



**Kenya County Government Workers Union v Nairobi City Water & Sewerage Co Ltd
(Cause 876 of 2015) [2022] KEELRC 13031 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13031 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 876 OF 2015
SC RUTTO, J
OCTOBER 28, 2022**

**BETWEEN
KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT
AND
NAIROBI CITY WATER & SEWERAGE CO LTD RESPONDENT**

JUDGMENT

1. The claimant being a registered trade union, has brought the instant suit on behalf of one of its members, Mr Clement Lubanga, who is the grievant herein. Mr Lubanga was appointed by Nairobi City Council on November 6, 1998 and thereafter transferred together with other employees, to Nairobi City Water & Sewerage Co Ltd, the respondent herein.
2. At the material time, the grievant was serving as a meter reader. He was suspended *vide* a letter dated December 16, 2009 on grounds that he had been implicated in corruptly rewinding a meter in respect of account No 20556801 at Shadrack Kimalael School Chamber. According to the letter of suspension, the grievant's suspension was to facilitate further investigations. This was to mark the beginning of the end of the grievant's employment relationship with the respondent, as he was summarily dismissed from employment through a letter dated February 26, 2009 (sic).
3. The grievant being aggrieved by the said dismissal, registered a trade dispute through the claimant union. The conciliator made findings and recommendations, key among them being reinstatement of the grievant. It is apparent that the respondent did not agree with the recommendations of the conciliator as it did not implement the same.
4. Citing the respondent for not implementing the pre-employment and labour relations stage recommendation and terming the grievant's dismissal as unprocedural and unlawful, the claimant subsequently filed the instant suit through which it now seeks against the respondent, the following reliefs:



- a. All the salaries withheld by the employer from the date of the alleged dismissal;
 - b. The acting allowances from 2005 to date;
 - c. Remit all the statutory deductions to various contributory bodies like PAYE, NSSF, NHIF provident fund;
 - d. Pay him salary arrears arising from the CBA of 2013 to 2014; and
 - e. Pay him six months (sic) as compensation for loss of earnings during the period of dismissal which is within section 12 of *Industrial Court Act* 2011 and section 15(c) of *Labour Institutions Act* 2007.
5. The respondent contends that all the necessary procedural and legal steps were taken in terminating the grievant's employment. The respondent further denies violating any labour standards, collective bargaining agreement rules or the employment law. Consequently, it has asked the court to dismiss the suit with costs.
 6. The matter proceeded for part hearing on October 28, 2021 and subsequently on May 30, 2022 when the defence closed its case, thus marking the end of the trial.

Claimant's Case

7. The grievant testified as CW1 and at the start of the hearing, sought to adopt his witness statement to constitute his evidence in chief. He also produced the documents filed together with his claim as his exhibits before court.
8. It was the grievant's testimony that the meter reading supervisor at Woodley section 10 wrote an internal memo dated April 30, 2009 informing the human resource coordinator that he would be proceeding on leave from May 4, 2009 to June 29, 2009 and that during this period he (the grievant) would be in charge of the said section 10.
9. That he received a letter dated December 16, 2009 suspending him on account of rewinding a meter in respect of account No 20556801 at Shadrack Kimalel School. That he was given 21 days to respond to the allegations. That he found the allegations strange as he had never altered or rewound any meter. That he was later invited to appear before a disciplinary committee on February 17, 2010. That the letter purported to invite him for a hearing in regards to a suspension that had occurred over one year after the letter was written.
10. That on February 26, 2010, the respondent's managing director dismissed him for corruptly rewinding meter in respect of account number 20556801 at Shadrack Kimalel School Chamber. That he appealed against the dismissal and on May 23, 2012, he appeared before the appeals committee which upheld the dismissal.
11. That on June 12, 2014, the claimant union took up the matter and reported a trade dispute at the Ministry of Labour, Social Security and Services. That subsequently, Mr R.G Ngugi was appointed as conciliator to handle the trade dispute. That following several conciliation meetings, the conciliator recommended that the grievant be reinstated to work without loss of benefits from the time of his dismissal or alternatively, he be paid terminal dues, acting dues from the time he acted as a meter reader supervisor, and six months' salary as compensation for loss of earnings during the dismissal period.
12. That the respondent's managing director ignored the conciliator's recommendations thus prompting the claimant to institute the suit herein on his behalf. That as a result of the respondent's action, he



has been made to suffer financial constraints as a result of loss of salaries and allowances. The grievant asked the court to allow his claim as prayed.

