



REPUBLIC OF KENYA



**Mayieka v DHL Excel Supply Chain [K] Limited (Cause 2082 of 2016)
[2022] KEELRC 12918 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12918 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2082 OF 2016
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

WYCLIFFE MAYIEKA CLAIMANT

AND

DHL EXCEL SUPPLY CHAIN [K] LIMITED RESPONDENT

JUDGMENT

Introduction

1. At all material times to the suit herein, the Claimant was an employee of the Respondent until the January 13, 2016, when the latter terminated his employment. Holding the termination to be unlawful and unfair, the Claimant sued the Respondent through a statement of claim dated October 7, 2016, seeking for the following reliefs: -
 - a. A declaration that the Claimant's termination was unconstitutional and in breach of the Claimant's right to an administrative action that is lawful, reasonable and procedurally fair; null and void ab initio.
 - b. General and exemplary damages for unconstitutional, unfair and unlawful termination.
 - c. Service pay for 9 years worked, Kshs 58,520 x 3 years.
 - d. Pension fund contributions.
 - e. An order compelling the Respondent to issue to the Claimant a certificate of service.
 - f. Costs of this suit.
2. In response to the Claimant's statement of claim the Respondent filed a memorandum of response dated November 22, 2016. The Claimant's claim and his entitlement to the reliefs sought were denied in toto.



3. The matter came up for hearing on the November 1, 2021, when both parties were heard. They did adopt their witness statements as their evidence in chief and the documents that they had filed under the respective lists of documents as their documentary evidence.

The claimant's case

4. It was the Claimant's case that through a letter of appointment dated August 5, 2013, he came into the employment of the Respondent as a warehouse controller at its Ruaraka Plant. The terms and conditions of service were enveloped under the said letter.
5. The Claimant contended that at all material times in the course of his said employment, he diligently and professionally rendered his service to the Respondent.
6. He stated that on the December 23, 2014, the Respondent issued him with a show cause letter of the even date accusing him of misconduct. He promptly responded to the letter on the same day. The Claimant contended that the allegations that were levelled against him in the show cause letter were totally untrue, fabricated, unjustified and prompted by malice.
7. The show cause letter was in regard of an alleged incident of December 18, 2014. The allegations against him were that:
 - a. He requested the clerk Tobias Omondi to move 4 [four] pellets of Guinness small [300ml] without the required documentation and outside of the Standard Operating procedure. He did this by way of a telephone call to an employee.
 - b. When he was questioned regarding the deviation from the Standard Operating Procedure, he used abusive language towards Tobias Omondi who had sought the clarification.
 - c. He damaged the employee's property by deliberately throwing his phone on the ground.
8. On the events of the material day, the Claimant testified that at around 1000 hrs a plan was released for loading of trucks for departure to Uganda. He instructed the cage clerk, Mr Sammy Kiboore to load Guinness 300ML BBT 23 K of manufacture date December 5, 2014 on priority.
9. After the instructions to Mr Kiboore, he instructed one Mr Tobias Omondi to load the same into the 1st truck that would come to the loading yard. This was in accordance with the standard procedure. He went further to state that Mr Omondi asked for a tow truck to move the product from TE05 to the Old Loading Bay. However, as there were only 4[four] pellets at TE05, he instructed him to use a folk lift. He notified Mr Daniel Mutunga to work with Mr Omondi to load the 4 pellets once the pick sheet was generated. After giving the instructions, the Claimant proceeded to a meeting beneficial to the Respondent.
10. In instructing Mr Omondi, the Claimant did not deviate from the Respondent's Standard Operating procedure. There was no telephone conversation between him and Mr Omondi. He gave the instructions at the loading bay to him personally. The Claimant was using a phone provided by the Respondent, and the records from the service provider would prove that there was no conversation as alleged by Mr Omondi. He never used any abusive language against him.
11. In the evening of same day at around 6.30 pm, the Claimant sought to know whether the loading of the product had been done according to the instructions the had given, only to be informed by Mr Mutunga that the loading was not done fully.
12. Mr Mutunga informed him that he was denied access to the product because the requisite documents were not issued to him by Mr Omondi. This prompted the Claimant to inquire from Mr Omondi



