employee Ms. Salome Malombe jointly liable for the loss that was incurred with regard to the Mombasa- Nairobi Transmission Line. There was a high likelihood that they colluded with the four structure owners who were paid fraudulently. Concerning the Mumias -Rangala Line, the board committee concluded that a fraud was committed against the respondent. The fact that the claimant and the other employee assisted in the recovery of the money did not in any way absolve them from liability flowing from their misconduct.
54. The witness stated that the committee found that the claimant failed to perform his duties diligently and with integrity that was expected of him as a public officer, and that in the case of Mumias- Rangala project he was personally liable for the loss of Kshs 4,432,936, that the respondent suffered.
55. The witness further stated that the actions by the claimant constituted gross misconduct as per the respondent's code of conduct and ethics. He was consequently summarily dismissed pursuant to section 44[c] and [g] of the *Employment Act*.
56. In her testimony under cross examination the witness stated that she had worked with the claimant for a period one year before his employment was terminated. His records are in her custody by virtue of her position. Up to the time of the incident the subject matter herein, he had not any disciplinary issue.
57. The witness alleged that the investigations mentioned in her witness statement were those that were carried out by the respondent's audit division. A report to the police was only made after the claimant had been dismissed.
58. The respondent declined to accept the resignation, the investigations had to run full course so that it would be established whether or not there were other employees involved in the fraudulent scheme.
59. At the material time, the staff remuneration committee, besides being concerned with staff welfare, was charged also with the mandate to deal with disciplinary matters. This mandate flowed from the respondent's manual. However, the manual was not filed in court by the respondent. The committee had jurisdiction over employees who were serving under grade 2-8.
60. The claimant was invited to appear before the committee. The committee was to listen to his case and thereafter report to the respondent's board. The respondent didn't file the minutes of the staff remuneration and welfare committee. It is therefore not possible for one to discern what actually transpired when the claimant appeared before them. The recommendations made to the board too are not filed in court.
61. The witness testified that she could not tell the exact date when the claimant appeared before the committee. However, according to the invitation letter, he was supposed to appear before it on the May 22, 2014. Further, she would not tell when service thereof was effected.



62. She admitted that though the claimant through his letter dated May 21, 2014, committed to appear before the committee, he in the same letter expressed reservations regarding the suitability of the proceedings that were intended, as he had not been furnished with any reasons for the same. The invitation letter had stated that the reasons were to be disclosed at the meeting. The reasons were therefore not given prior to the proceedings.
63. The dismissal letter was written on the May 23, 2014. The decision to dismiss him had been arrived at on the May 22, 2014. The witness wouldn't tell when the respondent's board received the report or recommendation from the committee.
64. She wouldn't tell what the outcome of the police investigations was. too, she couldn't tell whether he was issued with a certificate of service.
65. In her testimony in re-examination, she contended that the claimant was at the time of dismissal serving in grade MG-6. managers fell under the authority of the staff remuneration and welfare committee, in matters disciplinary. The other employees were under that of another disciplinary committee.
66. On the clarification sought by the court, the witness stated that any recommendation made by the committee to the board was not binding on the later.
67. The second witness was Mr Jacob Kawene Kisero, an internal auditor with the respondent. The witness stated that he on various occasions worked with the claimant as the claimant was in charge of project accounts. In his position the claimant would process payment to land owners and other persons whose houses or plants were affected by the construction of electricity transmission lines.
68. The witness stated that on the December 27, 2013, Kenya Commercial Bank forensic investigators approached the respondent's managing director regarding a suspicious transaction involving one Ms Antonina Mumo who had attempted to make a withdrawal from the bank and had presented as proof of entitlement to, a document purported to be by the respondent. The managing director instructed the witness and two of his colleagues to investigate the matter.
69. The witness contended that in the course of the investigations it came out that Ms Antonia and the other three payees who had been listed for benefit were not supposed to. The construction of the transmission line didn't affect them at all. A total sum of Kshs 4,863,608.75 had been released for payment of the four. Attempts to freeze the accounts of the four yielded some success, Out of the Kshs 4,863,608.75 that had been paid into their accounts, Kshs 4,765,841 was recovered, leaving Kshs 67, 767.00, unrecovered.
70. At about the same time, the team was investigating another fraudulent scheme that concerned a project that the respondent was implementing in Kakamega county, the Mumias-Rangala transmission line. The respondent had received an anonymous revelation that one of its employees had colluded with four local administrators, and money fraudulently paid to them under the project notwithstanding that they had not been affected by the construction of the line.
71. When the four were interviewed, they admitted that they had received money from the respondent yet they were not affected in any manner. The total amount that was paid to the four was Kshs 4,685, 477. The administrators revealed that the claimant variously and directly benefited from the payments. The benefit being receiving part of the money from them.
72. After the investigations, they concluded that the claimant had perpetrated a fraud. A report borne out of the investigations handed over to the managing director for his consideration and action.