Respondent's case

13. The respondent called oral evidence through Mr Simon Itubo and Mr George Otieno Oketch who testified as RW1 and RW2 respectively. RW1 was the first to go. He identified himself as an investigation officer at the respondent company. At the outset, he adopted his witness statement, the respondent's statement of response, the list and bundle of documents dated August 6, 2015 as well as the supplementary bundle of documents dated September 27, 2016, to constitute his evidence in chief.
14. It was RW1's testimony that on or about November 10, 2009, two members of 'Soweto Usafi Group' namely Maina (chairman) and Kimeu (member) both from Kibera visited the respondent's offices – Nairobi Dam to follow up on billing and disconnection of their water supply by the grievant on September 17, 2009. That they also presented a reading of 42172 as their true meter reading.
15. That based on the meter reading presented, the grievant computed the bill as Kshs 209,000/= and proposed that he could assist to bring it down if they paid a bribe of Kshs 100,000/=. That the two members, however, sought time to consult with other members as the said Soweto Usafi Group, was made up of more than 200 members and was funded by an NGO called Maji Bora.
16. It was RW1's further testimony that on November 18, 2009, the grievant accompanied by another person went to Kibera and reversed meter number 20556801 from reading 42173 to 28700, which reversal was effected in presence of Mutua, Nelson and Michael Osindo, all members of the aforementioned group. That immediately after re-winding the meter, the grievant drove the three members of Soweto Usafi Group to a Co-operative Bank situated at Chinese Centre Ngong Road, where they withdrew Kshs 60,000/= and paid the grievant as a bribe for reversing the meter.
17. That subsequently, he carried out investigations and made the following findings:
 - (a) That indeed the meter was reversed on November 18, 2009. This was confirmed by the grievant himself in his own written statement in which he affirmed that the reversal was done by one 'Odich' (a former employee of City Council) after receiving payment from the above-mentioned members. As a matter of fact, both the meter reversal and payment was done in his presence;
 - (b) That immediately after the reversal on the same date of November 18, 2009, the grievant willfully and knowing the reading to be false, caused the same false reading effected in the respondent's systems and in the process denying the respondent its rightful revenue.
18. RW1 further stated that after due consideration of all the facts gathered from the investigations, witnesses interviewed and statements recorded, coupled with the grievant's own recorded statement, he determined that the grievant working in cahoots with an ex-employee of the City Council reversed a NWC meter No 20556801 after receiving a bribe of Kshs 60,000/= and in the process, denied the company revenue.
19. That thereafter, he passed the investigations report to the respondent's Human Resource Officer and also recommended a disciplinary action to be taken against the grievant.
20. RW2 identified himself as an industrial relations coordinator in the respondent company. He also adopted his witness statement and all the respondent's documents to constitute his evidence in chief. He told the court that on or about December 16, 2009, the grievant was implicated in corruptly



rewinding a meter and was subsequently suspended from duty to allow for investigations on the allegations

21. That the grievant was then summoned by the respondent to appear before a disciplinary committee for hearing on February 17, 2010 where he was accorded a fair hearing. That the investigations report as presented to the disciplinary committee by the respondent's security department indicated, *inter alia*, that the grievant had managed to adjust an outstanding water bill. That the report further indicated that he rewound the meter in question and had received Kshs 60,000/= as a bribe.
22. That upon finalization of the internal disciplinary process, the respondent found the grievant culpable hence was summarily dismissed on account of gross misconduct. That further, the grievant was given room to appeal against the decision if he so wished.
23. RW2 further informed court that the grievant appealed against the summary dismissal and he was summoned to appear before an appeal hearing committee which he attended and was accorded a fair hearing.
24. That upon considering the grievant's appeal, the respondent's appeals committee upheld his summary dismissal and the said decision was communicated to him *vide* a letter dated September 27, 2013. That the decision was thus final. That the grievant was informed of the issues raised against him, was given an opportunity to make representations and he failed to give satisfactory explanations. That further, he was also given an opportunity to appeal against the decision by the respondent, but his appeal lacked merit.