- why the loading was not done. Mr Omondi contended that the security personnel denied them access to the product because they did not have picking documents.
13. Mr Omondi asserted that he tried to call the Claimant to inform him that he had not been able to pick the requisite pick sheet but was not getting through. It is at this juncture that he attempted to pick his phone to demonstrate that indeed he had tried to reach the claimant, but unfortunately, the phone slipped out of his hands and fell on the ground. The Claimant did not at all touch the phone. He never threw it down as was alleged.
 14. After his response to the show cause letter, the Respondent initiated a process disguised as an inquiry process which culminated to his unfair termination from employment vide a letter dated January 13, 2015.
 15. On the January 19, 2015, he lodged an appeal against the termination. The Respondent was under an obligation to handle his appeal in accordance with the law and the stipulations of its Human Resource Policy/Manual. In breach of the provisions of the Human Resource Policy, the Respondent failed to constitute an appeal board comprised of the; Human Resource manager – East & West Africa as the Chairman, Human Resource Manager EA, as the secretary and the General manager/Contract Manager.
 16. Contrary to the Policy, the Respondent constituted an appeal board constituting of Mr Elisha Omondi – Ag Outbound Operations Manager and Thomas Opiyo – Accounts Director, the very persons who had processed the claimant’s termination. This process was unfair in terms of section 45 of the *Employment Act*, and in breach of his right to fair administrative action under Article 47 of the Constitution.
 17. The Respondent handled his appeal without any input from the relevant department. This rendered the process leading to the decision on his appeal defective and unjust.
 18. The Claimant contended that the Respondent’s decision to terminate his employment was unfair, arbitrary and propelled by extraneous considerations.
 19. The Claimant testified that prior to the termination, he was not subjected to any hearing process, on the issues that had been raised against him. He requested the Respondent to use the CCTV footage to ascertain the allegations by Mr Omondi but his request was declined.
 20. In his evidence under cross examination the Claimant testified that the Respondent’s allegation against him was that he did not follow its Standard Procedure concerning loading. That he gave instructions for loading of a product without documentation.
 21. The Claimant asserted that trucks were loaded upon basis of documents [pick sheet] which is in the custody of the Respondent.
 22. The Claimant further testified under cross examination that there were two show cause letters one dated January 8, 2015 and another January 9, 2015. There was no report on the alleged investigations by the Respondent.
 23. The phone fell from Omondi’s hand as he was removing it from his pocket.
 24. The Respondent’s Human Resource Policy categorised cases of abusive language as a gross misconduct.
 25. He testified that though he was present when the appeal was being dealt with, the appeal board was not duly constituted.



26. His terminal dues were not paid. He did not clear with the Respondent.
27. Under re-examination he contended that documentation process fell outside the scope of a warehouse controller. Had Mr Omondi gotten in touch with the clerk concerned with documentation, the loading document would have been availed.
28. He has never at any time used an abusive language against any employee or person.