73. Through the managing director, the respondent reported two fraud cases to the Banking Fraud Investigation Unit [BFIU]. Subsequently, a number of the respondent's employees, including the claimant recorded statements with officers from the unit.
74. Cross examined, the witness stated that among the documents that were placed before the court by the respondent was an internal audit report dated April 8, 2012, in respect of the Mumias-Rangala, transmission line. The incident at hand occurred in the year 2013. He asserted that as the investigations were pending, new evidence emerged in 2013, relevant thereto.
75. The witness admitted that the report tendered before court was not a complete document. A number of pages were missing. Contents thereof were not flowing as expected. Pressed for the reason, the witness stated that they only picked that which they considered relevant to the matter at hand. The respondent's second document is an audit report too, just like the first one, the contents thereof do not flow into each other.
76. In re-examination, the witness stated that the respondent carries out routine internal audits, the report for 2012, was out of such an audit. The 2nd audit report was as a result of the incident the subject matter herein. The first report flagged irregular payments, and the claimant was found culpable.

Claimant's Written Submissions.

77. The claimant identified the following issues for determination by honorable court: -
- a. Whether the summary dismissal of the claimant was wrongful or substantively justified.
 - b. Whether the dismissal was procedurally fair.
 - c. Whether the remedy of reinstatement is appropriate.
78. Submitting on the first issue, Counsel for the claimant submitted that justice in this matter would be best served if what he termed as the philosophy behind the enactment of the *Employment Act, 2007* was appreciated and taken into consideration. The philosophy that was brought out in the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR, thus;
- “In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR this Court had the following to say on the burden of proof: -
- “There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act/Rules*. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:
- “...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees...”



Those provisions are a mirror image of their constitutional underpinning in article 41, which governs rights, and fairness in labour relations. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.” [

So that, the appellant (employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): “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.”

79. The claimant was under duty to demonstrate that his services were terminated and further that they were terminated wrongfully. From the material placed before the court the claimant was able to discharge this burden.
80. The respondent initiated investigations by writing to the director of banking fraud investigations department. The office of the director of public prosecution wrote back to the respondent advising on its findings. The investigating agencies exonerated the claimant from all allegations of fraud.
81. The respondent claimed that the police investigations were only for criminal culpability and did not preclude the respondent from instituting internal disciplinary proceedings. However, this is far from the truth, the two actions or processes of police investigations and internal disciplinary proceedings were jointly geared towards establishing the claimant’s impropriety hence culpability towards the alleged actions.
82. The police investigations were crucial and key in supporting and affirming the respondent’s claims. This informed its decision to engage the investigation agency. However, the respondent chose to ignore their findings, choosing to rely on partisan internal investigations, where it was the complainant, witness as well as the judge in their own cause.
83. As to whether the dismissal was procedurally fair, it was submitted that respondent’s HR manual establishes an elaborate procedure to be followed before an employee can be summarily dismissed from his employment, thus;

“L6. Initiation of disciplinary proceedings

L6.1 The offense

If an employee commits a breach of discipline which warrants formal disciplinary action, the immediate supervisor will, after conducting a preliminary investigation, forward the matter within 48 hours of the occurrence of the offence to the HHRAD.

L6.2 Charges against an employee

Upon receipt of the preliminary investigation report, the HHRAD will, if he/she finds it necessary to continue with the disciplinary proceedings against the employee, forward to the employee a statement of charge(s). The employee will be required to defend himself/herself within a period of two weeks.

L6.3 Preliminary investigation



Where it appears that an employee has committed a breach of discipline, the immediate supervisor must ensure that all the necessary evidence is immediately obtained from the employee concerned including statements of any available witnesses and the statements verified.