Submissions

25. Both parties filed written submissions upon close of the hearing. It was submitted on behalf of the claimant that the respondent had no justifiable cause to terminate the grievant's employment. That the respondent had not adduced evidence to show that the grievant received Kshs 60,000.00 as a bribe to rewind the meter in respect of account number 20556801. That further, the grievant's termination was unfair and the stipulated procedure was not followed. In support of its case, the claimant cited amongst others, the following authorities [*Kenfreight \(EA\) Limited v Benson K Nguti*](#) (2016) eKLR, [*Jane Wanja Muthaura v Ethics and Anticorruption Commission*](#) (2021) eKLR and [*Susan Njoki Kibe aka Susan Mungai v Institute of Certified Public Accountants of Kenya \(ICPAK\)*](#) (2019) eKLR.
26. On the other hand, the respondent submitted that the claimant had failed to prove that the grievant's dismissal was unfair and unlawful. That the grievant's dismissal was done in line with the provisions of section 44 of the [*Employment Act*](#) which elaborates the grounds on summary dismissal, among them being a suspicion of committing an offence. The respondent further urged that the test for valid reasons under section 43 (2) of the [*Employment Act*](#) is whether the employer at the time of terminating the employee's services genuinely believed that there existed a reason to satisfy the termination. To buttress its arguments, the respondent invited the court to consider the decisions in the cases of [*Josephat Munyao Kovulo v Teachers Service Commission*](#) (2019) eKLR, [*Galgalo Jarso Jilo v Agricultural Finance Corporation*](#) (2021) eKLR, [*Kenya Revenue Authority v Reuwel Waitbaka Gitabi & 2 others*](#) (2019) eKLR and [*Lawrence Nyamichaba Ondari v National Hospital Insurance Fund*](#) (2018) eKLR amongst others.
27. It was the respondent's further submission that the grievant's dismissal was procedural and that the dispute not having been concluded under section 68 of the [*Labour Relations Act*](#), there is nothing to bind the respondent to the recommendations of the conciliator. That further, the conciliation recommendations are not binding upon a court. To support this position, the respondent placed reliance on the case of [*Janet Mwacha Mwaboli v Modern Soap Factory Limited*](#) (2019) eKLR.



Analysis and determination

28. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before court, together with the rival submissions and the following issues stand out for determination:
- i. Was there a justifiable reason to terminate the employment of the grievant?
 - ii. Was the grievant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the grievant entitled to the reliefs sought?

Justifiable Reason?

29. The starting point in determining this question is section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. In addition, section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove-
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
30. What manifests from section 45 (2) (a) and (b), is that it is not enough to spell out the reasons for termination. The reasons ought to be fair and valid and the burden rests on the employer to prove as much. This is essentially substantive justification.
31. It is also worth noting that the fairness and validity is quite subjective and can only be determined on a case by case basis.
32. Further, it is worth mentioning that in terms of section 43 (2) of the Act, such reasons resulting in an employee's termination must be matters the employer genuinely believed to exist at the time of termination.
33. Turning to the case herein, the grievant was summarily dismissed on grounds of loss of trust stemming from allegations that he corruptly reversed a meter in respect of account No 20556801 at Shadrack Kimalel School chamber. This is discernible from his letter of summary dismissal which is couched as follows:

Re: Summary dismissal

Further to our letter ref NCWSC/HRD/VOL1/19266/GWN/mkm dated 16 December 2009 suspending you from work on account of corruptly rewinding meter in respect of account No 20556801 at Shadrack Kimalel School chamber. You were summoned to appear before the disciplinary committee on 17 February 2009. This is to inform you that your defence/response is unsatisfactory.

The company has therefore, decided to summarily dismiss you with immediate effect on account of loss of trust. On receipt of this letter, you are to handover your staff ID and all official tools and implements issued to you in the course of your employment.

You have the right to appeal if dissatisfied with the above decision. You can appeal to the Nairobi City Water and Sewerage Company Board through the office of the Managing Director within sixty (60) days from the date of this letter.



You are also required to clear yourself of any liabilities with the company before your dues, if any, are released to you. Attached find your certificate of service.

Yours sincerely.”