The respondent's case

29. The Respondent presented Mr Elisha Onyango to testify on its defence against the Claimant's claim. The witness stated that he is in the employment of the Respondent as a Driver Lead, Kenya.
30. The witness stated that in the year 2013, the Respondent employed the Claimant as a warehouse controller and in that capacity, he was in charge of all clerks for dispatch of products. His consolidated salary was Kshs 58,520.00 per a month. The payment was always compounded to include PAYE, NSSF and NHIF. The Claimant was not on permanent employment with the Respondent.
31. The Respondent had in place a policy guiding disciplinary matters within the organization and a Standard Operating Procedure guiding employees in carrying out their duties and responsibilities.
32. The witness asserted that on the December 18, 2014, the Claimant in breach of the Standard Operating procedure instructed a vehicle checker - Tobias Omondi to transfer four [4] pellets of Guinness small [300ml] without the required and/or proper documentation. He ought to have given the instructions to the cage clerk on duty. He too employed an abusive language against the said Omondi, and damaged his phone by throwing it to the ground. All this amounted to gross misconduct per the stipulations of the Respondent's Human Resource Policy.
33. According to the Respondent's Human Resource Policy, the gross misconduct entitled the Respondent to terminate the Claimant's employment without according him any hearing and paying him any terminal dues. However, the Respondent opted to give him a fair hearing.
34. In compliance with the law and the policy, the Respondent issued the Claimant with a first show cause letter dated December 23, 2014 and required him to respond thereto within 48 hours, stating why disciplinary action could not be taken against him. He responded on the same date.
35. The witness stated that on the December 24, 2014, he in his capacity as the then Ag Outbound Operations Manager issued the Claimant with a letter suspending him from duty for fourteen [14] days to enable the Respondent conclude investigations. The suspension period was through a letter dated January 7, 2015, extended for a further seven [7] days to enable conclusion of the investigations.
36. On the January 8, 2015 the Claimant was issued with a second show cause letter, putting forth accusations against him and required him to respond. He responded on the January 9, 2015, reiterating his earlier response.
37. The witness stated that the management deliberated internally and found that the Claimant's responses were unsatisfactory and, on the January 13, 2015, opted to terminate the Claimant's employment with terminal benefits subject to satisfactory clearance.
38. The witness contended that the Claimant was accorded a right of appeal. The Claimant appealed on the January 19, 2015, challenging the termination. On the January 22, 2015, the Claimant was invited to an appeal hearing that was slated for the January 27, 2015. His right of accompaniment was expressed to him. The Claimant opted not to be accompanied by a colleague.



39. The appeal was heard. The “parties” retired to deliberate and internally share the information with the Human Resource Managers, Chairman [East and West Africa], secretary [East Africa] and a member from General/contract Managers.
40. Based on the paper work involved, it took the members from 27th January to 4th January to come up with a decision on the appeal. The decision to terminate the Claimant’s employment was upheld.
41. The witness stated that the Claimant’s conduct of acting outside the respondent’s standard Operating Procedure, amounted to gross misconduct that justified summary dismissal under the provisions of section 44 [4] [g] of the *Employment Act* as read together with clause 27 of the Claimant’s employment contract.
42. At the termination, the Claimant was offered a notice pay and all the outstanding leave pay but he chose to leave the office without clearing with the Respondent.
43. Under cross examination, the witness testified that at the material time, the Claimant was directly reporting to him. It was the witness’s responsibility to assign duties to the Claimant and other workers.
44. The Respondent’s Standard Operating Procedures are enveloped under a document, but the Respondent did not place the document before the Court.
45. The witness stated that the Claimant was under contract, contract which was time bound.
46. The witness further stated that the vehicle checker, Mr Tobias Omondi made a complaint to him on the December 18, 2014, at around 6.50 pm. The complaint was verbal.
47. Referred to the show cause letter dated December 23, 2014, the witness acknowledged that the accusation against the complainant was that he gave instructions to a wrong person.
48. The witness contended that there were two hearings, one that was prior to the appeal hearing, and the appeal hearing. In the 1st meeting, those present were one Thomas, the Human Resource manager and the Claimant. The Claimant was given an opportunity to explain himself on the allegations. The meeting was held before the Claimant was suspended. The investigations came in later.
49. The Respondent did not have any statement from Tobias before Court. The disciplinary hearing minutes too.
50. The witness stated that those who were present in the meeting of January 27, 2015, were Thomas, him, the Human Resource manager and the Claimant. However, the minutes show that there was no officer from the Human Resource Department.
51. As regards whether the Claimant was paid or not his terminal dues the witness was not able to answer asserting that, that was a matter that fell under the province of the Human Resource Department.
52. It was the Human Resource Department that concluded that the Claimant’s conduct amounted to gross misconduct.
53. The Respondent had a warehouse manager. The Claimant’s letter of appointment indicated that the Claimant was to report to the warehouse manager. The warehouse manager never wrote any letter to the Claimant.
54. The Claimant had people who were reporting directly to him and not to the witness.
55. The witness alleged that after the 2nd show cause letter, the Respondent conducted a hearing on the January 22, 2015.



56. In his evidence in re-examination the witness stated that he was aware that there was a document spelling out the duties and responsibilities of the Claimant but the document was not filed in Court as it was a confidential document.