L6.4 Employee's right to defend him/herself

In any investigation under this manual, an employee is entitled to know the facts of the case against him/her, and must be given adequate opportunity for making his or her defence. An employee will be given a summary of the evidence supporting all the charges and no documentary evidence can be used against the employee unless he/she has previously been supplied with the copy thereof or given access thereto and given an opportunity to submit on the content thereof.

L6.5 Consideration of previous records

If as a result of the investigations carried out, the employee is found guilty, the HHRAD shall, before recommending disciplinary action and in consultation with the respective HoD, consider the employee's record of service, any previous offences or any other relevant factors.

L6.7 Summary dismissal

If after final investigation, breach of discipline is considered sufficiently serious to justify summary dismissal; the MD & CEO in the case of an employee in Grade KET 2 to KET 7 and above shall submit the case to the Board for deliberation and necessary action.

In the case of employees in Grade KET 8 and below, the case shall be deliberated upon by the disciplinary advisory committee, which will recommend to the MD & CEO for the employee to be summarily dismissed. Final dismissal must be sanctioned by the Board of directors which shall entertain appeals from employees who have been recommended for summary dismissal as above.”

84. The claimant was in job Grade KET 6 when he was interdicted. Interdiction or suspension of employees in Grade KET1 to 7 could only be authorized by the board of directors while the managing director and CEO shall authorize for grade KET 8 and below. The claimant was in grade KET 6 which required the Board's authorization but none was given.
85. It was argued that it cannot be available to the respondent to assert that it rejected the claimant's resignation letter because of the investigations that were ongoing more so by the police (BFIU) yet it couldn't wait for the logical conclusion of the investigations before terminating the claimant's employment.
86. It was further submitted an employee in job grades KET2 to KET7 (claimant was in Grade KET6), would become liable for dismissal after receiving a third and final written warning setting out the precise nature of the offence and containing a statement to the effect that if he /she commits another offence within one year from the date of the final warning he /she shall be liable to dismissal. The claimant did not receive any warning letter or even a verbal warning to warrant the disciplinary action that was taken against him.
87. Under the procedure set out in the respondent's HR manual for disciplinary proceedings, an employee is required to respond to the charges levelled against him or her within a period of two weeks against charges levelled against him. In the instant case the claimant was given 72 hours to respond against the allegations levelled against him contrary to the HR policies and Procedures Manual.



88. Furthermore, the respondent failed to provide reasons why it was considering terminating the claimant's employment instead stating that "in that meeting the reasons for which KETRACO is considering termination shall be explained respond to you, and the committee shall hear and consider any representations which you may wish to make. This was contrary to the respondent's hr policies and procedures (L6.4.)

Employee's right to defend himself) which states that:

"An employee will be given a summary of the evidence supporting all the charges and no documentary evidence can be used against the employee unless he /she has previously been supplied with the copy thereof or given access thereto and given an opportunity to submit on the content thereof."

89. Withholding the claimant's entire pay while he was still on leave and suspension, subjected the claimant to degrading inhuman and torturous conditions and as such was a violation of his right to human dignity under article 28 of the Constitution.

90. The claimant submitted that he was not accorded a fair hearing as required under section 41 of the Employment Act and articles 47 and 50 of the Constitution of Kenya and in so doing the claimant was discriminated contrary to article 27 of the Constitution which provides for equal protection and benefit, under the law.

91. On the reliefs, counsel submitted that section 49 of the Employment Act grants various remedies which may be awarded in singular or multiple terms by a court at its discretion. Section 49(3) of the Employment Act provides for reinstatement as one of the remedies for unfair termination.

92. The claimant has been unemployed since his termination in May 2014 with no prospects of securing a comparable or suitable employment. The unfair termination seriously affected his professional standing, image and suffered irreparable career and professional damage as a member of the Institute of Certified Public Accounts (ICPAK) while he was at the prime age and peak of his career. His attempts to secure employment have not realized any fruit.

93. Consequently, the urged the court to issue an order for his reinstatement order to his former position or equivalent position. In the alternative all the other reliefs sought in the statement of claim, should the court find the reinstatement order not grantable for one reason or the other.

Respondent's Submissions.