34. The grievant denied the allegations levelled against him by the respondent. It is instructive to note that the grievant’s main line of defence is the authenticity of the subject account number at Shadrack Kimalel School Chamber.
35. In this regard, the grievant states that the same has serial numbers of account numbers of the northern region while the said school is in Kibera and falls within the southern region. He further contends that the account number cited, does not exist. The grievant further contends that there was no evidence that he received the alleged bribe of Kshs 60,000/=.
36. The respondent’s case is hinged on the investigation report dated December 9, 2009, prepared by RW1 which states in brief; that on November 10, 2009, two members of ‘Soweto Usafi Group’ by the name Maina and Kimeu went to follow up on billing and disconnection of their water supply by the grievant. That they presented a meter reading of 421172 which translated to a bill of Kshs 209,000/= . That the grievant asked for a bribe of Kshs 100,000/= so as to assist bring down the bill. That subsequently, on November 18, 2009, the grievant accompanied by another person went to Kibera and reversed meter number 20556801 from reading 42173 to 28700. That immediately thereafter, the grievant drove the said members to the Cooperative Bank at Chinese Centre Ngong road where they withdrew a sum of Kshs 60,000/=and paid him a bribe for reversing the meter.
37. It is apparent that the findings in the investigation report was informed by statements received from the grievant and some members of Soweto Usafi group. The statement by Mr Hudson Maina, the chairman of the group, states in part:

“...I am currently the chairman of Soweto Usafi Group that deals with cleanliness and selling of water to the residents. As chairman I started following up on the billing and disconnection of water on September 19, 2009. On the September 20, 2009, I went to the meter point and found the water disconnected and did reconnect it back. The following day, on Monday, an officer from the water company; Mr Lubanga came looking for me and I told him that it was I that reconnected. He advised me and other officials to report to the Adams office the following day. We gave him a bribe (illegible) to rewind the meter...”

38. Another statement by one of the committee members by the name Mr Kimeu, states as follows:

“That I am the above male adult. Currently I am a committee member of Soweto Usafi Group based Kibera – Soweto Highrise. Our group deals with General Cleanliness within this area. Our organisation also deals with selling water to the residents at an affordable price. We’ve connected water from Ngumo and thus own meter No; - 20556801 under A/c No 1138332 in the name of “Usafi Group Soweto”.

I do remember that on November 10, 2009, my chairman – Mr Maina and I visited Nairobi Water Company offices at Kangethe – (Nairobi Dam) with a view of ascertaining why we’ve not been receiving bills since June leading to our non-payment. With us, we had it(sic) in taken our meter reading of the day which was 42173.

At the officers, we presented our complaints together with the meter reading for a Mr Lubanga. After presenting a meter reading of 42173, Mr Lubanga also informed us that indeed he was on the site the previous day on November 9, 2009 and had recorded a reading



of 42144. He did his maths (calculations) from June to November and found the difference as 13,474 cubic meters. This sum was arrived after subtracting 28,700 (June readings) from 42173 (November readings). According to Lubanga, this translated to Kes209,095/- as far as our bill was concerned.

However, Lubanga suggested that in order to help us, he suggested that (illegible) a bribe of Kes 100,000/-

We informed him that we must go back and consult with the rest of the committee members before coming back to him with a possible bribe that he demands. However, when we informed the committee members the same – the very day, the committee declined and refused any corrupt dealings with Nairobi Water Company official. Further to this, a general meeting was held and all the members refused corrupt dealings.

On November 19, 2009 while on my routine checks on our water pipeline, together with my chairman – Mr Maina and Treasurer – Mr Nelson Mutua and two other labourers, we checked our meter and discovered that the reading was (illegible) and not 42173...”

39. On the grievant’s part, he responded to the allegations through his written statement in which he stated as follows:

“I am the above named adult aged 27 years currently working with Nairobi City Water Company as (ag) meter reading supervisor. My duties are to assign duties of meter reading and downloading and uploading of meter numbers check reading and sambling (sic) of meters. Today on December 17, 2009 I was called to investigation department regarding meter recording of Maji na usafi located in Kibera Shadrack Kimalel School.

On the above rewinding I wish to state that it was on 10th November when (illegible) men from Kibera came to complain that their bill (illegible) abnormal. I had to (illegible) system then promised the following day, I will go check reading of which I didn’t make it the following day. When I went there I got there (sic) that they had called a former city council employee by the name Odhis on 18th November who rewound the meter for them after they had paid him. That they moved aside with him and when they came back, they said they had cleared with him. From there they came and forwarded the reading to the office for rebilling.”