The Claimant's submissions

57. The Claimant's Counsel proposed the following issues as those that present themselves for determination:
- a. What was the nature of the employment of the Claimant?
 - b. Whether there were valid reasons to terminate the services of the Claimant.
 - c. Whether due process was followed before the Claimant was terminated.
 - d. What remedies to grant in the circumstances?
58. Submitting on the 1st proposed issue, Counsel submitted that the letter of appointment dated 5th August, 2013 specifically put forth the terms and conditions of service. The letter did not stipulate that the Claimant's contract of service was time bound as alleged by the Respondent.
59. It was submitted that the termination of the Claimant's employment was not anchored on a valid reason. The Claimant was suspended from duty to pave way for internal investigations. The investigation report born out of the investigations was neither given to the Claimant nor produced in Court, yet it was the Respondent's case that the same culminated to the show cause letter of January 8, 2015.
60. The Standard Operating Procedure was central in the matter before Court. Considering the position that was taken by the Claimant that he did not deviate from the Procedure, it was imperative that the document containing the procedure be tendered as evidence for the Court's consideration. The Respondent's witness testified that it would not be produced as it was a private and confidential document. Counsel concluded that the document was not tendered as its contents would have been prejudicial to the Respondent's case. He invited the Court to draw an adverse inference.
61. The claimant's evidence that he gave instructions to the cage clerk and Mr Tobias Omondi as per the Standard Operational Procedure was not rebutted, as none of them was called to testify.
62. The failure of the Respondent to furnish the Claimant with a written complaint from the said Tobias, failure to furnish him with the findings of the internal investigations report, the failure to pull out the CCTV footage and the failure to tender the Standard Operating Procedure as evidence, cannot attract any other conclusion other than that there was no valid reason for the termination. The Respondent failed to discharge its legal burden under section 45 of the *Employment Act*.
63. As to whether the termination was procedurally fair, Counsel submitted that the termination was without adherence to the Respondent's own Human Resource Policy, and the law. The Respondent did not accord the Claimant an opportunity to face his accuser and tender his defence against the accusations that were levelled against him. The Respondent never conducted any disciplinary hearing.
64. The policy provided that when a breach occurs, the supervisor/manager in charge at the scene should ensure that all the key people present at the time of the incident record statements including the staff member under disciplinary consideration. The Respondent's witness confirmed that this procedure was not followed.



65. The policy stipulated how an appeal board was to be constituted for purposes of hearing an appeal by an employee against a decision by the Respondent, at clause 14 and 15. None of those present during the hearing of the appeal was among those that the stipulations of the policy, identify. Therefore, the board was unlawfully constituted and had no jurisdiction to hear the appeal.
66. It was further submitted that the failure by the Respondent to conduct a disciplinary hearing was contrary to the fair procedure envisioned under the provisions of section 41 of the *Employment Act*, Procedure which is mandatory. Reliance was placed on the cases of *Mary Chemweno Kiptai v Kenya Pipeline Company* [.....] eKLR, and *Kenya Union of Commercial Food and Allied Workers v North Farmers Sacco Ltd.* Cause No 74 of 2013.
67. On the reliefs sought it was submitted that the Claimant had a legitimate expectation that he will continue to work till his retirement. He should be awarded Kshs 21,067,200 as particularised in paragraph 15 of his statement of claim.
68. The Claimant is entitled to General and Exemplary damages for the breach of his constitutional rights and unfair termination.
69. It was submitted that the Claimant was not issued with a certificate of service contrary to the law. The Respondent should be directed to issue the same.
70. It was argued that the termination of the Claimant's employment was without notice, and this entitles him to the notice pay that he has sought.

Analysis and determination

71. From the pleadings of the parties and the other material placed before this Court by them, I distil the following issues for determination, thus: -
 - a. What was the nature of the Claimant's employment of service?
 - b. Was the termination of the Claimant's employment contract fair?
 - c. Was the Claimant's constitutional right[s] breached?
 - d. What reliefs if any can be availed to the Claimant?

What was the nature of the claimant's employment?