94. The respondent's counsel distilled the following issues for determination by this court, thus:

- a. Whether the claimant was unfairly terminated from employment;
- b. Whether the claimant was notified and given a fair hearing before termination;
- c. Whether the claimant was engaged in gross misconduct before termination;
- d. Whether the claimant is entitled to the reliefs sought;
- e. Who pays for the costs of this suit?



95. It was contended that the respondent had sufficient grounds to dismiss the claimant from employment. Counsel cited the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court held:

“.....For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect termination.”

96. The claimant’s conduct that led to his dismissal was in nature one that would attract a sanction of a summary dismissal. The court was urged to consider the provisions of section 44 (c) and (g) of the *Employment Act*, and so conclude.

97. It was stated that clause 25 of the claimant’s letter of appointment gave instances when the claimant could be summarily dismissed thus;

“The company reserves the right to terminate your service without notice if in its opinion you have willfully disobeyed the lawful orders and instructions or have been a party to any fraud or dishonorable act or have been guilty of any other gross misconduct act as per the *Employment Act*, 2007 or any other relevant law.”

98. As manager projects accounts, the claimant had amongst other duties the responsibility to ensure that only project affected persons were paid from the compensation kitty for projects that had affected their properties. It is common ground that the claimant was in charge of the respondent’s two projects namely; The Mombasa-Nairobi transmission line project and Mumias-Rangala transmission line project. Persons affected by these projects, were to be compensated by the respondent after due diligence and confirmation by the claimant that beneficiaries were indeed affected by the projects.

99. There is ample evidence before this court by the respondent that people who were not affected by the projects were paid.

100. In response to the respondent’s show cause letter, the claimant responded as follows through his letter dated March 28, 2014:

“It is regrettable that I processed some payments due to pressure without a thorough check trusting the details and date as completed by the administrators hence unable to discover and prevent the falsification hence loss in time.

...while taking full responsibility for any mistakes, errors or losses...

“I am very remorseful about these incidences that would exhibit incompetence, laxity and dishonest on my part I therefore seek to be pardoned as I promise to be extra vigilant and exercise high level of ethics and professionalism in discharging my duties and involvement in coming up with robust controls, checks and balances in a more devoted and dedicated manner to curb against any misappropriation of funds.”

101. It was argued that the above statement was evidence that the claimant willfully neglected to perform the work of ensuring that only affected persons were compensated. It was his work to, work which he carelessly and improperly performed.

102. Given the claimant’s own admission that he was careless in the performance of his duties and the carelessness made the respondent lose funds, his dismissal was fair and justified. The claimant



acknowledged that the incidences that made the respondent lose money exhibited incompetence, laxity and dishonesty on his part. This would rightly attract summary dismissal under section 44 of the *Employment Act*, 2007. To buttress this submission reliance was placed on the cases of *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR and *Amos Kitavi Kivite v Kenya Revenue Authority* [2020] eKLR.

103. That it cannot be in dispute that claimant was informed of the accusations against him and that he was given adequate time to prepare for the hearing. This is discernable from the evidence of the respondent's first witness and the documents that were placed before this court by the claimant.
104. It was submitted that out of the claimant's gross misconduct, the respondent lost Kshs 4,863,603.75 on the Mombasa Nairobi transmission line, out of which, a sum of Kshs 4,795,841.75 was recovered from the persons who had wrongfully been paid through the respondent's action of freezing their accounts. Kshs 67,767.00 wasn't. On the Mumias Rangala transmission line, Kshs 4,685,477 was paid out to four local administrators who did not deserve to receive the payments. These monies were never recovered from the claimant or the four local administrators.
105. It was further submitted that since the claimant's dismissal was fair both procedurally and substantively in accord with the *Employment Act*, the remedy of reinstatement cannot be availed in favour of the claimant. In any event, the relief for reinstatement is only available within 3 years of termination. The claimant was dismissed in May 2014 and cannot claim reinstatement after a period of almost 8 years. To bolster this point, the case of *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR was cited.

Analysis And Determination.

106. The parties herein didn't not have common issues proposed for determination by this court. Considering the pleadings by the parties herein, the evidence in support of their respective cases, and the submissions by their counsel, the court distils the following issues for determination, thus;
 - a. Whether the dismissal of the claimant was fair;
 - b. Whether the claimant is entitled to the reliefs sought.
 - c. Who should shoulder the costs of this suit?

Whether the dismissal of the claimant was fair.