40. As stated herein, the grievant has raised an issue in regards to the existence of the account No 20556801. Indeed, this was one of the grounds raised by the grievant in his appeal against the dismissal. The respondent has attributed this to an error in that the same is the meter number related to the said account and not the account number.
41. With respect to the accuracy of the meter no, it is notable that the grievant has not disputed that the account in question belongs to Soweto Usafi Group and is situated at Shadrack Kimalel School Chamber. Further the investigation report dated December 9, 2009 by RW1, expressly indicates that the said number 20556801 is in respect to the meter number. It would appear that is in subsequent communication to the grievant that the number was cited as the account number.
42. Further, the statement by Mr Kimeu, one of the committee members of the said Usafi group indicates that their meter number was 20556801 under account number 1138332 and under the name of “Usafi Group Soweto”.
43. It is therefore plausible that reference to the number 200556801 as being the account number as opposed to the meter number, was in error. What I find to be significant and what really ought to be



the major consideration is that the grievant was aware that the meter number being referred to was the one belonging to Soweto Usafi Group and situated at Shadrack Kimalel School Chamber.

44. Indeed, in his written statement, the grievant acknowledged that the investigations being undertaken were in respect to the meter readings at Shadrack Kimalel School and that he had met members of said group in regards to the same. Therefore, the existence or non-existence of the account number cited was not so material as the grievant was aware of the specific meter he was being accused of rewinding.
45. As regards the allegations of corruptly rewinding the meter, it is noteworthy that the grievant denied rewinding the meter in question. Indeed, he has denied any culpability.
46. The grievant's denial notwithstanding, the following excerpt stands out from his written statement in response to the allegations:

“When I went there I got there (sic) that they had called a former city council employee by the name Odhis on 18th November who rewound the meter for them after they had paid him. That they moved aside with him and when they came back, they said they had cleared with him. From there they came and forwarded the reading to the office for rebilling.”

47. First and foremost, I must state that the grievant did not dispute the contents of his statement in response to the allegations. Further, he admitted in the said statement that he was responsible for meter reading. Therefore, and going by his written statement, it is rather odd that a former employee of Nairobi City Council, would collude with the respondent's clients to tamper with the meter readings in the presence of the grievant, whose very work, was to check and record the meter readings. Essentially by his own admission, the grievant allowed the tampering of the meter in question by a former employee who was by all means, a stranger to the respondent company, in exchange for money.
48. Further, the grievant admitted in the said statement that the readings from the rewound meter were forwarded to the respondent's office for rebilling. What this means is that in the end, the reversal of the meter had an impact on the revenue due to the respondent. The admission in itself was a damning indictment on the grievant's conduct.
49. Further, the written statement of the chairman of the group directly implicates the grievant as he admits meeting with him together with other members of the group where he demanded a bribe from them in order to rewind their meter.
50. It is no doubt that the allegations which led to the dismissal of the grievant bordered on dishonesty and lack of trust in the employment relationship. By the very nature of the grievant's duties, trust and honesty were a very essential ingredient in the employment relationship as his work was in the field, outside the office set up, hence he worked unsupervised.
51. The respondent therefore expected and trusted him to submit accurate meter readings, which would in turn inform accurate billing of its clients. It thus follows that by the grievant admitting that he witnessed a stranger tampering with the meter readings in exchange for money, fundamentally dented the trust the respondent had bestowed on him. Undoubtedly, this went to the root of the employment relationship as it had a potential negative impact on the respondent's revenue.
52. As was held in the case of *McKinley v BC Tel* (2001) 2 SCR 161:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say,



for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”