72. It was the Claimant's case that he was engaged by the Respondent on permanent and pensionable terms. The Respondent through its witness denied this and asserted that the Claimant's employment was time bound. It was a fixed term contract. Here there is no common cause.
73. Section 10 of the *Employment Act* dictates that a written contract of employment shall state particulars of employment. Subsection [2] thereof provides the specific particulars that should be encompassed in the written agreement among them, the form and duration of the contract of employment.
74. Section 10 [7] provides: -

“If in any legal proceedings an employer fails to produce a written or the written particulars prescribed in subsection [1] the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
75. The Claimant placed his contention on the letter of appointment. Under the above stated provision, the Respondent was under a legal duty to disapprove the Claimant's allegation that his employment



was in nature permanent and pensionable. The Respondent did not point out any clause in the letter of appointment from which one can discern that the Claimant's contract of service was time bound. It did not tender any document to prove this. Consequently, it failed to discharge the burden under section 10 [7] of the *Act*.

76. Clause 3 of the letter of appointment speaks to company contribution to a Pension Scheme at Kshs 40,755 per annum. Clause 8 of the letter provides: -

Retirement Fund

“8.1 Upon confirmation of probation, you will be eligible to membership to company Pension Fund. Employee contributions are equal to 6.5% of the consolidated salary. Company contributions are equal to 6.5% of consolidated salary. The company shall make payment of the aforesaid contributions.”

Looking at the above stated clauses, and keeping in view the Respondent's failure to discharge the legal burden under section 10 [7], I am not persuaded that the Claimant's contract of service was a fixed term one, as alleged by the Respondent. It was in character permanent and pensionable.

77. Having stated as I have hereinabove, it is imperative to point out at this stage that whether an employee's contract of service is time bound or permanent and pensionable, the expansive protection that came in with the enactment of the 2007 Labour Laws, equally applies to the employees.

Was the termination of the Claimant's employment fair?

78. Charged with the task to interrogate fairness in the termination of an employee's contract of service, a court has to consider two aspects, the procedural and substantive fairness aspects.

79. Procedural fairness speaks to the procedure leading to the termination of an employee's contract of employment or summary dismissal of an employee from his or her employment. Procedural fairness flows from statute, constitutional stipulations, the tenets of natural justice and an employer's Human Resource Manual/Policy postulations whenever such manual or policy exists.

80. Section 41 of the *Employment Act 2007* provides the statutory anchor for procedural fairness in the Kenyan situation. There is now firm jurisprudence that the statutory procedure obtaining therein is mandatory and must be adhered to by any employer intending to terminate an employee's contract of employment or summarily dismiss him.

81. In the case of *Pius Machafu Isundu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated:

“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 reasons for termination [section 43] prove the reasons are valid, [section 45] fair and justified [section 47 [5] amongst other provisions. A mandatory elaborate process is then set up under section 41 of the *Employment Act*, requiring notification and hearing before termination.” [emphasis mine].

82. There is no contest that the Claimant was issued with show cause letters. The letters which I have considered did put forth specific accusations that were being levelled against him. To this end I am



satisfied that the notification component of the procedural fairness aspect was present in the process that culminated to the dismissal of the Claimant from employment.

83. The Claimant contended that he was not heard by the Respondent on the allegations that the Respondent had against him before the determination of his employment. The Respondent's witness was not candid on the issue as to whether or not the Claimant was subjected to any disciplinary hearing whereat, he was allowed to defend himself against the accusations. In her evidence in cross examination, he first admitted that there was no disciplinary hearing but later on changed mind and asserted that there was a hearing on the January 22, 2015. From the material placed before me, if there was any hearing on the 22nd of January 2015, then it must have been in regard to the appeal that the Claimant lodged assailing the decision to bring his employment to an end. As at the date the Claimant's employment had already been brought to an end.

84. I am convinced that prior to the termination of the Claimant's employment, he was not accorded an opportunity to defend himself against the accusations. The hearing component of the procedural fairness aspect was absent therefore. Consequently, the termination was procedurally unfair. Dealing with a similar situation as is in this matter, the Court of Appeal in the case of *Muthaiga County Club v Peter Ngaa Nzioka* [2019] eKLR expressed itself:

“..... Be that as it may, it is our view that there was no compliance with the provisions of section 41 of the *Employment Act* and whereas oral hearing need not necessarily be conducted, we think that the Respondent was dealt with without due process as the minimum requirements as set out in section 45 were not complied with.”