107. Fairness in matters summary dismissal or termination of an employee's contract of service has two components, the procedural and substantive fairness components. Procedural fairness speaks to the process leading to the termination or summary dismissal, while substantive fairness, the decision itself. In the Kenyan situation, the two aspects find their roots in statute. Jurisprudence abounds, absence of any of the two aspects or both of them in the determination of an employee's employment, renders such determination unfair.
108. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court expressed itself;

“ ... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect termination.”



109. I will first deal with the procedural fairness of the subject dismissal. Section 41 of the *Employment Act*, 2007 provides the structure for procedural fairness. Where existent, a human resource policy or manual will always provide content to be considered when interrogating presence or otherwise of procedural fairness in a dismissal or termination. However, it is imperative to state that such a policy or manual must agree with the statutory procedure, more specifically on the key aspects of notification / information, hearing and consideration, otherwise it shall be not useful a document. View has to be kept on the fact that, the 2007 employment and labour relationship legal regime ushered in applicability of the tenets of natural justice into the employment contract and, the regime is constitutionally and equity spirited.
110. Through the above stated lens, this court shall interrogate the procedural fairness. Section 41 of the Act, places upon an employer contemplating terminating an employee's employment a statutory duty to inform the employee of the intention and the grounds or reasons prompting the intention. The respondent contended and it was not disputed by the claimant that through the former's letter dated March 21, 2014, he was suspended from employment, and required to show cause why disciplinary action wouldn't be taken against him. I have considered the contents of the stated letter, the same was unambiguous as regards the respondent's intention and the events, and accusations against the claimant that were attracting the intention. Up to here, the respondent was on the right track save for one thing that this court shall point out and consider hereunder.
111. The letter read in part;
- “Your explanation should be received within 72 hours from the date of this letter, failure to which it will be assumed that you have none and Management will institute appropriate disciplinary measures without further reference to you.”
- The claimant contended that the notice of 72 hours was not adequate for him to prepare a sufficient response to the accusations. The period was unreasonable. The claimant's counsel heavily submitted that the notice was contrary to the stipulations of the respondent's Human Resource Manual. For reasons that I have failed to fathom out, neither the respondent nor the claimant placed the manual before the Court. The document was a crucial document, it ought to have been tendered as evidence. Since submissions are not evidence, I am deliberately unable to consider the claimant's submissions on the specific stipulations of the manual that he has cited.
112. However, looking at the 72 hours through the eyes of the tenets of natural justice, and the provisions of article 50 of the *Constitution*, which requires that a person be given adequate time to prepare for his defence, and considering the nature of the accusations, I am persuaded by the claimant that the period was inadequate and unreasonable. The respondent's action only helped to bring it out as an employer who was rushing to dismiss the claimant, and whose action was being propelled by bad faith. Employment relationships thrive on good faith, forthrightness, and candidness this apparently eluded the respondent.
113. Through its letter dated May 9, 2014, the respondent invited the claimant to appear before the staff and remuneration committee of the board on the May 22, 2014, the letter read in part;
- “In accordance with section 41 of the *Employment Act*, you are hereby required to present yourself before the staff and remuneration committee of the board in a meeting to be convened at the KETRACO main boardroom on Thursday the 22nd Day of May 2014, at 10 in the morning. In that meeting, the reasons for which KETRACO is considering



termination shall be explained to you, and the Committee shall hear and consider any representations which you may wish to make. In accordance with the law, you shall be entitled to have another employee present during the hearing.”

114. In reaction to this letter the claimant wrote to the respondent in his letter dated May 21, 2014;

“..... I wish to confirm that I will be attending the meeting as scheduled. However, given that the reasons for which the Board is considering my termination will be communicated to me during the meeting I am afraid that I may not be in a position to substantively respond to them. This will especially be so if I will have to refer to certain documentations.

For the above reasons and in anticipation of the foregoing I may have to request for your indulgence to substantively respond to the charge[s] the Board may bring against me.

I hope my request will find favour before you.....”

115. The respondent’s first witness confirmed the contents of the two letters as reflective of the true situation at the material time. The question which then comes up is, why should an employer who appreciates the existence and purport of section 41 of the *Employment Act*, clearly act in a manner in affront to the same provision. The provision requires that any employer intending to terminate an employee’s employment, informs the employee in a language that he understands the reasons upon which he intends to take the action. Considering that the provision, the tenets on natural justice and the constitutional right to fair hearing require that such an employee should be given an opportunity to defend himself on the accusations, it is easy for this court to conclude that then the reasons or accusations must be disclosed to him or her in advance to the disciplinary hearing. The purpose for the advance disclosure being to enable him or her prepare adequately for his or her defence.