53. Applying the above decision to the case herein, I am persuaded that the level of trust the respondent had in the grievant dwindled following the incident, and moving forward, the respondent would have found it difficult to trust him with checking and recording meter readings, which as it is, was his core duty. This would have in turn, affected his performance of duty in a fundamental way.
54. It is worth pointing out that section 43(2) of the Act, provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination, genuinely believed to exist, and which caused the employer to terminate the services of the employee.
55. In light of the circumstances presenting herein, it is evident that by his own admission, the grievant gave the respondent reason to genuinely believe that he was complicit in the doctored meter readings in respect to the meter belonging to Soweto Usafi Group, situated at Shadrack Kimalel School Chamber.
56. Indeed, and from the way I see it, a reasonable employer in the respondent's shoes would have let go of the grievant if faced with similar circumstances. The trust bestowed on him had been eroded. In the end, it would seem that termination of the grievant was the most reasonable decision it could make, as an employer confronted with the circumstances at hand.
57. On this issue, I apply the determination by Lord Denning in the case of *British Leyland UK Ltd v Swift* [1981] IRLR 91 thus:

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him”
58. I am therefore of the considered view that the reasons for the grievant's dismissal were valid and fair hence warranted his summary dismissal.
59. That said, I now move to consider whether in terminating the services of the grievant, the respondent did so in accordance with fair procedure.

Procedural Fairness?

60. The requirement for fair procedure is generally provided for under section 45 (2) (c) of the Act. Further, section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
61. It is not in dispute that the grievant was notified of the allegations against him and given 21 days to respond to the same. He also admits that he was invited to appear before a disciplinary committee



- for the hearing of his case. It is also his admission that he lodged an appeal against his dismissal and appeared before the Corporate Appeals Committee which upheld his dismissal.
62. The grievant's contention is in regards to the date of the summon to appear before the disciplinary committee which he states, is ten months before his suspension. In its defense, the respondent has attributed this to a typographical error.
63. The summon letter which is dated February 12, 2009 was the means through which the grievant was notified of the disciplinary hearing which was scheduled for February 17, 2010.
64. First, the grievant has not pointed out any malice on the respondent's part in issuing the summon with the date appearing as February 12, 2009. Second, he has not stated what prejudice he suffered as a result of the discrepancies in the dates. As a matter of fact, he does not dispute receiving the summon letter before the disciplinary hearing and after his suspension
65. Coupled with the foregoing, the grievant does not state, let alone suggest that he was on suspension for ten months before his summon to the disciplinary hearing and specifically as at February 12, 2009. If anything, it is clear from the circumstances herein that he was on duty until his suspension on February 16, 2009, a fact he does not dispute.
66. I must add that what is important from the provisions of section 41 of the Act, is that the grievant was notified of the allegations against him in a language he understood, given opportunity to respond and appear in person before the respondent's disciplinary committee, in the presence of another employee or union representative.
67. In Considering the import of section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR:
"Four elements must thus be discernible for the procedure to pass muster:-
(i) an explanation of the grounds of termination in a language understood by the employee;
(ii) the reason for which the employer is considering termination;
(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
(iv) hearing and considering any representations made by the employee and the person chosen by the employee."
68. Applying the above decision to the instant case, I am satisfied that the respondent complied with the requirements of section 41 of the Act and the discrepancy in the dates did not diminish the quality of the process. Needless to say, the spirit of section 41 was fulfilled.
69. Further, save for pointing out the discrepancies in the date in the summon letter, the grievant has not drawn this court's attention to any breach of procedure under section 41 of the Act.
70. In the circumstances, I cannot help but note that the grievant was accorded procedural fairness as he was informed of the allegations levelled against him, given an opportunity to be heard on his explanation to the allegations and had another shot at the appeal stage.
71. In total sum, I find that the grievant's dismissal was not unfair and unlawful.



Reliefs?

72. As the court has found that the grievant's dismissal was not unfair and unlawful, the claim for salary arrears and compensatory damages, fall.
73. With regards to the claim for acting allowance, the same flops as it has not been particularised. More importantly, the grievant did not exhibit the relevant Human Resource Policies and Procedure Manual, upon which the claim was based, to justify the award. In this regard, the period for which he is claiming the acting allowance as well as the applicable rates were not placed before the court. I note that it is only in the submissions that the claimant has provided better particulars. Be that as it may, this is not helpful to the grievant at this stage as it is trite law that submissions are not evidence. The particulars ought to have been clearly stipulated in the claim and not in the submissions.

Orders

74. In the final analysis, I find that the grievant is not entitled to the prayers sought hence I dismiss the claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Kerubo

For the Respondent Mr. Aringa

Court Assistant Abdimalik Hussein

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