85. The need to adhere to procedural fairness does not end at the termination of an employee's employment where the employer's Human Resource Manual provides an employee with the right to appeal. The appeal when filed by the employee must be handled with due regard to the procedure provided for handling of appeals.

86. The Claimant contended that his appeal was heard by people who were not authorised under the Human Resource Policy to hear and determine the appeal. The Respondent's Human Resource Manual whose purpose is captured at its introductory part thus: -

QUOTE{startQuote “}

The purpose of this document is to give clear procedure guidelines to all levels of management on how to deal with situations where staff disciplining is required” was tendered as evidence in Court.

87. The Court notes that clause 14 of the manual provides for “Appeals Board” and how it should be constituted. It provides: -

“The Appeals Board should sit within two weeks of receipt of the appeal letter. The board will consist of HRM – East & West Africa – chairman.

HR manager – EA secretary.

General manager/contract Manager concerned – member.

Chief shop steward – member. [In the case on unionized staff] or his/her nominated representative.”

88. I have no hesitation to conclude that looking at the evidence by the Claimant, and that of the Respondent's witness, the appeal was not heard by a Board duly constituted in accordance with the said provision.



89. It is surprising that those who made the decision to terminate the Claimant's employment were the ones who sat to hear the appeal. This much the Respondent's witness admitted in his evidence under cross examination. In the circumstances one cannot say that the Board sitting on an appeal of its own decision was fair and impartial.
90. The decision on the Claimant's appeal was therefore ultra vires. It was null and void ab initio. The situation created by the Respondent amounted therefore to denying the Claimant an opportunity to be heard on his appeal contrary to the Claimant's own Human Resource Policy.
91. In the upshot this Court concludes that the termination of the claimant's employment was procedurally unfair.
92. Substantive fairness has to do with the reason[s] for the termination of an employee's employment. For the termination of an employee's employment to be considered substantively fair, it must be effected for a fair and valid reason. Put in another way, the termination must be for a justifiable cause or excuse.
93. Section 43 of the *Employment Act* dictates that whenever there is a dispute concerning termination of an employee's employment, the employer has to prove the reason or reasons for the termination. In absence of the prove, the termination shall be deemed unfair pursuant to the provisions of section 45 of the *Employment Act*.
94. Section 45 [2] of the Act places upon the employer a further legal burden to prove that the termination was for a valid and fair reason. If the employer fails to satisfy this test the termination will be held unfair.
95. At the centre of the termination of the Claimant's employment was the allegation that he on the material date gave instructions to a wrong person, a vehicle checker, instead of a cage clerk, contrary to the Standard Operations Procedure of the Respondent. The Claimant throughout, from the show cause level to his testimony in Court maintained that the instructions that he gave were in accordance with the Standard Operations Procedure.
96. The Claimant maintained that he gave instructions to the cage clerk first and thereafter introduced the checker to assist give instructions to the fork lift operator, well within the Standard Operations Procedure.
97. With this diametrically opposite position taken by the parties, one would reasonably expect of a reasonable employer to place before Court the Standard Operation Procedure document and point out to Court the specific procedure that was flouted for Court's interrogation. The document was not placed before this Court. On the failure to tender the document as evidence, the Respondent's witness asserted that the document was confidential and private, an assertion whose seriousness one would have considerable difficulty to fathom in an adversarial system like is ours, and in the face of the current labour laws system.
98. I am persuaded to make a presumption that the unproduced document was unfavourable to the Respondent.
99. The Claimant's evidence that he gave the instructions to the right person, and that the relevant documents for loading were available, was not rebutted. There was not any material placed before this Court from where it can be discerned that the cage clerk was not given the instructions, and that the vehicle checker was only instructed to assist.
100. It would have been easier for the Respondent if it had conducted disciplinary proceedings and have the clerk and the vehicle checker present their evidence thereat, or present them as witnesses in this matter to counter the Claimant's evidence, if at all their evidence would.