116. From the contents of the claimant’s letter, one cannot be faulted to conclude that he did intimate that he was not able to prepare for the hearing as the reasons stirring the respondent’s intention had not be disclosed to him, and that he was to seek for time to enable him prepare. The respondent through its witnesses didn’t at all state to this court why the reasons were not disclosed to him prior to the hearing date and why the respondent’s committee found it necessary not to adjourn the alleged disciplinary hearing in the circumstance of what was raised by the claimant.

117. The claimant contended that at the meeting he sought that the hearing to be adjourned but his plea was declined. The respondent as admitted by its first witness, did not place before the court the minutes of the meeting to enable one discern the happenings at the thereat. I can only agree with the claimant that indeed he sought for time but the plea was declined. I draw an adverse inference that had the respondent tendered the minutes, the same would have been in support of this position taken by the claimant.

118. Lastly, the claimant asserted that at the meeting he was not given an opportunity to be heard. The respondent contended that he was heard. The respondent’s witnesses who testified were not present at the meeting. It is only through production of the minutes of the meeting that the claimant’s assertion would be rebutted, therefore. The respondent’s first witness testified that the meeting had minutes but the same were not filed herein by the respondent. In absence of the same, I am impelled to agree with the claimant that he was not given an opportunity to make his representations in accordance with the provisions of Section 41 of the *Act*.

119. Due to the respondent’s failure to adjourn the meeting the claimant’s right of accompaniment contemplated under the stated provision was curtailed.



120. The long and short of the foregoing premises is that the dismissal of the claimant from employment was procedurally unfair. It was not in accord with justice and equity as envisaged by section 45[4][b] of the Act.
121. Now I turn to consider whether the dismissal was substantively justified. Section 43 of the Act places an obligation in a dispute like is in the instant matter, on the employer, to prove the reason[s] for the dismissal of an employee from his or her employment. A default in so proving would have a prejudicial legal consequence against the employer, the dismissal shall be deemed unfair by dint of the provisions obtaining in section 45 of the Act.
122. Section 44[4] 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 therein is not an exhaustive list. An employer can dismiss an employee on a reason outside those in the catalogue for as long as the account has the characteristics such as I will demonstrate shortly hereinafter. See Darius Kiseu Mwamburi v Co-operative Bank of Kenya Ltd. [2021] eKLR.
123. It was the respondent's case that the acts and omissions that were in issue, during the investigations, at the show cause level, and the disciplinary hearing, alleged to have been by the claimant, amounted to gross misconduct on the part of the claimant, and therefore that would attract a sanction of summary dismissal against him legally.
124. It is not enough for an employer to state that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44 (4) of the Employment Act 2007, or its human resource policy. An employee's misconduct does not inherently justify summary dismissal unless it is "so grave" that it intimates the employee's abandonment of the intention to remain in employment. See Darius Kiseu Mwamburi (supra).
125. In Laws v London Chronicle Limited [1959] 2ALL L.R. 285 the English Court of Appeal rendered itself, thus;
- “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 disregarded the essential conditions of the contract of service.”
126. Whether an employee's misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances. In Mckinley v BC Tel, the Supreme Court of Canada held;
- “when examining whether an employee's conduct 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 behavior was such that the relationship could no longer viably subsist.”
127. The respondent contended that the dismissal of the claimant was as a result of the fraudulent acts that the claimant involved himself in and or omissions on his part in regard to the two projects that featured in the investigations hereinabove mentioned, and the show cause letter. I have carefully considered the material that was placed before this court on the claimant's position in the service of respondent, his responsibilities, the circumstances of the alleged fraud and or omissions, the manner in which the claimant has been linked to the fraud and omissions including that he benefited from the fraud by directly receiving money from some of those who were unjustifiably compensated, and concluded that



applying the contextual approach the behaviour of the claimant was such that the relationship between the parties herein as employee and employer could no longer viably subsist.

128. The court takes note that the claimant's evidence in this matter was heavily on the procedural component of the dismissal, minimal evidence was adduced on the reasons that the respondent placed the dismissal on, and the validity and fairness thereof.
129. This court is of the view that in the circumstances of the dismissal the subject matter herein, any reasonable employer would dismiss the claimant on the account that the respondent dismissed him. The respondent had a valid and fair reason[s] to summarily dismiss him. The summary dismissal was therefore substantively fair in terms of the provisions of section 45 of the [Employment Act](#).

Whether The claimant Is Entitled To The Reliefs Sought.

130. The claimant sought inter alia for an order for reinstatement into his former position of manager - project accounts or an equally similar position with the respondent. This court is unable to avail this relief to him for two reasons. First, having found as I have hereinabove that the conduct of the claimant was such that the relationship between the respondent and him could no longer viably subsist, it is impracticable for the court to order for a reinstatement. Second, the claimant in his testimony and submissions was clear that it is now more than eight years since the separation occurred. The court is not lost of the ceiling that has been imposed by the law. I am in agreement with the submissions by the respondent that an order for reinstatement can only be granted within three years of the separation. The claimant deliberately or otherwise didn't address the court on this point.
131. The claimant contended that he was not paid salary for the months of March, April, and May 2014, a period when he was on suspension. He consequently sought for a sum of Kshs 1,031,021.70. The respondent did not deny that indeed through its suspension letter hereinbefore mentioned it placed the claimant on suspension without pay. The respondent did not place before this court any reasonable reason or at all, the law and or a specific stipulation of its human resource manual, that could be anchor for the deprivation. I am not convinced that the respondent had any justification for not paying the claimant during the suspension period. Consequently, I grant the claimant the sum of Kshs 1,031,021.70.
132. The claimant sought for salary arrears for 36 months from June 2014 to May 2017 totalling to Kshs 14,902,048.00. Having found that the summary dismissal was substantively fair, and declined the claim for reinstatement inter alia on the same ground, I am convinced that this is not a relief that this court can fairly grant. On the same breath, the court declines to grant the Annual leave pay for Kshs 2,247,276.00 sought.
133. The claimant made a further claim of Kshs 10,600,000.00 under the head medical allowance. I found considerable difficulty in understanding the basis for this claim. The claimant didn't lead any evidence or sufficient evidence to justify his entitlement to payment of the amount in the circumstances of the matter. He didn't not allege that at any time he was constrained to incur the stated amount following inaction by the respondent. It is a claim that he didn't prove therefore.
134. The claimant in his testimony admitted that his pension was settled.
135. The claimant sought for a compensatory relief for unfair dismissal for a sum of Kshs 5,489,160, 12 months' gross salary. Section 49[1][c] of the [Employment Act](#) bestows upon this court power to grant the relief in the nature sought by the claimant. However, a grant of the relief is discretionary, grantable where the circumstances and justice of the matter so dictate. The extent of the award is also dependent on the peculiar circumstances of each matter. This court has not lost sight of the fact that liability



against the respondent is attaching only on its failure to adhere to procedural fairness. However, considering the manner in which the respondent handled the process leading to the summary dismissal, manner which, I have found hereinabove didn't help but reveal it as an employer who was in a rush to dismiss an employee, was testament of absence of good faith, candidness and forthrightness on its part, and which easily passes for an unfair labour practice, I am persuaded that a grant of the compensatory relief is entitled to, and to an extend of 10 [Ten] months' gross salary. Therefore, Kshs 3,436,739.00.

136. This court has found that the determination of the claimant's employment by way of a summary dismissal was substantively fair. In the circumstances of the matter, fairly, notice pay cannot be availed to him.

137. In the upshot, Judgment is hereby entered for the claimant in the following terms;

- [a] A declaration that the dismissal of the claimant from his employment was procedurally unfair.
- [b] Unpaid salary for the months of March, April and May 2014, Kshs 1,031,021.70.
- [c] Compensation pursuant to section 49[1][c] of the *Employment Act*, ten [10] months' gross salary, Kshs 3,436,339.00
- [d] Interest on [b] above at court rates from May 30, 2014, and [c] above from the date of this judgment, till full payment, respectively.
- [e] Costs of this suit.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

OCHARO KEBIRA

JUDGE

In Presence of:

Mr Omagwa for Mr Mogire for the respondent.

Mr Kinalu for the claimant.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 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