101. The Claimant was accused of damaging the vehicle checker's phone and using an abusive language against him. The checker was the complainant as regards these accusations. Clearly and the Claimant contended so, the checker did not present his evidence at any forum in regard thereof, in a manner that the Claimant would have an opportunity to cross examine him on the allegations. The checker was not presented in Court to testify. It was imperative considering that the Respondent's witness testified that his complaint to him was verbal and that there was no disciplinary hearing conducted whereat he testified in support of his allegations.
102. The Claimant was placed on investigatory suspension. The Respondent contended that the 2nd show cause letter flowed from the investigations and therefore the termination. The Claimant asserted that the investigation report was not given to him. I note that the Respondent did not place the report before this Court. The Respondent's witness' testimony before me leaves no doubt that the result of the investigations was based on statements from employees. It was imperative that the report be placed before this Court for consideration.
103. By reason of the foregoing premises, I come to a conclusion that the Respondent failed to prove that the reason[s] for the termination was valid and fair. Consequently, the termination of the Claimant's employment was substantively unfair.

Whether the claimant's constitutional rights were breached.

104. Article 47 [1] of the Constitution provides:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

105. It was the Claimant's case that contrary to the Respondent's own manual, his appeal was heard and determined by same people who had made the decision to have him dismissed from his employment. One cannot understand what informed this action by the Respondent. However, it will not be difficult for one to discern that the action was unreasonable and procedurally unfair particularly when the tenets of natural justice are had in mind. In conclusion, I am persuaded that the Claimant's constitutional right under Article 47 of the Constitution of Kenya, 2010, was violated.

Of the reliefs

106. The Claimant sought for General and Exemplary damages for unconstitutional, unfair and unlawful termination. Section 49 [1] [4] of the Employment Act bestows upon the Court the authority to make an award, compensatory in nature in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment or summarily dismiss him or her. However, a grant of the relief and the extent thereof shall always depend on the circumstances peculiar to each case. The Claimant's matter herein is one that merits an award of the compensatory relief. The Respondent did not adhere to procedural fairness envisioned in the law. It did not act with substantive justification. The Respondent through its agents acted in a manner that borders one prompted by malice, and which can pass for unfair labour practice. The Court has too considered the length of time the Claimant served the Respondent, and conclude that compensation to an extent of twelve [12] months gross salary, Kshs 702,240.
107. Having found as I have hereinabove, that the Claimant's constitutional right under Article 47 was breached, I make an award of General damages, Kshs 100,000.



108. The Respondent did not put forth any evidence before this Court against the Claimant's claim for service pay. I find him entitled to the same for the period August 2013 to January 13, 2015, a sum of Kshs 38,993.30.

109. The appointment letter at its clause 8 provided:

“ 8.1 upon confirmation of probation, you will be eligible to membership to the company Pension Fund. Employee contributions are equal to 6.5.% of the consolidated salary. Company contributions are equal to 6.5% of consolidated salary. The company shall make payment of the aforesaid contributions.

It was the Claimant's case that he was a member of the Pension Fund, and that the contributions that were contemplated under the above stated clause were made. Having been dismissed from employment, he became entitled to a payment of the same.

110. By reason of foregoing premise, I direct that the Claimant be paid the pension contribution to be computed by the Respondent and be paid by the Respondent or from the relevant fund, whichever is applicable.

111. Under section 51 of the *Employment Act*, a certificate of service to an employee who has left an employer's employment, mattering not under which circumstance, is entitled as a statutory right. In this case there was no assertion and prove that the Respondent did issue the same. Consequently, I find that the Claimant is entitled to the certificate.

112. In the upshot, Judgment is hereby entered in favour of the Claimant for: -

- a. A declaration that his dismissal from employment was procedurally and substantively unfair.
- b. A declaration that his constitutional right under Article 47 of the *Constitution* was violated.
- c. Compensation pursuant to the provisions of section 49 [1] [c] of the *Employment Act*, Kshs 702,240.
- d. General damages for breach of the constitutional right, Kshs 100,000.
- e. Service pay, Kshs 38,993.30.
- f. An order that the pension fund contributions be computed by the Respondent and be paid, by it or from the relevant fund, whichever is applicable.
- g. The Respondent to issue a certificate of service within 30 days of this Judgment.
- h. Interest on the sum awarded above at Court rates from the date of this judgment till full payment.
- i. Costs of the suit.

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

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Kahura for the Respondent.



Nyaga for Mose 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

